IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Joseph D. SUAREZ** Corporal (E-4) U.S. Marine Corps, Appellant	**BRIEF ON BEHALF OF APPELLANT** Crim.App. Dkt. No. 202300049 USCA Dkt. No. 25-0004/MC

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

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ISSUES PRESENTED

I.

Did unlawful command influence affect Appellant's court-martial?

II.

Was trial defense counsel's deficient performance prejudicial?

III.

Did Appellant waive review of the question whether unlawful influence affected his court-martial?

STATEMENT OF STATUTORY JURISDICTION

The sentence entered into judgment includes a punitive discharge. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[1] This Court has jurisdiction under Article 67(a)(3), UCMJ.[2]

RELEVANT AUTHORITY

Article 37, UCMJ, provides in relevant part:

(a) . . .

(2) No court-martial convening authority, nor any other commanding officer, may deter or attempt to deter a potential witness from participating in the investigatory process or testifying at a court-martial. . . .

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[1] 10 U.S.C. § 866(b)(3).
[2] 10 U.S.C. § 867(a)(3).

> (3) No person subject to this chapter may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter as prescribed by the President.
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> . . .
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> (c) No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused.[3]

STATEMENT OF THE CASE

A military judge convicted Appellant, consistent with his pleas, of wrongful use, introduction, distribution, and conspiracy to distribute controlled substances in violation of Articles 81 and 112a, UCMJ.[4] The military judge sentenced him to sixty months' confinement, reduction to E-1, and a dishonorable discharge.[5] The convening authority approved the sentence, and the military judge entered the findings and sentence into judgment.[6] The lower court affirmed the findings and sentence.[7] Appellant then timely petitioned this Court for review, which was granted as to the three issues presented.

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[3] 10 U.S.C. § 837(a), (c).
[4] Joint Appendix [J.A.] at 157.
[5] J.A. at 158.
[6] J.A. at 160, 162.
[7] *United v. Suarez*, No. 202300049, slip op. (N-M. Ct. Crim. App. Aug. 23, 2024).

STATEMENT OF FACTS

A. Appellant's Battalion Commander coordinated with NCIS to arrest and denounce Appellant as a "drug kingpin" in front of his company.

In January 2022, the Headquarters and Service Company of 3d Battalion, 3d Marines (V33) mustered in an auditorium for a company event.[8] Although a command climate survey debrief was the communicated business of the day, the Battalion Commander also planned to have Appellant, whom he suspected of drug offenses, publicly arrested in front of the company.[9]

The Battalion Commander coordinated with agents of the Naval Criminal Investigative Service (NCIS) to make the arrest, and the planned operation went into effect when Appellant arrived.[10] Upon his arrival, Appellant was greeted by an officer and led into the auditorium.[11] The officer then notified the Battalion Sergeant Major, who was standing by outside the auditorium with the NCIS agents and two other Marines in V33 leadership.[12] With the conditions set, the six men advanced into the auditorium.[13] The Battalion Sergeant Major interrupted the brief and called out for Appellant to identify himself.[14] Appellant moved to the front of the company

[8] J.A. at 167.
[9] J.A. at 167, 331.
[10] J.A. at 181, 338.
[11] J.A. at 181.
[12] J.A. at 181.
[13] *Id.*
[14] J.A. at 181, 188.

as the Battalion Commander pointed to Appellant's location, and the NCIS agents closed in.[15] As Appellant faced his peers, subordinates, and superiors, the NCIS agents handcuffed him and took him into custody.[16]

During this public apprehension, the Battalion Commander denounced Appellant as a "drug kingpin" who was "selling cocaine in [his] barracks," and said he would "crush anyone that was even suspected of selling drugs in his barracks."[17] As the agents escorted Appellant away, the Battalion Commander characterized Appellant as the enemy, remarking that the company was "letting Charlie into the wire" and "that should be the last of the problem."[18] The Battalion Sergeant Major also chimed in, scolding Appellant and the company: "This piece of crap drug kingpin has been selling drugs in your barracks and no one has the nut sack to say anything about it."[19]

B. Appellant's public arrest and labelling as a "drug kingpin" occurred in the early stages of a criminal investigation.

At the time of Appellant's arrest, the investigation was still premature, having begun just five days prior.[20] The sum total of evidence supporting that Appellant had violated the UCMJ consisted of his failed urinalysis and a statement by a confidential

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[15] J.A. at 182.
[16] *Id*.
[17] J.A. at 182, 188.
[18] J.A. at 258, 328, 331.
[19] J.A. at 183.
[20] J.A. at 354.

informant—a Marine with a reputation as a compulsive liar who spoke to NCIS only after he himself had failed a urinalysis.[21] After Appellant's arrest, as NCIS continued its investigation by interviewing other service members, Appellant "was known throughout the base" as the "drug kingpin."[22] This moniker was echoed during the interviews of other service members,[23] many of whom were suspected of their own criminality.[24]

C. After Appellant's arrest and a subsequent command investigation, the Battalion Commander continued to publicly denounce Appellant for selling drugs and other misconduct.

Two days after Appellant's arrest, the Battalion Commander continued to discuss the case and the ongoing NCIS investigation publicly, announcing during a battalion meeting that Appellant had also been prostituting himself.[25]

A subsequent command investigation into an Inspector General (IG) complaint found that, in addition to having Appellant handcuffed and denounced in front of his company, the Battalion Commander had referred to a different Hispanic Marine as a "spic," denied another Marine normal liberty, and been derelict in his duty by drinking whiskey during a field training exercise.[26] The investigating officer

[21] J.A. at 211, 330.
[22] J.A. at 211-41, 355.
[23] J.A. at 355, 358
[24] J.A. at 211-41.
[25] J.A. at 329.
[26] J.A. at 185, 186.

found the evidence insufficient to substantiate ten other allegations of misconduct.[27] Thereafter, the Battalion Commander and Sergeant Major were relieved due to a "loss of trust and confidence."[28]

Following his removal from command, rather than accept responsibility for his conduct and attempt to mitigate the damage done to the fairness of Appellant's investigation and court-martial process, the Battalion Commander made more public allegations against Appellant to an online media publisher.[29] During the interview, he publicly stated that Appellant "was actively selling narcotics to [his Marines]."[30] He blamed the public arrest and denouncement he had orchestrated on the fact that "he had no staff judge advocate assigned to his battalion to advise him."[31] He also blamed NCIS: "I get advice from the law enforcement specialists. And, you know, it'd be great if it was good advice. Turns out not to be, obviously."[32] The only comment the Battalion Commander actually took responsibility and apologized for was for calling another Marine a "spic."[33]

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[27] J.A. at 184-87.
[28] J.A. at 291.
[29] J.A. at 290-327.
[30] J.A. at 304.
[31] J.A. at 302.
[32] *Id*.
[33] J.A. at 308.

D. The military judge found that UCI occurred, but that it would not affect Appellant's trial based on certain remedial measures he ordered in response.

