IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

CANDACE G. WHITE
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7295, fax (202) 685-7687
Bar no. 36701

JAMES P. WUZHU
LCDR, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-4623, fax (202) 685-7687
Bar no. 36943

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01

IAIN D. PEDDEN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01

1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-2947, fax (202) 685-7687
Bar no. 33211

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UNITED STATES COURT OF MILITARY APPEALS AND COURT OF APPEALS FOR THE ARMED FORCES CASES

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II.

WAS TRIAL DEFENSE COUNSEL'S DEFICIENT PERFORMANCE PREJUDICIAL?

III.

DID APPELLANT WAIVE REVIEW OF THE QUESTION WHETHER UNLAWFUL COMMAND INFLUENCE AFFECTED HIS COURT-MARTIAL?

Statement of Statutory Jurisdiction

The Entry of Judgment includes a sentence of a dishonorable discharge. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of (1) wrongful use of cocaine, (2) wrongful introduction of cocaine with an intent to distribute, (3) wrongful distribution of cocaine, lysergic acid diethylamide, and amphetamine, and (4) conspiracy to wrongfully distribute cocaine, in violation of Articles 81 and 112a, UCMJ, 10 U.S.C. §§ 881 and 912a

(2019). The Military Judge sentenced Appellant to confinement for sixty months, reduction to E-1, and a dishonorable discharge. The Convening Authority took no action on the Sentence, and the Military Judge entered the Judgment into the Record. The lower court affirmed the Findings and Sentence. *United States v. Suarez*, No. 202300049 (N-M. Ct. Crim. App. Aug. 23, 2024). Appellant timely petitioned for review, and this Court granted the three Issues presented.

Statement of Facts

A. The United States investigated Appellant for multiple drug offenses, including distribution on military installations.

Law enforcement identified Appellant as both a user and distributor of cocaine on Marine Corps Base Hawaii and other military installations on Oahu, Hawaii. (J.A. 191.)

Appellant began using cocaine around August 1, 2021. (J.A. 191.) Shortly after, Appellate began purchasing cocaine for distribution as well as personal use. (J.A. 191.) The Appellant primarily sold to servicemembers on Marine Corps Base Hawaii and other military installations on Oahu. (J.A. 191.)

As Appellant's drug distribution network grew, he hired several Marines to assist him. (J.A. 191.) Appellate convinced several Military Police Officer Marines to provide him gate schedules and other law enforcement sensitive information to more easily transport cocaine onto base. (J.A. 191.)

Appellant's drug sales resulted in a large number of Marines from 3d Marine Littoral Regiment testing positive for cocaine. (J.A. 191.)

Appellant tested positive for cocaine during a random command urinalysis on January 6, 2022. (J.A. 192.) The command issued a Command Authorized Search and Seizure, which law enforcement executed. (J.A. 192.) During the search, law enforcement found controlled substances, drug paraphernalia, an additional cell phone, and a ledger tracking Appellant's distribution activity. (J.A. 192.)

The command placed Appellant in pre-trial confinement on January 11, 2022. (J.A. 193.) While in confinement, Appellant admitted to using and distributing cocaine, and bragged that his distribution network continued to operate while he was in the brig. (J.A. 192.)

B. Appellant's Battalion Commander engaged in unlawful command influence by having law enforcement publicly arrest Appellant. He and the Command Sergeant Major were relieved as a result.

1. The Command arranged for law enforcement to arrest Appellant in front of his Company during a command climate survey debrief.

On January 10, 2022, law enforcement contacted the Battalion Commander to coordinate the arrest of Appellant. (J.A. 192.) Law enforcement informed the command that the preference was for the arrest to be a surprise to preserve any evidence on Appellant's phone. (J.A. 192.) Because Appellant had already left

work, law enforcement decided to postpone the arrest until the next day when Appellant arrived at his appointed place of duty. (J.A. 192.) Appellant's appointed place of duty was at 0800 the following morning for a previously scheduled command climate debrief. (J.A. 192.)

Law enforcement arrived at Classroom 7 on Marine Corps Base Hawaii at 0730 to arrest Appellant before the debrief. (J.A. 193.) However, Appellant arrived late, around twenty minutes into the thirty-minute debrief. (J.A. 193.) Law enforcement arrested Appellant in the classroom, where the Battalion Commander was debriefing Headquarters and Service Company. (J.A. 193.) After the arrest, law enforcement quickly exited the classroom with Appellant. (J.A. 193.)

As law enforcement and Appellant exited, the Battalion Commander said to the Company: "That's the guy selling cocaine in my barracks." (J.A. 193.) The Battalion Sergeant Major also said to the Company that Marines in the command lacked the "testicular fortitude" to come forward and report the drug distribution. (J.A. 193.) Appellant was not in the classroom when the Commander and Sergeant Major made these comments. (J.A. 193.)

