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

REPLY ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 202300049

USCA Dkt. No. 25-0004/MC

Colin W. Hotard
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (504) 388-1069
Email: colinwhotard@gmail.com
CAAF Bar No. 37736

Todd Eslinger
Lieutenant Colonel, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7663
Email: todd.f.eslinger.mil@us.navy.mil
CAAF Bar No. 38076

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REPLY

I. RELYING ON UNSUPPORTED "FACTS," THE GOVERNMENT HAS NOT PROVEN BEYOND A REASONABLE DOUBT THAT THE ADJUDICATIVE UCI DID NOT AFFECT APPELLANT'S COURT-MARTIAL.

As an initial matter, the Government's Answer asserts "facts" that are not supported by the record, but rather are mere assertions made by the Trial Counsel in response to the defense unlawful command influence (UCI) motion—i.e., they are cited to the brief itself, as opposed to any substantive evidence.[1] Among such unsupported assertions are the following: that "Appellant's drug sales resulted in a large number of Marines . . . testing positive for cocaine;"[2] that Appellant bragged about selling cocaine;[3] that the unlawful public arrest of Appellant needed to occur in front of the company "to be a surprise in order preserve evidence . . . ;"[4] that none of the Marines interviewed by the Investigating Officer ultimately feared retaliation

[1] Gov. Answer at 2-7.
[2] Gov. Answer at 3.
[3] Gov. Answer at 3.
[4] Gov. Answer at 3; *cf.* J.A. at 339-40 (the Military Judge finding that the Battalion Commander "coordinat[ed] the arrest" and "directed" the agents into the auditorium to effectuate the arrest).

for testifying for the Defense;[5] and that the Battalion commander was relieved because of the UCI.[6]

Facts must be proven, not just asserted.[7] And while these unsupported claims attempt to shape the narrative, they are largely irrelevant to resolving the issue before the Court.

A. The Government fails to distinguish *United States v. Rivers* and *United States v. Gilmet*.

As this Court squarely held in *Rivers*, the form of UCI at issue here—improper command messaging—requires "clear and effective retraction."[8] The Government's

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[5] Gov. Answer at 5, 26. Contrary to the Government's suggestion, the Investigating Officer found that a Company Commander and a First Sergeant "informed [him] that they were concerned about receiving retribution or retaliation *for speaking to [him]*." J.A. at 262 (emphasis added). The Company Commander began his interview by expressing "concern[] about vindictive behavior or reprisals *regarding statements he would make to [the Investigating Officer]* based on previous events or actions," and the First Sergeant expressed his concern "regarding retaliation from SgtMaj *for speaking with [the Investigating Officer]*." J.A. at 328, 332 (emphasis added). Asking about any fear of retaliation for having a candid dialogue does not equal asking about any fear of testifying on behalf of the Defense. Contrary to the Government's reiteration of the Trial Counsel's conjecture, there is no evidence that the Investigating Officer asked about a fear of testifying. *See* J.A. at 89 (the First Sergeant testifying that the Investigating Officer never asked if he "would fear retaliation if [he] spoke for [Appellant]).

[6] Gov. Answer at 3-4, 6. Rather, the Battalion Commander was relieved for loss of trust and confidence "in [his] ability to serve in command leadership positions." J.A. at 180. This occurred after an Investigating Officer investigated fifteen allegations of other misconduct against the Battalion Commander and substantiated that the Battalion Commander called a junior Marine a "spic," unlawfully deprived another Marine of his liberty, and drank whiskey during a field exercise. J.A. at 181-87.

[7] *See United States v. Dimberio*, 56 M.J. 20, 25 (C.A.A.F. 2001).

[8] *United States v. Rivers*, 49 M.J. 434, 440-41 (C.A.A.F. 1998).