In light of the impact of the Battalion Commander's conduct on the fairness of Appellant's investigation and court-martial process, upon referral of charges the Defense submitted a pretrial motion to dismiss all charges and specifications with prejudice on grounds of unlawful command influence (UCI).[34] The military judge presiding over the motions hearing concluded the Defense had "presented 'some evidence' that UCI occurred."[35] He found the Battalion Commander had "engaged in actual and apparent UCI" by having Appellant arrested in front of the company and declaring, "that's the guy selling cocaine in my barracks."[36]

In reaching his conclusion that UCI had occurred, the military judge noted the prejudicial impact of such public arrest and chastisement:

> The effect of the public arrest and disparaging commentary was that potential witnesses and potential members received a message that [Appellant] was guilty and should be removed from the Unit/Marine Corps. Such actions have a chilling effect on potential witnesses, potential members and creates the perception of unfairness and illegitimacy of the proceedings.[37]

The military judge further found that "[t]he manner in which the accused was brought forth, arrested, and subsequently disparaged, could have created an

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[34] J.A. at 179.
[35] J.A. at 339.
[36] *Id*.
[37] J.A. at 340.

impression amongst the unit, and perhaps others outside the unit due to the publicity of the arrest, that the Battalion [Commander] and [Sergeant Major] had prejudged [Appellant] as guilty instead of maintaining their required impartiality and [Appellant]'s presumption of innocence."[38]

Notwithstanding his findings of both actual and apparent UCI, however, the military judge concluded the Government had proved beyond a reasonable doubt that "the facts amounting to UCI will not affect the proceedings" and "that the UCI did not place an intolerable strain on the public's perception of military justice."[39] He found the Battalion Commander's pre-preferral removal from the case and subsequent relief of command "sought to protect [Appellant's] presumption of innocence," and expressed his "confidence" that "any apparent UCI can be cured by the following two remedies":

> (1) the [convening authority] will issue a directive to encourage any member of the command to serve as a witness in support of [Appellant] without any repercussions; and
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> (2) the defense will be authorized liberal voir dire of members [concerning their knowledge of Appellant's public arrest, chastisement, etc.].[40]

[38] J.A. at 340.
[39] *Id*.
[40] J.A. at 340-41.

E. The convening authority never issued the remedial directive the military judge ordered be provided to potential witnesses, who were subsequently unwilling to testify for the Defense.

In the wake of his arrest and denouncement, the command climate was so publicly against Appellant that a different military judge subsequently ordered V33 Marines prohibited from serving as members on his court-martial.[41] Yet despite this negative impact of the Battalion Commander's actions, "the convening authority never issued the directive" ordered by the military judge to encourage Appellant's fellow Marines to participate as witnesses in support of the Defense without any repercussions.[42]

Consequently, when Appellant's trial defense counsel (TDC) attempted to speak with numerous Marines, among those who "would speak to [him] and sp[oke] of [Appellant] in high regard, none of them were willing to testify on his behalf."[43] Based on these conversations, the TDC "sensed" the UCI was the reason for their trepidation.[44]

F. After receiving advice from his TDC that the lower court concluded was "deficient," Appellant agreed to plead guilty.

After the military judge denied the defense motion to dismiss on grounds that the Battalion Commander's UCI impacted their ability to prepare a defense,

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[41] J.A. at 487.
[42] J.A. at 355.
[43] *Id*.
[44] *Id*.

Appellant discussed with his TDC whether "pleading guilty would prevent the appellate court from deciding the [UCI] issue," which was "very important to [him]."[45] Indeed, as he told the lower court, Appellant "would not have pled guilty if the [military] judge's [UCI] decision could not be overruled."[46] In response to Appellant's questions about the effect of his guilty pleas and plea agreement on the UCI issue, the TDC advised Appellant that "the issue was preserved and would be reviewed."[47]

During their guilty plea discussions, the TDC also advised Appellant that if he went to trial and was convicted of the charge of attempted prostitution, he would have to register as a sex offender.[48] Consequently, before agreeing to plead guilty, Appellant "weigh[ed]" the fact that the plea agreement required the Government to dismiss what the TDC had led Appellant to believe was a registerable offense.[49]

The lower court found the TDC's advice to Appellant on both of these issues was "deficient."[50] The court found it was "unreasonable" for the TDC to advise Appellant that, pursuant to Department of Defense Instruction (DoDI) 1325.07, a

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[45] J.A. at 359; *see also* J.A. at 355 (TDC swearing "[p]rior to entering into the plea agreement, [Appellant] asked if the military judge's denial of the UCI motion would be reviewed on appeal").
[46] J.A. at 360.
[47] J.A. at 355.
[48] J.A. at 356, 359; *Suarez*, slip op. at 18.
[49] J.A. at 359.
[50] *Suarez*, slip op. at 15, 19.

conviction for attempted prostitution would require sex offender registration.[51] The court found this advice conflicted with the plain language of that instruction, which states: "An offense involving consensual sexual conduct between adults is not a reportable offense."[52]

The lower court also found the TDC had erroneously advised Appellant that the UCI issue was preserved and not waived by virtue of the plea agreement's "waive all waivable motions" provision.[53] The court found the TDC's advice "was below the standard expected and was deficient."[54]

After considering his TDC's deficient advice, Appellant reluctantly agreed to plead guilty to the drug-related offenses.[55] Although he "did not think five years of confinement was a good deal," he "did not trust [he] would get a fair trial" due to the UCI that had occurred, depriving him of potential defense witnesses.[56] Rather, he believed the government witnesses would continue to exaggerate his criminality as the drug "kingpin"—the label pinned on him by the Battalion Commander—which his defense team had been unable to combat.[57]

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[51] *Id.* at 18.
[52] *Id.* at 18 (quoting DoDI 1325.07).
[53] *Id.* at 20.
[54] *Id.* at 20.
[55] J.A. at 359.
[56] *Id*.
[57] *Id*.

G. The TDC's advice to Appellant conflicted with what he and Appellant told the military judge during the guilty plea.

During the guilty plea colloquy, the military judge presiding over Appellant's trial addressed the plea agreement's "waive all waivable motions" provision.[58] She said "certain motions are waived or given up if [the TDC] does not make the motion prior to entering your plea" and that the provision "may preclude this court or any appellate court from having the opportunity to determine . . . relief based upon these motions."[59] The military judge then listed five previously litigated motions (including the UCI motion) and asked if the Defense understood that the provision waived appellate review of those motions.[60] Both the TDC and Appellant answered in the affirmative.[61]

Both the TDC and Appellant dispute that they actually understood the plea agreement to waive appellate review of the UCI issue. Based on his recollection, the TDC thought he was agreeing to waive a potential unreasonable multiplication of charges motion, not the litigated UCI motion.[62] He states that he "d[id] not

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[58] J.A. at 552.
[59] J.A. at 552-53.
[60] J.A. at 554 ("So there were some motions that were previously litigated in this court-martial. There was a motion to dismiss for unlawful command influence; a motion to preclude evidence pursuant to M.R.E. 404(b); a motion to get you released from pre-trial confinement; and a motion to compel experts; and, finally, a motion to suppress evidence that was seized when the investigators did their search.").
[61] *Id*.
[62] J.A. at 355.

remember, nor did [he] intend, waiving the UCI motion as the UCI motion that [he] raised was unable to be waived."[63] Appellant remembers the colloquy, but states he was unaware of what "waiving legally mean[t]" and "did not think that meant that the appellate court could not overrule the judge's decision."[64]

H. Despite the TDC's and Appellant's statements that they believed the UCI claim was preserved, the lower court held Appellant "intentionally relinquished a known right" to appeal the issue.