2. Following an Inspector General complaint, an investigation was conducted into the circumstances of Appellant's arrest, resulting in the relief of the Battalion Commander and Sergeant Major.

On January 19, 2022, an Inspector General complaint was filed regarding the manner in which Appellant was arrested. (J.A. 193.) Immediately upon receipt of

the complaint, the Staff Judge Advocate determined that the Battalion Commander should no longer serve as the convening authority for Appellant's case. (J.A. 193.) That same day, the 3d Marine Regiment Commanding Officer took over as the Convening Authority for Appellant's case. (J.A. 193.)

After January 19, 2022, the Battalion Commander and Sergeant Major had no involvement with Appellant's court-martial. (J.A. 194.) When the Battalion Commander was removed as the convening authority, Appellant had not yet been charged with any offenses. (J.A. 194.)

On January 28, 2022, the Investigating Officer began his investigation into Appellant's arrest. (J.A. 194.) The Investigating Officer interviewed fifty-five Marines. (J.A. 194.) All fifty-five Marines provided statements, and only one said he feared retaliation if he testified in the case, based on the Battalion Commander's actions. (J.A. 194.)

But that Marine stated during an interview, and also during sworn testimony in a Motions hearing, that once the Battalion Sergeant Major was relieved he no longer felt intimidated to speak about what occurred with Appellant. (J.A. 194.) The Marine said that he was willing to testify on behalf of Appellant, including testifying as to Appellant's good military character. (J.A. 194.)

The Marine said that he also believed that junior Marines would now feel comfortable discussing Appellant's arrest and testifying to Appellant's character. (J.A. 194.)

The investigation was completed on March 8, 2022. (J.A. 194.) The Investigating Officer opined that there was insufficient evidence to find that the Battalion Commander harassed Appellant during the arrest and in his subsequent comments to the Company. (J.A. 194.) The Investigating Officer found that while the Commander should not have conducted Appellant's arrest in such a public forum, it did not create an intimidating, hostile, or offensive work environment. (J.A. 194.) The Investigating Officer recommended that the Commanding General, 3d Marine Division, take appropriate administrative action against the Battalion Commander. (J.A. 194.)

On April 7, 2022, the Commanding General endorsed the command investigation, and relieved both the Battalion Commander and Sergeant Major from their leadership positions. (J.A. 195.) The Commanding General issued a report of substandard performance for the Battalion Commander, citing Appellant's arrest as the circumstances substantiating the report. (J.A. 195.)

A number of media outlets reported on the relief of the Battalion Commander and Sergeant Major. (J.A. 195.) The articles mentioned Appellant's

public arrest and the role those events played in the decision to relieve the command team. (J.A. 195.)

C. The United States charged Appellant with drug and prostitution offenses.

On February 3, 2022, the United States charged Appellant with wrongful use, introduction, and distribution of drugs in violation of Article 112a, UCMJ. (J.A. 150–52.) The United States also charged Appellant with attempted prostitution in violation of Article 80, UCMJ. (J.A. 150–52.) On April 6, 2022, the United States preferred an additional charge of conspiracy to distribute cocaine in violation of Article 81, UCMJ. (J.A. 153–54.)

D. Appellant moved to dismiss all Charges and Specifications based on unlawful command influence, stemming from his arrest. The Military Judge denied the Motion.

Appellant moved to dismiss all Charges and Specifications with prejudice due to unlawful command influence. (J.A. 179.) The United States filed a responsive Motion. (J.A. 190–334.) The Parties litigated the Motion. (J.A. 361–480.)

In an emailed Ruling, the Military Judge denied the Motion while finding Appellant presented "some evidence" of unlawful command influence. (J.A. 339.) The Military Judge ruled that the Battalion Commander engaged in actual and apparent unlawful command influence by coordinating Appellant's arrest in front of the Company and declaring, "That's the guy selling cocaine in my barracks."

(J.A. 339.) He found that the evidence established that the Sergeant Major told the Marines present: "This piece of shit drug kingpin has been selling drugs in your barracks and no one has the nut sack to say anything about it," or words to that effect. (J.A. 339.)

The Military Judge further found that the arresting Agent was caught off-guard by the manner in which the Battalion Commander and Sergeant Major conducted the public arrest on January 11th. (J.A. 340.) The Agent received a verbal Command Authorized Search and Seizure from the Battalion Commander on January 10th , and had intended to arrest Appellant that day. (J.A. 340.) The Agent then planned to discreetly arrest Appellant the next day, but was directed to the classroom where the command climate debrief was ongoing. (J.A. 340.)

The Military Judge also found: "The manner in which the [Appellant] was brought forth, arrested, and subsequently disparaged, could have created an impression amongst the unit, and perhaps others outside the unit due to 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." (J.A. 340.) The public arrest and disparaging comments would have a chilling effect on potential witnesses and members, and created the "perception of unfairness and illegitimacy in the proceedings." (J.A. 340.)