Answer suggests instead that relieving and reprimanding the Battalion Commander somehow served as a surrogate for actually taking the steps needed to address and cure the UCI, to prevent it from infecting Appellant's court-martial.[9] But this argument, which failed in *Gilmet*, also fails here.[10]

Similar to *Gilmet*, the Government argues that because the Battalion Commander was relieved, the Marines under his command should have *assumed* it was on account of the UCI (Appellant's public arrest and denouncement), and therefore should have further assumed they were now free to speak candidly on behalf of the "drug kingpin" without fear of retribution.[11]

The problem is, the causal argument is not supported by the record. Maybe the Marines assumed the Battalion Commander was relieved for calling a Marine a "spic" or for calling Marines who cooperated with the command investigation "rats or snitches" or for drinking during a field exercise or for unlawfully restricting a Marine's liberty. Or maybe they assumed the Battalion Commander *was* relieved

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[9] Gov. Answer at 26 (attempting to distinguish *Rivers* and arguing, "[h]ere, even more severe—and public—remedial measures were taken").
[10] *See United States v. Gilmet*, 83 M.J. 398, 404-05 (C.A.A.F. 2023) (finding that where the government argued a similar form of UCI was cured when the perpetrator was suspended and then relieved and the perpetrator's superior rejected the statements that amounted to UCI, the superior's actions were a "litigation tactic produced in response to ongoing legal proceeding" rather than a curative measure, and the punishment did not alleviate the "fear of repercussions").
[11] *See* Gov. Answer at 26-27.

due to the UCI, but were sympathetic to him and thus blamed Appellant for the relief, further exacerbating the effects of the UCI.

These entirely speculative possibilities illustrate why what the Government calls the Battalion Commander's "severe" punishment of being relieved from command and reprimanded, for a variety of misconduct, does not equate to the "clear and effective retraction" that the law requires.[12] Just as in *Gilmet*, the relief and reprimand is nothing more than a "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."[13] And more importantly, the Battalion Commander's punishment failed to cure the lasting effect of the UCI and the message it conveyed to the Marines: "that [Appellant] was guilty and should be removed from the Unit/Marine Corps."[14]

B. The UCI is adjudicative in nature, and regardless, the Government is preempted from arguing otherwise.

Before this Court, for the first time, the Government argues that the UCI at issue is accusatory, not adjudicative.[15] Before the lower court, the Government argued just the opposite: that for "claims of [UCI] related to the *adjudicative* process

[12] *Rivers*, 49 M.J. at 440-41.
[13] *Gilmet*, 83 M.J. at 404.
[14] J.A. at 339.
[15] Gov. Answer at 20-25.

. . . an appellant may 'initiate an affirmative and knowing waiver . . . .'"[16] The Government's concession at the lower court did not affect its argument because the lower court's precedent provides (erroneously) that both adjudicative and accusatory UCI are waivable.[17] But now, before this Court, whose precedent supports that only accusatory UCI is waivable,[18] the Government shifts its argument and argues the character of the Battalion Commander's UCI has suddenly changed its stripes.[19]

Judicial estoppel prohibits such gamesmanship, preventing a party from offering contradictory arguments at different stages of proceedings.[20] As a member of this Court has explained, "[a]bsent any good explanation, a party should not be allowed to gain an advantage by litigating on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."[21] Having prevailed at

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[16] J.A. at 82 (quoting *United States v. Gattis*, 78 M.J. 748, 753 (N-M. Ct. Crim. App. 2021)) (emphasis added).
[17] *See Gattis*, 78 M.J. at 753.
[18] *See United States v. Douglas*, 68 M.J. 349, 356 n.7 (C.A.A.F. 2010) (citation omitted); *see also United States v. Riesbeck*, 77 M.J. 154, 160 (C.A.A.F. 2018) (citation omitted).
[19] Gov. Answer at 20-23.
[20] *See Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000) (providing that [j]udicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."); *see also Gilmet*, 83 M.J. at 408 (declining to consider an argument that the government never raised before); *United States v. Muwwakkil*, 74 M.J. 187, 191-92 (C.A.A.F. 2015) (same).
[21] *United States v. Schmidt*, 82 M.J. 68, 80 (C.A.A.F. 2022) (Maggs, J., concurring) (citing 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4477 (2d ed. 1992; Supp. 2021)).

the lower court after conceding the UCI is adjudicative, the Government now argues to this Court that the UCI is accusatory to gain an inconsistent advantage. The Court should not entertain such tactics.

Additionally, the law-of-the-case doctrine preempts the Government's argument. When an appellate court decides a question of law, that decision generally "should continue to govern the same issues in subsequent states of the same case."[22] Here, the lower court decided "[t]he present case presents a claim of UCI in the adjudicative process."[23] Because that aspect of the lower court's decision was neither petitioned nor certified for this Court's review, it continues to govern.