The lower court held the "waive all waivable motions" provision of the plea agreement and subsequent colloquy with the military judge waived the UCI issue.[65] The court found that a "claim of UCI in the adjudicative process" is waivable and that when the Defense signed the plea agreement and acknowledged the waiver on the record, Appellant intentionally relinquished a known right.[66]

The lower court reached this conclusion despite finding that the TDC had indeed advised Appellant prior to his guilty pleas that the UCI issue would be preserved (and was constitutionally ineffective in doing so).[67] The court discounted Appellant's statement that he was "confused" and did not know that the term

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[63] J.A. at 355.
[64] J.A. at 360.
[65] *Suarez*, slip op. at 7-9.
[66] *Id.* at 8-9.
[67] *Id.* at 20 (explaining that the TDC's "understanding and explanation of the scope of what the 'waive all waivable motions' provision covered was below the standard expected and was deficient").

"waiver" meant the UCI issue would not be reviewed on appeal.[68] Irrespective of the evidence of any apparent confusion by Appellant or the TDC in this regard, the court found that Appellant "affirmatively, knowingly and consciously waived the UCI claim in his case."[69]

I. The lower court held that even if Appellant did not waive the issue, there was no apparent or actual UCI.

The lower court further held that, even assuming *arguendo* the UCI issue was not waived, Appellant's claim of adjudicative UCI was without merit.[70] Like the military judge, the lower court found the "public and well-documented comments by [the Battalion Commander and the Sergeant Major] clearly met the defense threshold of 'some evidence'" of UCI.[71] The court found that "[p]ublicly labeling Appellant as the 'king pin' and making other disparaging remarks" was "inappropriate, ill-advised, and amounted to UCI."[72]

However, the lower court concluded the taint of any adjudicative UCI had been cured by three remedial measures: (1) the Battalion Commander took no part in the preferral process; (2) the Commanding General (CG) conducted an investigation into an IG complaint against the Battalion Commander (which

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[68] *Suarez*, slip op. at 8.
[69] *Id.* at 9.
[70] *Id*.
[71] *Id*.
[72] *Id.* at 9, 11.

included the UCI); and (3) the CG relieved the Battalion Commander and Sergeant Major.[73] The court also factored in the remedial measures ordered by the military judge—which the government did not implement—concluding that "[w]hile those curative measures never came to bear, their existence contribute[d] to the seeming fairness of the proceedings."[74] The court further concluded that Appellant had waived enforcement of the military judge's remedial measures "by failing to insist on them and by entering into the plea agreement."[75] The court found that because Appellant decided to plead guilty, the government's failure to comply with those remedial measures—which included issuing a directive to encourage command members to serve as witnesses in support of Appellant without fear of repercussion—was "largely moot."[76]

J. After finding the TDC had provided guilty-plea advice that was "below the standard expected" and "deficient," the lower court concluded his performance did not prejudice Appellant.

As discussed above, the lower court found the TDC had erroneously advised Appellant both as to whether the attempted prostitution charge would require sex offender registration and as to whether the plea agreement's "waive all waivable motions" provision would preserve his claim of adjudicative UCI.[77] The lower court

[73] *Suarez*, slip op. at 10-11.
[74] *Id.* at 10.
[75] *Id.* at 11.
[76] *Id.*
[77] *Id.* at 18, 20.

concluded that the TDC's "deficient" performance in these respects satisfied the first prong of *Strickland v. Washington.*[78]

However, the court concluded that *Strickland*'s second prong was not satisfied because Appellant was not prejudiced by the TDC's deficient representation.[79] In reaching this conclusion, the court did not consider whether the TDC's errors contributed to Appellant's decision to plead guilty.[80] Instead, the court considered whether Appellant proved he would have received a more beneficial plea agreement had the TDC offered competent representation, and found he failed to make such a showing.[81] The court then concluded there was no prejudice based on this standard and the view that despite the TDC's deficient advice, the claim of adjudicative UCI it caused Appellant to waive was without merit.[82]

SUMMARY OF ARGUMENT

The Battalion Commander's public arrest and denouncement of Appellant as a "drug kingpin" was UCI that affected his court-martial. The government's remedial measures (the investigation and removal of the Battalion Commander) addressed only accusatory UCI, not the adjudicative UCI that the military judge's ordered measures were designed to address (the chilling of potential defense

[78] *Suarez*, slip op. at 15, 19 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).
[79] *Id.* at 19, 20.
[80] *Id.* at 16.
[81] *Id.* at 18.
[82] *Id.* at 19-20.

witnesses). Because the government never implemented the military judge's ordered measures, the adjudicative UCI went uncured, prejudicing Appellant's defense on the merits and at sentencing and ultimately causing him to plead guilty when he "did not believe [he] would get a fair trial."[83] The Court should remedy this unlawful undermining of the presumption of innocence, unbiased criminal investigations, and fair and just court-martial proceedings by setting aside the findings and sentence and dismissing the charges with prejudice.

Appellant was also prejudiced by the TDC's deficient performance. The TDC's erroneous advice caused Appellant to plead guilty pursuant to a plea agreement with a high confinement range in order to prevent sex offender registration that was not required for any of the charges. The TDC also advised Appellant to plead guilty pursuant to a plea agreement that waived all waivable motions, despite Appellant's concern about ensuring his UCI claim was preserved for appeal. While the Court should find Appellant did not waive his claim of adjudicative UCI—which affected the fairness of his court-martial both on the merits and at sentencing—any waiver of this issue was a direct result of the TDC's deficient performance.

[83] J.A. at 358.

ARGUMENT

I.

The Government did not prove beyond a reasonable doubt that the adjudicative UCI did not affect Appellant's court-martial.