Despite finding that unlawful command influence occurred, the Military Judge also found that the United States proved beyond a reasonable doubt that it would not impact the proceedings. (J.A. 340.) The Military Judge found that the Command's actions "did not place an intolerable strain on the public's perception of military justice such that an objective disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." (J.A. 340.)

The Military Judge considered that the Regimental Commanding Officer took Appellant's investigation and case away from Battalion leadership less than two weeks after the public arrest, and charges were preferred two weeks later. (J.A. 340.) An Inspector General investigation was conducted, and resulted in the 3d Marine Division Commanding General relieving the Battalion Commander and Sergeant Major from their leadership positions. (J.A. 340.) The Commanding General ultimately served as the Convening Authority and referred Appellant's charges. (J.A. 340; 150–54.)

The Military Judge ruled:

> Battalion leadership may have initially engaged in conduct amounting to [unlawful command influence] during [Appellant's] arrest at the command climate debrief on 11 January 2022. However, it is clear that the chain of command sought to protect [Appellant's] presumption of innocence, guard against [unlawful command influence], and uphold the legitimacy of our justice system by immediately taking over the case against [Appellant] and subsequently relieving [the Battalion Commander and Sergeant Major] from Battalion leadership.

(J.A. 340.)

The Military Judge further ruled that any apparent unlawful command influence would be:

> cured by the following 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 (2) the defense will be authorized liberal voir dire of the members concerning whether they know about the 11 January 2022 incident involving [Appellant] at the command climate debrief, or anything about views of [Appellant] by members of the command in 3d Battalion, 3d Marine Littoral Regiment (including [the Battalion Commander and Sergeant Major]).

(J.A. 340–41.)

A new Military Judge was detailed, and supplemented the prior Military Judge's unlawful command influence Ruling. (J.A. 487.) The Military Judge added the additional remedy that no members would come from 3d Battalion, 3d Marines, "to ensure that unlawful command influence won't affect the proceedings beyond a reasonable doubt." (J.A. 487.)

E. Appellant entered into a Plea Agreement.

Appellant and the Convening Authority signed a Plea Agreement. (J.A. 344–53.) Appellant agreed to plead guilty to six of the eight Specifications. (J.A. 346–48.) The Convening Authority agreed to conditionally withdraw and dismiss the other Specifications without prejudice, to ripen into dismissal with prejudice if the conviction and sentence are upheld on appellate review. (J.A. 349.) Appellant

negotiated for a sentence that included a dishonorable discharge and confinement between twenty-four and sixty months, among other provisions. (J.A. 350.) Appellant also agreed to waive all waivable motions. (J.A. 349, 552.)

F. Appellant pled guilty to drug offenses and stated that he understood what it meant to waive all waivable motions.

Appellant pled guilty to (1) wrongful use of cocaine, (J.A. 491); (2) wrongful introduction of cocaine with the intent to distribute, (J.A. 501); (3) wrongful distribution of cocaine, (J.A. 515); (4) wrongful distribution of LSD, (J.A. 529); (5) wrongful distribution of amphetamine, (J.A. 539); and (6) conspiracy to distribute cocaine, (J.A. 550, 162).

During the plea colloquy, the Military Judge asked Appellant if he understood what it meant to waive all waivable motions as part of the Plea Agreement. (J.A. 553.) Appellant said that he understood. (J.A. 553.)

The Military Judge asked Trial Defense Counsel "which side originated the waiver of motions provision?" (J.A. 553.) Counsel replied, "The defense did." (J.A. 553.) The Military Judge then advised Appellant that the provision meant he was waiving his right to appellate review of motions previously litigated, to include the Motion to Dismiss for Unlawful Command Influence. (J.A. 554.)

The Military Judge asked Appellant if he voluntarily agreed to this term, and if he believed this to be a beneficial agreement. (J.A. 554.) Appellant replied: "Yes, Your Honor."

Appellant confirmed he was pleading guilty, not only in hope of getting a lighter sentence, but because he was convinced that he was in fact guilty. (J.A. 557.) Before pleading guilty, Appellant had enough time and opportunity to talk to Trial Defense Counsel. (J.A. 558.) Appellant informed the Military Judge that he received the full benefit of his Trial Defense Counsel's advice and was satisfied the advice was in his best interest. (J.A. 558.)

G. The Military Judge found Appellant guilty and sentenced him.

The Military Judge found Appellant guilty and sentenced him to a dishonorable discharge and confinement for a total of sixty months. (J.A. 162–63, 562, 567.)

H. At the lower court, Appellant filed a Motion to Attach Appellant's Trial Defense Counsel post-trial Affidavit which discussed concerns during the negotiation process.