II. THE TRIAL DEFENSE COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED APPELLANT.

The same is true of the Government's attempt to re-litigate whether the Trial Defense Counsel (TDC)'s performance was deficient, when the only issue before this Court is whether the TDC's performance, which the lower court found deficient, prejudiced Appellant.[24] In *United States v. Lewis*, this Court reviewed a decision by court of criminal appeals (CCA) holding that the appellant met his burden of raising UCI, but did not suffer prejudice from the UCI.[25] Thus, the CCA's decision that the

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[22] *United States v. Steen*, 81 M.J. 261, 271 (C.A.A.F. 2021) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).
[23] *United States v. Suarez*, NMCCA No. 202300049, slip op. at *9 (N-M. Ct. Crim. App. Aug. 23, 2024); J.A. at 9.
[24] *See* Gov. Answer at 29-32.
[25] *United States v. Lewis*, 63 M.J. 405, 412 (C.A.A.F. 2006).

appellant had raised UCI was law of case, and the only issue before this Court was whether the government had "met its burden, beyond a reasonable doubt, that these proceedings were untainted by [UCI]."[26]

Here, the lower court found the TDC was deficient when advising Appellant that attempted prostitution was a registerable offense and that the "waive all waivable motions provision" did not waive review of the UCI issue.[27] This finding, that the first prong of *Strickland v. Washington* has been met,[28] is now the law of the case. Only *Strickland's* second prong—whether the TDC's deficient performance caused prejudice to Appellant—is before this Court.[29]

A. The Government fails to show there was no reasonable possibility that, but for the TDC's errors, Appellant would not have pleaded guilty.

The Government is mistaken in arguing that "overwhelming evidence" and Appellant's desire not to register as a sex offender demonstrates a lack of prejudice

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[26] *Id.* at 413.
[27] *See Suarez*, slip op. at *18; J.A. at 18.
[28] 466 U.S. 668 (1984).
[29] Of note, with regards to the "waive all waivable motions" provisions, the Government misstates how the TDC was deficient. Contrary to the Government's framing, Appellant did not argue that the TDC was deficient for negotiating a plea agreement with a "waive all waivable motions" provision. *See* Gov. Answer at 31-32. Instead, the TDC was deficient for negotiating a plea agreement with a "waive all waivable motions" provision, then advising Appellant that the UCI issue was preserved, then stating on the record that the provision waived review of the litigated motion.

from the TDC's deficient performance.[30] First, the very fact that Appellant thought a conviction for attempted prostitution would result in sex offender registration—which the lower court found the TDC had incorrectly advised him about—shows there *is* prejudice. It is certainly reasonable that an appellant would plead guilty in exchange for the Government agreeing to withdraw and dismiss a registerable offense. But here, there was no such offense on the charge sheet. The consideration that the TDC misled Appellant into believing he received was no consideration at all.

Second, the Government fails to show how its case actually contained "overwhelming evidence." The admissible evidence comes from Appellant's stipulation of fact and his admissions during providency, which resulted from his agreement to plead guilty. The Government cannot rely on evidence that was introduced after Appellant agreed to plead guilty as a basis to prove that "overwhelming evidence" *caused* him to plead guilty.

In fact, the evidence was far from overwhelming. The Government's case would have been premised on testimony from Marines with their own run-ins with the law, only one of whom had even implicated Appellant before the Battalion

[30] *See* Gov. Answer at 32-35 (arguing "Appellant's Plea Agreement was highly favorable given the overwhelming evidence supporting the charges against him," and "Appellant's Plea Agreement allowed him to avoid…potential sex offender registration stemming from such a [attempted prostitution] offense").

Commander arrested him, labeled him the "drug kingpin," and accused him of being the enemy in front of the command. Prior to the public arrest, the evidence that Appellant had violated the Uniform Code of Military Justice consisted of a failed urinalysis and a statement by a confidential informant (who spoke to the Naval Criminal Investigative Service (NCIS) only after he himself had failed his own urinalysis).[31]

Indeed, before Appellant was publicly arrested, when the confidential informant attempted to purchase cocaine from Appellant, Appellant *declined* the request.[32] But after Appellant's public arrest, as NCIS continued its investigation by interviewing other service members, Appellant had become "known throughout the base" as the drug "kingpin,"[33] a moniker that was echoed during the other service members' interviews.[34] Evidence composed of witnesses with a motive to mitigate their own wrongdoing, collected after the Battalion Commander had poisoned the well of both fact and character witnesses, is not "overwhelming" evidence.