Standard of Review

Allegations of UCI where the prejudice persists even after a court-ordered remedy are reviewed de novo.[84] A military judge's findings of fact with respect to UCI are reviewed under a clearly erroneous standard.[85]

Discussion

Article 37(a), UCMJ, prohibits a convening authority or other commanding officer from "deter[ing] or attempt[ing] to deter a potential witness from participating in the investigatory process or testifying at a court-martial," and also from "attempt[ing] to coerce or, by any unauthorized means, attempt[ing] to influence the action of a court-martial."[86] As this Court has explained, such UCI exists when "there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case."[87] The "mortal enemy of military justice," UCI not only "tends to deprive servicemembers of their

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[84] *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018) (citation omitted); *United States v. Gore*, 60 M.J. 178, 186 (C.A.A.F. 2004).
[85] *United States v. Gilmet*, 83 M.J. 398, 403 (C.A.A.F. 2023) (citation omitted).
[86] 10 U.S.C. § 837(a)(3) (2023).
[87] *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017).

constitutional rights," but also "involves a corruption of the truth-seeking function of the trial process."[88] To establish a prima facie claim of UCI an appellant bears the burden of establishing '"some evidence' of UCI—facts that if true, would constitute UCI."[89]

Where, as here, an appellant shows that UCI occurred, a rebuttable presumption of prejudice attaches.[90] The Government then bears the burden to prove beyond a reasonable doubt that the UCI did not affect the proceedings.[91] In this regard, this Court has drawn a distinction between UCI during the accusatorial process (which affects the preferral, forwarding, and referral of charges) and UCI at the adjudicative stage (which includes interference with witnesses, judges, members, and counsel).[92] Where UCI is followed by a subsequent plea agreement, courts examine whether there is evidence "that any unlawful command influence caused appellant to plead guilty" or "that he was deprived of witnesses."[93]

Here, the Battalion Commander's public arrest and denouncing of Appellant as a "drug kingpin" in front of his company affected Appellant's court-martial in

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[88] *Thomas*, 22 M.J. 388, 393-94 (C.M.A. 1986) (internal quotation marks and citations omitted).
[89] *Gilmet*, 83 M.J. at 403 (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)).
[90] *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010) (citing *Biagase*, 50 M.J. at 150).
[91] *Biagase*, 50 M.J. at 151.
[92] *United States v. Weasler*, 43 M.J. 15, 17-18 (C.A.A.F. 1995) (citations omitted).
[93] *United States v. Newbold*, 45 M.J. 109, 111 (C.A.A.F. 1996).

both respects. This adjudicative UCI pinned that criminal moniker on Appellant so effectively that it poisoned the well of any potential defense witnesses. And because the government ignored the military judge's ordered remedy to encourage command members to assist the Defense without fear of repercussions, Appellant felt he had no choice but to plead guilty.

A. The Battalion Commander exerted adjudicative UCI on Appellant's court-martial.

As both the military judge and the lower court concluded, Appellant satisfied his burden of establishing evidence of UCI with a logical connection to his court-martial.[94] In the middle of a company-wide brief, the Battalion Commander coordinated with NCIS to publicly arrest and denounce Appellant as a "drug kingpin"; threatened to "crush anyone that was even suspected of selling drugs in his barracks"; and then told the assembled company, "that should be the last of the problem."[95]

The military judge correctly concluded these actions constituted both "actual and apparent UCI," and specifically analyzed their impact on the adjudicative stage of Appellant's court-martial.[96] He found the actions "could have created an impression amongst the unit, and perhaps others outside the unit due to the publicity

[94] J.A. at 340; *Suarez*, slip op. at 9.
[95] J.A. at 182, 331.
[96] J.A. at 339-341.

of the arrest, that the Battalion [Commander] and [Sergeant Major] had prejudged [Appellant] as guilty instead of maintaining their required impartiality and [Appellant]'s presumption of innocence."[97] He further found that "[t]he effect of the public arrest and disparaging commentary was that potential witnesses and potential members received a message that [Appellant] was guilty and should be removed from the Unit/Marine Corps. Such actions have a chilling effect on potential witnesses, potential members and creates the perception of unfairness and illegitimacy of the proceedings."[98]

B. The adjudicative UCI affected the court-martial by depriving Appellant of defense witnesses and causing him to plead guilty.

The military judge's prescient focus on the adjudicative nature of the UCI highlights how it affected Appellant's court-martial: the Battalion Commander's actions and comments pinned the "drug kingpin" moniker on Appellant, tainted the NCIS investigation, chilled defense witnesses, compromised Appellant's right to a fair trial, and ultimately caused him to plead guilty. At the time of Appellant's public arrest and denouncement in front of his company, NCIS had only interviewed one witness who implicated Appellant: a confidential informant with a failed urinalysis and a reputation as a compulsive liar.[99] In the following weeks and months, the NCIS

[97] J.A. at 340.
[98] *Id*.
[99] J.A. at 211-12, 330.

investigation identified other Marines who implicated Appellant, many of whom were also suspects and thus had their own individual motive to fabricate.[100] Unsurprisingly, those witnesses echoed the Battalion Commander's publicly-announced characterization of Appellant.[101]

In the wake of Appellant's public arrest and denouncement, Appellant's TDC attempted to find good military character evidence, a feasible goal considering Appellant's military record and evaluations and the fact that even the Battalion Commander praised Appellant's work performance: "He was really, really good . . . and everybody loved him around. He was reliable. He was technically proficient. Good attitude."[102] But the TDC was unable to find any Marines willing to testify on Appellant's behalf, even among those who spoke of Appellant in high regard, which he reasonably attributed to the Battalion Commander's derogatory public comments.[103]

In this context, the Battalion Commander's UCI also led Appellant to reluctantly plead guilty because he "did not trust [he] would get a fair trial."[104] He reasonably believed that the Government's witnesses would continue to overemphasize his criminality as the "drug kingpin" the Battalion leadership had

[100] J.A. at 211-41.
[101] J.A. at 358.
[102] J.A. at 301, 355.
[103] J.A. at 355.
[104] J.A. at 359.

labelled him as, and that no Marine would speak on his behalf or present any good military character evidence.[105] Under these circumstances, and without any type of clear retraction or guidance, the collateral deprivation of basic due process rights undeniably prejudiced Appellant and caused him to plead guilty.

This Court's decisions in both *United States v. Rivers*[106] and *United States v. Gilmet*[107] illustrate why the Government did not rebut the presumption of prejudice in this case. *Rivers* holds that when a senior leader makes a public statement amounting to UCI, "clear and effective retraction" can cure the taint.[108] In that case, during a battery formation, the battery commander, a captain (O-3), told his soldiers that "they were entitled to a drug-free battery, that there were drug dealers in the battery, and that they should stay away from those involved with drugs."[109] After learning that these comments were ill-advised, the commander convened another battery meeting where he specifically "retracted his prior remarks, apologized for having overstepped proper legal bounds, and assured his soldiers that no adverse consequences would befall any soldier who testified as a witness for an alleged

[105] *Id*.
[106] 49 M.J. 434 (C.A.A.F. 1998).
[107] 83 M.J. 398 (C.A.A.F. 2023).
[108] *Rivers*, 49 M.J. at 440-41.
[109] *Id.* at 440.

offender."[110] The battalion commander and the division artillery commander also attended this meeting, which was recorded for the soldiers who could not attend.[111]