At the lower court, Appellant filed a Motion to Attach Appellant's Trial Defense Counsel post-trial Affidavit. (J.A. 355–57.) During the early stages of pre-trial negotiations, Trial Counsel offered a plea agreement with a two-year confinement cap. (J.A. 356.) After significant litigation, the Convening Authority agreed to a Plea Agreement with a sixty-month cap on confinement, which would avoid charges that might require sex offender registration. (J.A. 356–57.)

I. At the lower court, Appellant filed a Motion to Attach a post-trial Affidavit.

Appellant filed a Motion to Attach a post-trial Affidavit that did not deny his role in the narcotics distribution scheme, but suggested that other Marines "exaggerated my role in the conspiracy." (J.A. 359–60.)

Appellant's Affidavit alleged for the first time that he did not want to plead guilty. (J.A. 359.) Appellant claimed that he did not think five years' confinement was a "good deal," but that he "did not trust that [he] would get a fair trial." (J.A. 359.) Appellant admitted he wanted to avoid potential sex offender registration due to the prostitution charge, and stated, "Weighing these factors, I reluctantly decided to plead guilty to the drug charges." (J.A. 359.)

Appellant asserted that he asked his Trial Defense Counsel if pleading guilty would prevent appellate review over the unlawful command influence issue, and his Counsel assured him that the court would still review the issue. (J.A. 359.) Appellant alleged that he would not have pled guilty if he could not appeal the Military Judge's unlawful command influence Ruling. (J.A. 359.) Appellant remembered the conversation during the plea colloquy with the Military Judge, but stated that he was confused and did not think that he was waiving appellate review of the unlawful command influence ruling. (J.A. 360.)

J. The lower court upheld the Findings and Sentence.

1. The lower court held that Appellant "intentionally relinquished a known right" to appeal the unlawful command influence issue.

The lower court considered both Appellant's written Plea Agreement and his on-Record colloquy to analyze whether he waived the unlawful command influence issue. (J.A. 7–9.) The lower court held that: "based on the totality of the record before us we find Appellant intentionally relinquished a known right, leaving no error to correct on appeal." (J.A. 9.)

2. The lower court found no actual or apparent unlawful command influence.

The lower court then considered the unlawful command influence claim, assuming arguendo that the issue was not waived. (J.A. 9–12.) The court looked at the numerous remedies provided in the case, including removing the case from the original convening authority before preferral of charges. (J.A. 10.)

The court noted that while not all of the curative measures "came to bear, their existence contribute to the seeming fairness of the proceedings." (J.A. 10.) The court found that the Plea Agreement and open-court guilty plea colloquy also contributed to the apparent fairness of the proceedings. (J.A. 10–11.) Therefore, the lower court found no apparent unlawful command influence. (J.A. 11.)

The lower court found that the comments by the Commander and Sergeant Major amounted to unlawful command influence. (J.A. 11.) But given the United

States' remedial measures, the Military Judge's additional remedies, and considering the totality of the circumstances, the lower court found that "Appellant was not materially prejudiced by that influence [and] the net result was no actual [unlawful command influence]." (J.A. 11.)

3. The lower court found that the Trial Defense Counsel's performance was deficient in relying on Department of Defense Instruction 1325.07 to determine sex offender registration requirements. But it found Appellant suffered no prejudice.

In analyzing Appellant's ineffective assistance of counsel claim, the lower court noted that there is "nothing in the record to indicate that, but for his counsels' alleged error, Appellant would not have pleaded guilty and would have insisted on going to trial." (J.A. 16.) The lower court found that Trial Defense Counsel erred in relying on Department of Defense Instruction 1325.07 to conclusively determine sex offender status registration requirements. (J.A. 18.)

But the lower court found that despite the "deficient" performance of counsel, Appellant was not prejudiced because he failed to demonstrate that he could have reached a more beneficial plea agreement. (J.A. 18.) Because Appellant failed to show prejudice, he could not show ineffective assistance of counsel. (J.A. 19.)

The lower court also found that the "waive all waivable motions" provisions did not adversely impact Appellant. As with the Military Judge, the lower court found that the United States proved beyond a reasonable doubt that unlawful

command influence did not impact the proceedings. (J.A. 20.) Therefore, while Trial Defense Counsel did not properly explain the provision, Appellant was not prejudiced. (J.A. 20.)

Summary of Argument

Appellant waived review of his unlawful command influence claim in his Plea Agreement and on-Record. Nonetheless, any unlawful command influence was cured by the Commanding General relieving and reprimanding Appellant's Commander and Sergeant Major. The Investigation after the Inspector General complaint confirmed that junior Marines felt comfortable openly discussing Appellant's case. In fact, one Marine planned to testify on Appellant's behalf.