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[31] *See* J.A. at 211-41.
[32] *Suarez*, slip op. at 3; J.A. at 3, 211.
[33] Supp. J.A. at 569. CORRECTION: In the Brief on Behalf of Appellant, undersigned counsel cited to the TDC's second declaration, J.A. at 355-56, when the correct cite was the TDC's first declaration. *See* Appellant's Br., notes 22-23, 42, 45, 47-48, 62-63, 102-03, 119, 154, 156, 169, and 192. The first declaration is now provided. *See* Supp. J.A. at 569-570.
[34] *See* J.A. at 358.

The evidence supports that Appellant considered a variety of factors when deciding to plead guilty based on the TDC's advice. He "did not think five years of confinement was a good deal," but he "did not trust [he] would get a fair trial" due to the UCI that had occurred.[35] He "weigh[ed]" the fact that the plea agreement required the Government to dismiss what the TDC had led him to believe was a registerable offense.[36] And he considered that that plea agreement allowed "the appellate court [to decide] the [UCI] issue, which was "very important" to him—so important, in fact, that he "would not have pled guilty if the [Military Judge's UCI] decision could not be overruled."[37] The Government's dismissal of these reasonable and corroborated considerations is unavailing.[38]

B. The Government misconstrues Appellant's requested relief for IAC.

The Government incorrectly states, "[W]ithout citing any authority, [Appellant] requests that the Findings and Sentence be set aside and all charges be dismissed with prejudice."[39] To the contrary, as to the relief requested for this specific issue, Appellant does not ask for dismissal with prejudice.[40] He agrees with

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[35] J.A. at 359.
[36] J.A. at 359.
[37] J.A. at 360.
[38] *See* Appellant's Br. at 31-33 (showing how Appellant's considerations were reasonable and corroborated).
[39] Gov. Answer at 35.
[40] *See* Appellant's Br. at 35 (providing "Appellant respectfully requests that the Court set aside the findings and sentence").

the Government that "the remedy is to set aside the findings [and sentence], allowing him to plead not guilty."[41]

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

The Government argues that the UCI at issue here—where "potential witnesses . . . received a message that [Appellant] was guilty and should be removed from the Unit/Marine Corps,"[42] causing him to reasonably question the likelihood of a fair trial[43] and eventually forfeit his right to a contested trial—garners ordinary waiver scrutiny.[44] This position fails to address the constitutional concerns implicated and whether such concerns preserve the issue or at least require a heightened level of scrutiny. Regardless, the Government's argument fails to survive even ordinary waiver scrutiny.

A. The Government fails to show the record "clearly establish[es]" that Appellant "knowingly, voluntarily, and intelligently" waived review.

Constitutional concerns require a heightened standard.[45] The record must "*clearly establish[]*" that Appellant knowingly, voluntarily, and intelligently waived

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[41] Gov. Answer at 37.
[42] J.A. at 440.
[43] *See* J.A. at 359.
[44] Gov. Answer at 39-41.
[45] Assuming arguendo that this type of UCI is waivable. *See* Appellant's Br. at 37-40.

his right of review,[46] that he "kn[e]w[] what he [wa]s doing and his choice [wa]s made with his eyes open."[47] A thorough inquiry that ascertains whether an accused understands the nature, circumstances, risks, and limitations of a waiver establishes such.[48]

Here, the record fails to show a thorough inquiry. The Military Judge asked about the waiver provision, to which Appellant concurred that the pre-litigated motions were waived.[49] But the Military Judge failed to inquire about whether the UCI impacted Appellant's decision to plead guilty or whether he was pleading guilty because of the UCI's effect. And as he states in his sworn declaration, corroborated by the TDC, Appellant "did not want to plead guilty," but believed "the Marines would continue to overemphasize [his] role" and he "would not get a fair trial."[50]