In *Gilmet*, this Court favorably cited *Rivers* as an example of how proper remedial measures can cure the effects of adjudicative UCI.[112] The court did so in contrast to the facts in *Gilmet*, where a senior Marine judge advocate held a meeting with the Camp Lejeune trial defense counsel and made comments amounting to UCI.[113] In the aftermath of the inappropriate comments, a general officer ordered an investigation, relieved the senior Marine of his position, and swore an affidavit disavowing the comments.[114] But the Court held these remedial measures failed to cure the UCI.[115] It found that there was "no reason to believe [the] affidavit would be *seen by those present* at [the senior judge advocate's] meeting" since the record failed to show that the affidavit was "published or distributed to anyone at Camp Lejeune."[116] The Court also noted that the senior Marine never took responsibility for his actions or disavowed his remarks, which aggravated the UCI's effect.[117]

Here, the remedial measures that were actually effectuated pale in comparison

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[110] *Id.*
[111] *Id.*
[112] *Gilmet*, 83 M.J. 404-05 (citing *Rivers*, 49 M.J. at 443).
[113] *Id.* at 401.
[114] *Id.* at 402.
[115] *Id.* at 404.
[116] *Id.* at 405 (emphasis added).
[117] *Id.* at 405.

to *Rivers*, or even *Gilmet*. While the Battalion Commander was relieved due to a "loss of trust and confidence" after an investigation into a slew of misconduct alleged in an IG complaint,[118] not one Marine who witnessed Appellant's arrest and the rush to judgment was instructed to disregard the Battalion's Commander's message, that Appellant had a presumption of innocence, and that he or she could testify on Appellant's behalf without fear of reprisal. To the contrary, even when *ordered by the military judge* to take the obvious step of remediating the effect of the UCI by publishing such a directive to encourage court-martial participation on Appellant's behalf, the command failed to do so.[119]

In fact, the Battalion Commander did just the opposite. Instead of trying to ameliorate the effects of the UCI he had orchestrated, he aggravated them further through public statements to a reporter that Appellant was "actively selling narcotics to [his Marines]."[120] As with the senior Marine in *Gilmet*, who denied his remarks were inappropriate and dismissed the UCI concerns as "purely a misunderstanding," the Battalion Commander's comments only further "undercut the Government's attempt to meet its burden rather than support it."[121]

Thus, the lower court was mistaken in concluding the UCI was cured when

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[118] J.A. at 291.
[119] J.A. at 340-41, 355.
[120] J.A. at 304.
[121] *Gilmet*, 83 M.J. at 405.

the Battalion Commander's chain of command took over the case, investigated an IG complaint against him, and subsequently relieved him of command.[122] While these actions may have addressed any accusatory UCI,[123] they failed to cure the *adjudicative* UCI that was the more deeply rooted problem. The specter of adjudicative UCI was, in fact, precisely why the military judge preceded his UCI ruling with an order that the convening authority "issue a directive to encourage any member of the command to serve as a witness in support of [Appellant] without any repercussions."[124] Thus, when the government ignored the military judge's order, the measures it actually took were, as in *Gilmet*, the sort of "generic response to the misconduct of a senior officer [that] does not approach the type of curative measures from the command that [this Court] has found sufficient in the past."[125]

Finally, it bears highlighting that the burden rests with the Government, not Appellant, to prove *beyond a reasonable doubt* that this adjudicative UCI did not affect Appellant's court-martial—i.e., that it did not deprive him of potential defense witnesses and cause him to plead guilty. Based on the facts and circumstances in this case, the Government has not met that burden.

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[122] J.A. at 340; *Suarez*, slip op. at 9-11.
[123] *See United States v. Givens*, 82 M.J. 211, 215 (C.A.A.F. 2022) (finding that revocation of preferral authority can ameliorate accusatory UCI).
[124] J.A. at 340-41.
[125] *Gilmet*, 83 M.J. at 10.

Conclusion

Given the irrevocable harm the Battalion Commander's adjudicative UCI caused to the NCIS investigation, Appellant's presumption of innocence, and his ability to defend himself against the charges at a fair trial, the findings and sentence should be set aside and the charges dismissed with prejudice.

II.

The trial defense counsel's deficient performance prejudiced Appellant.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo.[126]

Discussion

Servicemembers have a constitutional right to effective legal representation.[127] In order to prevail on a claim of ineffective assistance of counsel, an appellant must show that: (1) his counsel's performance was deficient, and (2) the deficiency resulted in prejudice.[128] In the context of a guilty plea, the prejudice analysis focuses on whether there was a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[129]

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[126] *United States v. Metz*, 84 M.J. 421, 429-30 (C.A.A.F. 2024) (citation omitted).
[127] *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citations omitted).
[128] *Metz*, 84 M.J. at 428 (citations omitted).
[129] *Lee v. United States*, 582 U.S. 357, 364 (2017) (citation omitted); *see also United*

Here, the lower court correctly concluded the TDC's advice to appellant (that attempted prostitution was a registerable offense and that pleading guilty under the plea agreement would preserve review of the UCI ruling) was "not reasonable," "below the standard expected," and "deficient."[130] But when analyzing the second prong, the court applied the wrong standard in concluding Appellant was not prejudiced by the TDC's deficient performance.[131] When the correct standard is applied, the record reflects the prejudice caused by the TDC's deficient performance, as there is a reasonable probability that, but for the TDC's erroneous advice, Appellant would not have pleaded guilty and would have insisted on going to trial.

A. The legal standard applicable to guilty pleas examines the nexus between the counsel's deficient performance and the appellant's pleas.

In *Lee v. United States*, the Supreme Court reiterated the distinction between deficient performance "during the course of a legal proceeding" and deficient performance during guilty plea discussions.[132] When the error occurs during a legal proceeding—i.e., when counsel fails to "raise an objection at trial or to present an

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States v. Furth, 81 M.J. 114, 117 (C.A.A.F. 2021).

[130] *Suarez*, slip op. at 18, 20.

[131] *Id.* at 15 (quoting *Strickland*, 466 U.S. at 694); *see also id.* at 16 (providing when the deficient performance affected the sentencing phase of a court-martial, the standard is "whether there is a reasonable probability that, but for counsel's error, there would have been a different result").

[132] *Lee*, 582 U.S at 364 (citations omitted) (describing a plea as a "critical stage[] of a criminal proceeding" in which the "Sixth Amendment guarantees Appellant . . . effective assistance").

argument on appeal"—the prejudice analysis focuses on the result of the proceeding: "a claim can demonstrate prejudice by showing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[133] But when the unprofessional errors "led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself," prejudice does not depend on a different result.[134] Rather, "[w]hen a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial 'would have been different' than the result of the plea bargain."[135] Instead, the analysis considers "whether the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right."[136]

B. The TDC's deficient performance caused Appellant to plead guilty under the plea agreement.

In *Lee*, the Supreme Court found a counsel who provided erroneous advice regarding the collateral consequences of a guilty plea was constitutionally

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[133] *Id.* (citation omitted); *see also Furth*, 81 M.J. at 117; *United States v. Rose*, 71 M.J. 138, 144 (C.A.A.F. 2012); *Denedo v. United States*, 66 M.J. 114, 129 (C.A.A.F. 2008).