Appellant fails to show his counsel were deficient in negotiating a favorable Plea Agreement that balanced the overwhelming evidence against him with his desired outcome of not being a registered sex offender. Appellant further fails to show any prejudice, given the United States' overwhelming case against Appellant and his failure to state that he would plead not guilty if the Charges are set aside. Instead, without legal authority, Appellant requests a set aside with prejudice for ineffective assistance of counsel.

Argument

I.

THE UNLAWFUL COMMAND INFLUENCE HAD NO EFFECT ON THE TRIAL, BEYOND A REASONABLE DOUBT, AND APPELLANT RECEIVED THE BENEFIT OF HIS PLEA AGREEMENT.

A. The standard of review is de novo.

Appellate courts review claims of unlawful influence de novo, accepting the military judge's findings of fact unless they are clearly erroneous. *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018).

A finding of fact is clearly erroneous "when there is no evidence to support the finding, or when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018) (citation and quotation omitted).

B. Article 37, UCMJ, prohibits actual unlawful command influence. The doctrine of apparent unlawful command influence no longer exists under the current version of Article 37, UCMJ.

Article 37(a), UCMJ, provides that "[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial… or any member thereof, in reaching the findings or sentence in any case…" 10 U.S.C. § 837(a) (2019). Actual unlawful command influence occurs "when there is an improper manipulation of the criminal justice process which

negatively affects the fair handling and/or disposition of a case." *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017) (citation omitted). Although apparent command influence existed as a judicial construction under the former version of Article 37, the present version of Article 37 requires material prejudice to the appellant. *See United States v. Gattis*, 81 M.J. 748, 755–57 (N-M. Ct. Crim. App. 2021).

The Court of Appeals for the Armed Forces has not yet decided the issue, but has noted criticism of "the objectivity and propriety" of the apparent unlawful command influence doctrine, which suggested the doctrine "in reality may be 'simply a cover for a military judge to rule in accordance with his own personal views on the fairness of a court-martial.'" *United States v. Horne*, 82 M.J. 283, 287 (C.A.A.F. 2022) (quoting amicus curiae brief). *Horne* makes clear that the apparent unlawful command influence doctrine stems from a now-obsolete version of Article 37.

As a result of the changes to Article 37, acts of unlawful command influence committed after December 20, 2019, require a showing of "material prejudice[] [to] the substantial rights of the accused" to warrant relief. Art. 37(c), 10 U.S.C. § 837(c) (2019); *see also United States v. Gattis*, 81 M.J. 748, 754 (N-M. Ct. Crim. App. 2021). By amending Article 37, UCMJ, Congress eliminated consideration of whether "an objective, disinterested observer, fully informed of all the facts and

circumstances, would harbor a significant doubt about the fairness of the proceeding." *Boyce*, 76 M.J. at 249.

C. Once Appellant raises unlawful influence by some evidence, the burden shifts to the United States to persuade the court beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute unlawful influence; or (3) the unlawful influence did not affect the findings or sentence.

To raise a claim of unlawful command influence, an appellant must: "(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness." *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003) (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). "The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is some evidence." *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002) (citation and quotation omitted).

Once unlawful command influence is raised by some evidence, the burden shifts to the United States to persuade the court beyond a reasonable doubt that "(1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings or sentence." *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013).

D. The United States proved beyond a reasonable doubt that the unlawful influence would not affect the court-martial.

1. Appellant met his initial burden in showing "some evidence" of unlawful command influence.

The United States concedes that at trial, Appellant raised "some evidence" of unlawful influence and met his initial burden. At trial, the Military Judge found: "The manner in which [Appellant] was brought forth, arrested, and subsequently disparaged, could have created an impression amongst the unit, and perhaps others outside the unit due to 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." (J.A. 340.)

The Military Judge found that the public arrest and disparaging comments would have a chilling effect on potential witnesses and Members, and created the "perception of unfairness and illegitimacy in the proceedings." (J.A. 340.)

2. The unlawful command influence was not adjudicative, and the United States proved beyond a reasonable doubt that it did not impact the court-martial.

"Unlawful command influence is generally reviewed as accusatory (preferral, forwarding, and referral of charges) or adjudicative (interference with witnesses, judges, members, and counsel) claim." *United States v. Givens*, 82 M.J. 211, 215 (C.A.A.F. 2022) (citing *United States v. Weasler*, 43 M.J. 15, 17–18 (C.A.A.F. 1995).

In *United States v. Proctor*, 81 M.J. 250 (C.A.A.F. 2021), the Court of Appeals for the Armed Forces looked at the appellant's allegations of adjudicative unlawful command influence. In *Proctor*, the appellant's squadron commander held his biannual commander's call, during which he discussed a variety of topics, including his "NCO problem." *Id*. at 252. The commander told the squadron that they need to "support their fellow airmen no matter what disciplinary or criminal process they might be going through," but they should not "enable bad behavior." *Id*. In response to the comments, the appellant filed a motion to dismiss for unlawful command influence, claiming that the commander's message improperly influenced his court-martial by "discouraging the squadron from writing character letters on his behalf." *Id*. at 253.