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[46] *United States v. Oliver*, 76 M.J. 271, 273 (C.A.A.F. 2017) (internal quotations and citations omitted) (emphasis added).
[47] *United States v. Bowie*, 21 M.J. 453, 456 (C.M.A. 1986) (citation omitted).
[48] *See United States v. Edwards*, 58 M.J. 49, 51 (C.A.A.F. 2003) (showing an inquiry for a pretrial agreement provision that implicated public policy considerations); *United States v. McFadyen*, 51 M.J. 289, 291 (C.A.A.F. 1999) (showing the appropriate inquiry for ascertaining whether an accused executed an Article 13, UCMJ, waiver); *United States v. Hasan*, 80 M.J. 682, 696-97 (Army Ct. Crim. App. 2020) (showing a thorough inquiry for ascertaining whether the accused waived his right to counsel); *see also United States v. Spykerman*, 81 M.J. 709, 730 (N-M. Ct. Crim. App. 2021) (stating that the military judge sua sponte convened a post-trial Article 39(a) hearing in which he conducted a lengthy inquiry and determined that the appellant had "knowingly and consciously waived [alleging UCI]….and ha[d] done so voluntarily without any pressure").
[49] J.A. at 554.
[50] J.A. at 359.

In fact, there is no evidence that the Military Judge who presided over the trial knew the nature of the UCI, as she was two judges removed from the Military Judge who presided over the UCI litigation during the motions phase.

Additionally, the Military Judge at trial never explained the practical effect of a waiver: that a preserved issue would allow the lower court to review the issue and to potentially come to a different decision, while a waived issue would foreclose such review. As Appellant swears in his declaration, he was "confused" by the legal term and did not know the practical effects of waiver. His confusion is corroborated by the undisputed fact that the TDC advised him that the plea agreement would not prevent the appellate court from reviewing the UCI ruling and "deciding different that the [Military] Judge."[51]

B. The Government fails to show Appellant knowingly and voluntarily waived review of the litigated UCI issue.

Faced with such a difficult position, the Government's Answer opts to simply bypass the TDC's errant advice and assume Appellant received correct advice, arguing Appellant understood what waiver meant because "his counsel had explained the provision to him."[52] That argument may have held weight had the TDC correctly explained the provision to Appellant. But that, indisputably, did not happen here. Instead, as the lower court found, the TDC provided *in*correct advice regarding

[51] J.A. at 359.
[52] Gov. Answer at 41.

the plea agreement provision.[53] Thus, considering the lower court's finding and the corroborated facts, the Government's argument does not survive even ordinary waiver scrutiny.

Conclusion

WHEREFORE, this Court should decide the Government failed to prove—beyond a reasonable doubt—that the UCI did not impact Appellant's court-martial, for which Appellant respectfully requests that the findings and sentence be set aside and the charges dismissed with prejudice. In the alternative, should this Court decide only that Appellant was prejudiced by the TDC's deficient performance, Appellant respectfully requests that the findings and sentence be set aside.

Respectfully submitted.

Colin W. Hotard
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate
Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (504) 388-1069
Email: colinwhotard@gmail.com
CAAF Bar No. 37736

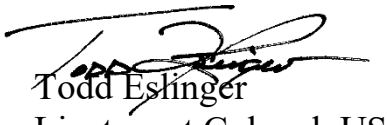
Todd Eslinger
Lieutenant Colonel, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate
Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7663
Email: todd.f.eslinger.mil@us.navy.mil
CAAF Bar No. 38076

[53] J.A. at 20.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and delivered to the Director, Appellate Government Division (Code 46), at DACCode46@navy.mil and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity (Code 40), at Joshua.D.Ricafrente.civ@us.navy.mil on March 10, 2025.

Colin W. Hotard
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate
Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (504) 388-1069
Email: colinwhotard@gmail.com
CAAF Bar No. 37736



Todd Eslinger
Lieutenant Colonel, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate
Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7663
Email: todd.f.eslinger.mil@us.navy.mil
CAAF Bar No. 38076

CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

This Brief complies with the type-volume limitations of Rule 24(b) because: This brief contains 3,920 words. This brief complies with the typeface and type style requirements of Rule 37.

Colin W. Hotard
Major, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate
Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (504) 388-1069
Email: colinwhotard@gmail.com
CAAF Bar No. 37736

Todd Eslinger
Lieutenant Colonel, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate
Defense Division
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7663
Email: todd.f.eslinger.mil@us.navy.mil
CAAF Bar No. 38076