[134] *Lee*, 582 U.S at 364 (citation omitted) (explaining that although the Supreme Court ordinarily applies "a strong presumption of reliability to judicial proceedings, [the Court] cannot accord any such presumption to judicial proceedings that never took place").

[135] *Id.* (citation omitted).

[136] *Id.* (alterations omitted) (citation omitted).

ineffective.[137] The petitioner, a South Korean national, faced charges of possession with intent to distribute ecstasy.[138] His case was "weak" and, facing the bleak chance of success at trial, he pleaded guilty.[139] Before he did so, his counsel assured him that pleading guilty would not require his deportation, which was material to his decision to plead guilty.[140] But the counsel's advice was wrong.[141] As the petitioner quickly learned, pursuant to the Immigration and Nationality Act, his conviction made him subject to mandatory deportation.[142]

On his appeal for ineffective assistance, the Supreme Court rejected the government's argument that the alternative option would have also resulted in deportation, given his "prospects of acquittal at trial were grim."[143] The Court instead considered the petitioner's understanding of the guilty plea, his "decision-making" in deciding to plead guilty, and the "contemporaneous evidence to substantiate" such.[144] Based on the unrefuted testimony of both the petitioner and his counsel, the Court concluded the petitioner "adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it

[137] *Lee*, 582 U.S. at 366.
[138] *Id.* at 360.
[139] *Id.* at 362.
[140] *Id.*
[141] *Id.* at 361.
[142] *Lee*, 582 U.S. at 361-62.
[143] *Id.* at 365.
[144] *Id.* at 358, 367.

would lead to mandatory deportation."[145]

So, too, here. Appellant's statements about his plea discussions with the TDC demonstrates a reasonable probability that, but for the TDC's erroneous advice, he would not have pleaded guilty and would have insisted on going to trial. In his declaration, Appellant describes his thought process and his material considerations for pleading guilty, swearing that the preservation of the UCI claim was "very important" and that he "*would not have pled guilty without knowing that [he] could appeal the judge's [UCI] ruling*."[146] He also "did not want to plead guilty" and did not think a plea agreement with a potential of five years' confinement was a good deal, but feared the uncured UCI would prevent a fair trial: "I also did not trust that I would get a fair trial. I believed the Marines would continue to overemphasize my role and I would not have superiors from my command speak on my behalf."[147] He further believed, based on his counsel's deficient advice, that going to trial would risk him having to register as a sex offender.[148] And so, "[w]eighing these factors, [he] reluctantly decided to plead guilty to the drug charges."[149]

The contemporaneous evidence in the record also supports that the TDC's performance was deficient and that his post-trial declaration is more than some *post*

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[145] *Id.* at 369.
[146] J.A. at 359 (emphasis added).
[147] *Id.*
[148] *Id*.
[149] *Id*.

hoc attempt to benefit his client.[150] During the first motions hearing in July 2022, the military judge found the TDC had missed the deadline to file motions without good cause.[151] After involving supervisory counsel, the military judge heard the late motions anyway because he was "concerned with ensuring that [Appellant] gets a fair trial and not exerting error into the trial."[152] After doing so, he counseled the TDC to improve his "troubling" representation of Appellant, stating:

> So there's seven weeks between now and trial. Dig in. Let's go. Your client deserves zealous representation. Focus. He is facing 81 years of confinement. Focus up and dig in and give him the representation he deserves.[153]

Appellant's key statements are also corroborated by the now-adverse TDC. The TDC corroborates that Appellant specifically asked, and the TDC confirmed, that the plea agreement would preserve review of the UCI ruling,[154] indicating the issue was important to Appellant's decision to enter into the agreement and that the TDC's advice contributed to that decision.[155] The TDC corroborates Appellant's

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[150] *Lee*, 582 U.S. at 369 (explaining that "[j]udges should . . . look to contemporaneous evidence to substantiate a defendant's expressed preferences"); *see also Furth*, 81 M.J. at 117 n.8 (explaining that "an accused's post hoc assertions are not dispositive and that appellate courts are to look to contemporaneous evidence to substantiate these assertions").
[151] J.A. at 481.
[152] *Id.*
[153] J.A. at 484, 485.
[154] J.A. at 355.
[155] *See Rose*, 71 M.J. at 144 (showing that an accused's request for information about the effects of a pretrial agreement indicates the requested information is important to his decision to plead guilty).

fair-trial concerns, swearing that "the drug kingpin" nickname "was known throughout the base" and that "while some [potential witnesses] would speak to [him] and speak of [the Appellant] in high regard, none of them were willing to testify on his behalf."[156] And the TDC corroborates that Appellant did not want to be convicted of a registerable offense, with which the TDC had advised Appellant that he was charged.[157] Thus, as with the deportation concern that was material to the petitioner in *Lee*, the evidence here supports that a plea agreement avoiding an unfair, UCI-infected trial for a registerable offense was material to Appellant.[158]

In reaching the opposite conclusion, the lower court failed to consider this evidence in focusing on the wrong question: whether, but for the TDC's errors, Appellant would have received a more beneficial outcome.[159] The court found that, although Appellant only sold drugs for a few weeks, a deal for *five years* of confinement was too good of a deal to pass up.[160] Such a view is not supported by even a cursory review of other plea agreements for similar misconduct.[161] And even

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[156] J.A. at 355.
[157] *Id*.
[158] *See Rose*, 71 M.J. at 144 (showing how sex offender registration is a material consideration before deciding to plead guilty); *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006) (same).
[159] *Suarez*, slip op. at 18-19.
[160] *Suarez*, slip op. at 11.
[161] *See, e.g.*, J.A. at 166, 167; *United States v. Ruff*, No. 202200167, Northern Circuit (Apr. 7, 2022) (maximum confinement of *thirteen months* for guilty pleas to conspiracy to introduce and distribute LSD and psilocybin and wrongful distribution, introduction, and possession of LSD, Xanax, and psilocybin)

in formulating this dubious reasoning, the court made assumptions not supported, and often refuted, by the evidence in the record.