The military judge denied the motion, holding that the appellant was not able to show anything beyond a mere allegation or speculation that there was unlawful command influence in the adjudicative stage. *Id*. at 254. The Air Force Court of Criminal Appeals disagreed with the military judge, finding that the appellant had met his initial burden of showing some evidence. *Id*. However, the United States was able to successfully rebut the allegation beyond a reasonable doubt. *Id*. at 255. The Court of Appeals for the Armed Forces agreed with the lower appellate court, finding that while the appellant did present some evidence of unlawful command influence, it was "confident, beyond a reasonable doubt, that such influence 'did

not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceedings.'" *Id*. at 257 (internal citations omitted).

In reaching its conclusion, this Court considered that the appellant's allegations of unlawful command influence were raised and litigated immediately. *Id*. Additionally, the "alleged causal connection between [the commander's] comments at the commander's call and the level of support [the appellant] received from his squadron during his court-martial is tenuous at best." *Id*. Additionally, there was significant time lapse between the commander's call and the court-martial, during which time the commander left the squadron. *Id*. at 257–58. Finally, the appellant was able to get character letters and witnesses from the squadron—in direct contradiction to his allegations. *Id*.

Here, as in *Proctor*, the United States proved beyond a reasonable doubt that the unlawful influence did not impact the court-martial.

Regarding apparent unlawful command influence, the Military Judge found that it "did not place an intolerable strain on the public's perception of military justice such that an objective disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." (J.A. 340.)

Appellant argues that the unlawful command influence at issue was adjudicative. (Appellant Br. at 19.) The facts do not support that claim. As in *Proctor*, Appellant was able to quickly and thoroughly litigate his claims. (J.A. 168–253, 361–480.) The Military Judge considered that Battalion leadership was removed from involvement in Appellant's case, before preferral of charges. (J.A. 340.) An Inspector General investigation was conducted, and resulted in relief of the Battalion Commander and Sergeant Major from their leadership positions. (J.A. 340.) The Commanding General who ordered the relief then served as the Convening Authority and referred Appellant's charges. (J.A. 340; 150–56.)

Given this series of events, the Military Judge ruled: "Battalion leadership may have initially engaged in conduct amounting [unlawful command influence] during [Appellant's] arrest at the command climate debrief on 11 January 2022. However, it is clear that the chain of command sought to protect [Appellant's] presumption of innocence, guard against [unlawful command influence], and uphold the legitimacy of our justice system by immediately taking over the case against [Appellant] and subsequently relieving [the Battalion Commander and Sergeant Major] from Battalion leadership." (J.A. 340.)

The curative measures—all occurring before preferral of charges—demonstrate this was not adjudicative unlawful command influence.

After preferral and referral, the two Military Judges also issued curative measures they determined would cure any apparent unlawful command influence. (J.A. 230–41, 487.) Appellant argues that because the Record does not show that all curative measures were executed—that the Convening Authority did not issue a directive to the command—that the unlawful command influence was not cured. (Appellant Br. at 25.) In *Proctor*, it was the passage of time and change of station of the commander that demonstrated no adjudicative unlawful command influence. 81 M.J. at 257–58. Here, it was Appellant's own actions that rendered the directive moot. The Military Judge issued his supplemental Ruling, which included the curative measures, on July 25, 2022. (J.A. 339.) Only fifteen days later, on August 9, 2022, Appellant submitted a signed Plea Agreement. That Plea Agreement was signed three days later by the Commanding General, on August 12, 2022. (J.A. 353.)

In the Plea Agreement, Appellant waived his right to trial by members. (J.A. 348.) Appellant agreed to not request any witnesses outside of Oahu, Hawaii, at the United States' expense, and explicitly stated that the provision "[did] not interfere with [his] ability to present an effective case in extenuation and mitigation." (J.A. 348.) Contrary to Appellant's claims, these facts indicate that the unlawful command influence did not impact local witnesses or Appellant's ability to present a defense using those witnesses, which was supported by the

Investigating Officer's conclusion that the unlawful command influence did not create an intimidating, hostile, or offensive work environment. (*See* Appellant Br. at 19; J.A. 194.) Furthermore, Appellant agreed to waive all waivable motions. (J.A. 349.) By submitting this Plea Agreement, Appellant negated and waived the need for the execution of the court-ordered curative measures.

3. Appellant's reliance on *Rivers* and *Gilmet* is inapt. The curative measures here were sufficient and the Military Judge's Findings to that effect were not clearly erroneous.

Appellant relies on *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998) and *United States v. Gilmet*, 83 M.J. 398 (C.A.A.F. 2023), to support his position that the United States did not rebut the presumption of prejudice. (Appellant Br. at 23–24.) While *Rivers* was decided before the recent changes to Article 37, that case demonstrates that the United States executed sufficient curative measures so that Appellant was not prejudiced.