First, the lower court clearly erroneously found, "There is nothing in the record to indicate that, but for his counsel's alleged error, Appellant would not have pleaded guilty and would have insisted on going to trial."[162] Appellant's declaration, which the lower court attached to the record, states precisely that, but for the TDC's deficient advice, he would not have pleaded guilty.[163] And this clear error, in turn, is what left the court "unconvinced that the UCI was the forcing factor behind the plea agreement."[164]

Second, the lower court erroneously assumed the nature of the charges, rather than the Battalion Commander's UCI, caused the unavailability of "good military character" witnesses.[165] As an initial matter, this assumption is at odds with this

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(https://stjececmsdusgva001.blob.core.usgovcloudapi.net/public/documents/Ruff_J..pdf); Statement of Trial Results at1-2, *United States v. Ascencio*, No. 202100199, Northwest Circuit (May 3, 2021) (maximum confinement of *twelve months* for guilty pleas to wrongful use and distribution of MDMA, LSD, and psilocybin) (https://stjececmsdusgva001.blob.core.usgovcloudapi.net/public/documents/us_v_ascencio_nicolas_usmc.pdf); Statement of Trial Results at 1-2, *United States v. Helean*, 202100096, Eastern Circuit (Jan. 14, 2021) (maximum confinement of *eighteen months* for guilty pleas to wrongful distribution, possession, and use of cocaine) (https://stjececmsdusgva001.blob.core.usgovcloudapi.net/public/documents/us_v_helean_wyatt_usmc.pdf).

[162] *Suarez*, slip op. at 16.

[163] J.A. at 359.

[164] *Suarez*, slip op. at 11.

[165] *Id.*

Court's opinion in *United States v. Douglas*, which places the burden on *the Government* to show the "presentation of a good character defense was unfeasible."[166] And here, contrary to the court's assumption, the record shows that good military character evidence *would* have been feasible but for the UCI that chilled the defense witnesses. The Battalion Commander himself described Appellant as "really, really good . . . and everybody loved him around. He was reliable. He was technically proficient. Good attitude."[167] Appellant's evaluations also corroborate this statement.[168] And the TDC swore that there were individuals who spoke of Appellant in "high regard, [but] none of them were willing to testify on Appellant's behalf," which he "sensed" was caused by the UCI.[169]

Thus, even reasonably effective assistance would have created a very reasonable probability of a different result—i.e., that Appellant would have pleaded not guilty, both to preserve his UCI claim and because there was actually no risk of conviction of a registerable offense.

Conclusion

Accordingly, Appellant respectfully requests that the Court set aside the findings and sentence.

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[166] *Douglas*, 68 M.J. at 356.
[167] J.A. at 301.
[168] J.A. at 568.
[169] J.A. at 355.

III.

APPELLANT DID NOT WAIVE REVIEW OF THE QUESTION OF WHETHER UNLAWFUL COMMAND INFLUENCE AFFECTED HIS COURT-MARTIAL.

Standard of Review

Whether an appellate court can review an issue is a question of law reviewed de novo.[170]

Discussion

Appellant's claim of adjudicative UCI, which he litigated to ruling before the military judge at trial, is not waived.

A. The UCI issue was not waived by operation of law.

Three rules dictate whether an issue is waived by operation of law—Rules for Courts-Martial (R.C.M.) 910(j), 905(b), and 905(e)—none of which apply here. In *United States v. Hardy*, this Court analyzed these rules in determining whether a pretrial agreement waived appellate review of unreasonable multiplication of charges (UMC).[171] The court found that R.C.M. 910(j) did not prevent review of the issue because that rule only waives "objections relat[ing] to the *factual issue of guilt*

[170] *United States v. Blackburn*, 80 M.J. 205, 209 (C.A.A.F. 2020).
[171] *United States v. Hardy*, 77 M.J. 438, 439 (C.A.A.F. 2018).

of the offenses to which the plea was made."[172] So, too, here, since the UCI issue does not pertain to a "factual issue of guilt."[173]

Nor do R.C.M. 905(b)(2) and R.C.M 905(e)—which this Court found applicable in *Hardy*[174]—apply in this case. First, R.C.M. 905(b)(2) only waives "objections based on defects in the charges and specifications," to which Appellant's claim of adjudicative UCI does not pertain. Second, R.C.M. 905(e) only waives motions *not* made at trial, whereas Appellant not only made a UCI motion at trial, but also fully litigated it to a ruling by the military judge.[175] Thus, the issue was not waived by operation of law.

B. Appellate review of this form of UCI—which infringed on Appellant's right to a fair trial and impacted his decision to waive his right to a trial—is not waivable.

"Whether a particular right is waivable . . . depends on the right at stake."[176] An unconditional guilty plea does not waive defects resulting in a "deprivation of due process of law."[177] And UCI undoubtedly "tends to deprive

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[172] *Id.* at 443 (emphasis added).
[173] R.C.M. 910(j).
[174] *Hardy*, 77 M.J. at 443.
[175] J.A. at 180, 339.
[176] *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F.2008) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)); *see also Rochin v. California*, 342 U.S. 165, 169 (1952) (providing "[r]egard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . in order to ascertain whether they offend [canons of fairness]").
[177] *United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022) (providing that an

servicemembers of their constitutional rights."[178] Hence, this Court "has not applied the doctrine of waiver where [UCI] is at issue,"[179] but has instead found that "it is against public policy to require an accused to withdraw an issue of [UCI] in order to obtain a pretrial agreement," even through "tactical machinations."[180] The Air Force Court of Criminal Appeals has taken this reasoning one step further to hold generally that "claims of [UCI] that interfere with the adjudicative process may not be waived."[181]

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unconditional plea generally waives all issues that are neither jurisdictional nor "a deprivation of due process of law") (internal quotation marks and citations omitted); *see also* R.C.M. 705(c)(1)(B) (providing a "term or condition in a plea agreement shall not be enforced if it deprives the accused of . . . the right to due process").

[178] *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986) (citing U.S. Const. amend. VI; *cf.* Article 46, UCMJ); *see also United States v. Sayler*, 72 M.J. 415, 423 (C.A.A.F. 2013) (providing that UCI undermines an accused's right to a fair trial and the opportunity to put on a defense"); *Douglas*, 68 M.J. at 355 n.6 (explaining that UCI is the "mortal enemy" because of "the exceptional harm its causes to the fairness"); *United States v. Gleason*, 43 M.J. 69, 73 (C.A.A.F. 1995) (explaining that a commander's interference of witnesses "infringes on the right to counsel granted by the Sixth Amendment and by the Uniform Code, for a defense counsel cannot properly render assistance to the client when precluded from interviewing witnesses or obtaining their truthful testimony"); *United States v. Stombaugh*, 40 MJ. 208, 212 (C.M.A. 1994) (explaining UCI that encompasses witness interference runs afoul "the Sixth Amendment right to compulsory process, and the right to confront and to cross-examine witnesses").

[179] *Douglas*, 68 M.J. at 356 n.7 (citation omitted); *see also United States v. Riesbeck*, 77 M.J. 154, 160 (C.A.A.F. 2018) (citation omitted). Other decisions have distinguished between accusatory and adjudicative UCI; while accusatory UCI is waived if not raised at trial, the same is not true of adjudicative UCI. *See Givens*, 82 M.J. at 219; *United States v. Baldwin*, 54 M.J. 308, 310 n.2 (C.A.A.F 2001); *United States v. Weasler*, 43 M.J. 15, 17 (C.A.A.F. 1995).

[180] *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986) (citation omitted).

[181] *United States v. Hill*, No. ACM 38979, 2017 CCA LEXIS 477, at *10 (A.F. Ct.

While this Court has not explicit held that UCI infringing upon an accused's right a fair trial is nonwaivable, it has held that other fundamental rights are nonwaivable. In *United States v. Mizgala*, for example, the Court held an unconditional guilty plea does not waive review of a litigated Article 10 motion.[182] The Court considered the "fundamental right" to a speedy trial and the "legislative importance given to a speedy trial."[183] It found "[this] fundamental, substantial, personal right—a right that dates from our earlier cases—should not be diminished by applying ordinary rules of waiver and forfeiture associated with guilty pleas."[184]

Protecting courts-martial against adjudicative UCI in the form of commanders poisoning the well of potential witnesses—both on the merits and at sentencing—is no less fundamental to a trial's fairness than ensuring it occurs within a reasonable time. Just as Article 10, UCMJ, ensures a substantial, personal right dating back to early case precedents, so does Article 37, UCMJ—an article enacted to "preserve integrity of military courts" and "assure to all in military service [an] absolutely fair trial."[185] As it is equally fundamental to the right to a speedy trial protected by Article

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Crim. App. July 12, 2017).

[182] *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005).

[183] *Id.* at 126.

[184] *Id.* at 127.

[185] *United States v. Navarre*, 5 C.M.A. 32 (C.M.A. 1954). The protection could not be more clearly emblazoned on the face of the Article 37, UCMJ: "No court-martial convening authority, nor any other commanding officer, may deter or attempt to deter a potential witness from participating in the investigatory process or testifying at a court-martial." Art. 37(a)(2), UCMJ.

10, the fundamental rights to the presumption of innocence, due process, and a fair trial that protected by Article 37 merit the same treatment with respect to waiver and forfeiture.

C. Appellant did not intentionally relinquish or abandon a known right.

Likewise when the right at stake is of a constitutional nature, "there is a presumption against the waiver," and an appellant only waives review of such a right when "it is *clearly established* that there was an intentional relinquishment or abandonment of a known right."[186] "[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake."[187] This standard requires a showing that an accused "expressly waive[d] the right," which depends on the "surrounding circumstances" and whether the waiver was "knowing, voluntary, and intelligent."[188]

Considering UCI's constitutional underpinnings, this heightened waiver scrutiny applies to the issue here: where, as the military judge found, "potential witnesses . . . received a message that [Appellant] was guilty and should be removed

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[186] *United States v. Oliver*, 76 M.J. 271, 273 (C.A.A.F. 2017) (internal quotations and citations omitted) (emphasis added).
[187] *Harcrow*, 66 M.J. at 156 (quoting *Olano*, 507 U.S. at 733).
[188] *United States v. Hasan*, 84 M.J. 181, 198 (C.A.A.F. 2024); *see also Ricketts v. Adamson*, 483 U.S. 1, 23 (1987) (providing that waivers of fundamental constitutional rights must be "knowing, intelligent, and voluntary").

from the Unit/Marine Corps";[189] where Appellant and his counsel consequently had difficulty finding any witnesses willing to speak on his behalf in the wake of his Battalion Commander branding him the "drug kingpin"; and where that difficulty caused Appellant reasonably to question the likelihood of a fair trial and eventually to forfeit his right to a contested trial for that reason.

Even assuming ordinary waiver scrutiny applies, Appellant did not intentionally relinquish or abandon a known right when he pleaded guilty pursuant to the plea agreement; rather, he intended just the opposite: to preserve his ability to seek appellate review of the adjudicative UCI claim he had litigated before the military judge.[190] It is unrefuted that Appellant asked the TDC "if pleading guilty would prevent the appellate court from deciding the [UCI] issue," and the TDC "assured [him] that the court would still review the issue and pleading guilty does not prevent the appellate court from deciding differently than the [military] judge."[191] The TDC—a now-adverse witness—corroborates Appellant's claim, stating, "Prior to entering into the plea agreement, [Appellant] asked if the military judge's denial of the UCI motion would be reviewed on appeal. I advised [Appellant] that *the UCI issue was preserved and would be reviewed*."[192] The TDC further

[189] J.A. at 340.
[190] J.A. at 359.
[191] J.A. at 359.
[192] J.A. at 355 (emphasis added).

stated, "I do not remember, nor did I intend, waiving the UCI motion as the UCI motion that I raised was unable to be waived."

In holding otherwise, the lower court focused only the military judge's colloquy with Appellant and the TDC and discounted their post-trial statements entirely.[193] Thus, the court dismissed Appellant's statement that he was "confused" during the colloquy,[194] when the record shows how a lay person in Appellant's position *would* be confused: since *his TDC had specifically advised him the issue was preserved*.[195] In such an unfamiliar, pressure-intense proceeding, it is not unreasonable that Appellant "did not know that the [military judge's] question meant the court would no longer be able to overrule the [military] judge's decision."[196] To the contrary, given the full context of what the TDC had advised him, Appellant's confusion was not only reasonable, but unsurprising.

It is difficult to reconcile the lower court's holding—that Appellant "affirmatively, knowingly and consciously waived the UCI claim"—with the unequivocal statements of both Appellant and his TDC that they believed the UCI issue was preserved.[197] Nor is the lower court's resolution of the factual basis for

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[193] *Suarez*, slip op. at 9.
[194] *Id.* at 8.
[195] J.A. at 355.
[196] J.A. at 360.
[197] *Cf. Day*, 83 M.J. at 56 (providing that the military judge's advisement that a motion was *not* waivable "prevented the possibility of waiver"); *United States v. Stewart*, 43 C.M.R. 112, 114 (C.M.A. 1971) (finding a law officer's comments that

this holding consistent with the principles this Court announced in *United States v. Ginn*.[198] Rather, here, the record fails to support that Appellant possessed the necessary "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" to knowingly and intentionally waive the right to appeal the UCI ruling.[199]

supported the accused's erroneous impression that he did not waive the issue). *But see United States v. Bradley*, 68 M.J. 279, 282 (C.A.A.F. 2010) (finding the accused waived an objection to the trial counsel remaining on the case even though there was evidence that the civilian defense counsel believed the guilty plea did not waive review of the objection).

[198] 47 M.J. 236, 248 (C.A.A.F. 1997) (discussing the limited circumstances under which a court of criminal appeals can decide a disputed factual issue without ordering further fact-finding proceedings).

[199] *Berghuis v. Thompkins*, 560 U.S. 370, 382-83 (2010)).

Conclusion

Accordingly, Appellant respectfully requests that the Court hold the adjudicative UCI issue has been preserved for appeal.

Respectfully submitted,

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1. This brief complies with the type-volume limitations of Rule 24(c) because it contains fewer than 14,000 words.

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I certify that I delivered the foregoing to this Court and opposing counsel on January 13, 2025.

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