In *Rivers*, the battery commander made statements to his soldiers that "they should stay away from those involved with drugs," and other comments regarding drug dealers in the battery. 49 M.J. at 440. After realizing the error of the comments, the battery commander directed another meeting where he "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 offender." *Id.*

Here, even more severe—and public—remedial measures were taken to remedy the inappropriate comments. Immediately upon receipt of the Inspector General complaint, the Staff Judge Advocate advised the Battalion Commander should no longer serve as the convening authority for Appellant's case. (J.A. 193.) The 3d Marine Regiment Commanding Officer agreed and immediately took over as the Convening Authority in this case. (J.A. 193.)

An Investigation was conducted into the statements, interviewing fifty-five Marines during the course of the investigation. (J.A. 194.) The Investigating Officer opined that there was insufficient evidence to find that the Battalion Commander harassed Appellant during the arrest and in his subsequent comments to the Company. (J.A. 194.) The Investigating Officer recommended that the Commanding General, 3d Marine Division, take appropriate administrative action against the Battalion Commander. (J.A. 194.)

The Commanding General endorsed the command investigation, and relieved both the Battalion Commander and Sergeant Major from their leadership positions. (J.A. 195.) The Commanding General issued a report of substandard performance for the Battalion Commander, citing Appellant's arrest as the circumstances substantiating the report. (J.A. 195.)

The removing of the Commander and Sergeant Major from any participation in Appellant's case, publicly investigating and subsequently relieving the

Commander and Sergeant Major, were all far more severe—and public—than the internal statements of the battery commander in *Rivers*. The remedies were also far more swift, far-reaching, and public, than those this Court found insufficient in *Gilmet*. Here, the Commanding General made clear to the entire command—even those not present for the comments—that such behavior would not be tolerated and severe consequences would result from any violation.

The Findings of Fact by the Military Judge were not clearly erroneous. The Military Judge addressed both the actual and apparent unlawful command influence allegations. Furthermore, once Appellant's case was taken from the battalion leadership and handled by the Commanding General as the Convening Authority, Appellant cannot show unlawful command influence. Furthermore, any unlawful command influence was cured in that it did not impact potential members or witnesses to the case, as indicated by the command investigation. (J.A. 194.)

II.

APPELLANT'S TRIAL DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR NEGOTIATING A PLEA AGREEMENT WITH A WIDE SENTENCING RANGE TO PROTECT AGAINST SEX OFFENDER REGISTRATION, ADVISING APPELLANT TO PLEAD GUILTY UNDER A PLEA AGREEMENT THAT WAIVED ALL WAIVABLE MOTIONS, INCLUDING AN ADJUDICATIVE UNLAWFUL COMMAND INFLUENCE CLAIM THAT HAD ALREADY BEEN UNSUCCESSFULLY LITIGATED.

A. The standard of review is de novo.

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021).

B. *Strickland* provides a two-part test to assess ineffective assistance of counsel claims. Counsel is presumed to be competent.

Appellant is entitled to effective assistance by defense counsel. U.S. Const. amend. VI; Article 27(a), UCMJ; *United States v. Rivas*, 3 M.J. 282, 287 (C.A.A.F. 1977).

Under *Strickland v. Washington*, 466 U.S. 668 (1984), to prevail on a claim of ineffective assistance of counsel, appellant must prove: (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Id*. at 687; *see also United States v. Gonzalez*, 62 M.J. 303, 308 (C.A.A.F. 2006) (using three-part version of *Strickland* test). Appellant bears the

burden of demonstrating each part and establishing the relevant facts. *United States v. Gutierrez*, 66 M.J. 329, 331 (C.A.A.F. 2008).

Counsel is strongly presumed to have provided effective assistance throughout trial. *Strickland*, 466 U.S. at 689–90. Second-guessing and hindsight are not sufficient to overcome the presumption of competence. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). The presumption of competence may be rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *Id.* The record must establish counsel made errors so serious that they were no longer functioning as the "counsel" the Sixth Amendment guarantees. *Strickland*, 466 U.S. at 687.

C. Appellant's ineffective assistance of counsel claims are without merit.

1. Appellant fails to show Counsel was ineffective for negotiating the terms of an Agreement that Appellant agreed to.

In *United States v. Quick*, 59 M.J. 383, 385 (C.A.A.F. 2004), the appellant negotiated for a plea agreement that allowed for up to thirty years of confinement and a dishonorable discharge. On appeal, the appellant claimed that his trial defense counsel was ineffective for conceding the appropriateness of a dishonorable discharge and confinement of up to forty years. *Id.*

The Court of Criminal Appeals and this Court agreed that the trial defense counsel "improperly conceded the appropriateness of a dishonorable discharge where the record was silent as to the wishes of his client." *Id*. at 386. However,

this Court disagreed with the lower court's finding of ineffective assistance of counsel. *Id*. at 386–87. This Court held that the appellant was unable to show that there would have been a different result even if the defense counsel had not conceded the punishment. *Id*. At 387. Given the nature of the offenses, the appellant's plea and admissions, and sentencing by military judge alone who did not adopt the trial counsel's sentencing recommendation, there was no showing of prejudice to the appellant. *Id*.

Here, Appellant claims that his Trial Defense Counsel was deficient for advising him that prostitution could be a registerable offense, and negotiating a wide range of confinement as part of the plea deal to avoid potential sex offender registration. (Appellant Br. at 28.) Appellant claims that because prostitution is not a registerable offense, and Appellant wanted to avoid sex offender registration, his Trial Defense Counsel was deficient in negotiating "a plea agreement avoiding an unfair, unlawful command influence-infected trial for a registerable offense." (Appellant Br. at 33.)

In this case, Appellant acknowledged in his Affidavit that "[he] did not want to risk registering as a sex offender." (J.A. 359.) Given this potential collateral consequence, as well as the additional convictions and maximum sentence stemming from the prostitution charge, it was not deficient for the Trial Defense

Counsel to negotiate a plea agreement that avoided convictions on certain offenses, even if that required a higher maximum permissible confinement cap.

As in *Quick*, two parties negotiated: the Appellant and the Convening Authority. Given the severity, breadth, and scope of Appellant's offenses, Trial Defense Counsel reasonably bargained for an Agreement that expanded the confinement parameters, but avoided guilty pleas to certain charges and their potential collateral consequences. (*See* J.A. 150–56, 344–53.)

Thus, Appellant fails to show Counsel was ineffective for negotiating the terms of the pretrial agreement to which Appellant ultimately agreed.

2. Appellant fails to show Counsel was deficient in negotiating a plea agreement that waived all waivable motions, given the strength of the United States' case and the seriousness of the offenses.

In *United States v. Bradley*, 71 M.J. 13 (C.A.A.F. 2012), the appellant claimed that his counsel was ineffective for erroneously waiving a motion. This Court held that "merely being entitled to relief on an erroneously waived motion does not by itself satisfy the prejudice analysis in the guilty plea context," the appellant must also show that if properly advised, it would have been rational to not plead guilty. *Id*. at 17. In that case, even if the appellant could have received relief from the erroneously waived motion, it would still not have been rational for him to reject his pleas given the nature of the evidence he faced. *Id*. Furthermore, the appellant failed to show how the relief from the erroneously waived motion

would have resulted in his trial proceeding differently even if he had chosen to not plead guilty. *Id*. Therefore, he could not show prejudice.

In Appellant's case, Trial Defense Counsel did not memorialize his advice to Appellant. However, it was entirely reasonable for the Counsel to make tactical decisions in negotiating the terms of the Plea Agreement. Given the severity and number of the charged offenses, it was reasonable for the Counsel to advise Appellant to give up some rights, including the raising of certain motions, in order to avoid certain convictions or heightened punishment. (*See* J.A. 150–56, 344–53.) Similar to *Bradley,* Appellant does not even attempt to demonstrate how trial would have proceeded differently or how the United States' case against him would have somehow weakened.

Thus, Appellant fails to show Counsel was deficient in negotiating a plea agreement that waived all waivable motions.

D. Assuming ineffective assistance, Appellant has not shown prejudice.

To merit relief, the ineffective assistance must "indicate a denial of a fair trial or a trial whose result is unreliable." *Davis*, 60 M.J. at 473.

1. Appellant affirmed that he wanted to avoid potential sex offender registration, which was a factor in his decision to plead guilty. Appellant does not assert that he would instead plead not guilty if the findings are set aside.

In the guilty plea context, an appellant must show a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have

insisted on going to trial. *United States v. Bradley*, 71 M.J. at 16. A reasonable probability is a probability sufficient to undermine confidence in the outcome: a substantial, not just conceivable, likelihood of a different result. *Id.* "Mere allegation that defendant would have insisted on going to trial is insufficient." *United States v. Ginn*, 47 M.J. 236, 247 (C.A.A.F. 1997) (quoting *Barker v. United States*, 7 F.3d 629, 633 (7th Cir. 1993)).

In *Ginn*, the court found no prejudice, noting that "nowhere does he state that he would have changed his plea in this case. His conclusory argument that 'prejudice is clear' from his counsel's defective performance is legally inadequate." *Id.* (citing *Hill v. Lockhart*, 474 U.S. 52, 58–60 (1985)).

And in *United States v. Furth*, 81 M.J. 114 (C.A.A.F. 2021), the court found no prejudice because no reasonable probability existed that the appellant would have rejected the plea offer, which was favorable in light of the allegations. *Id*. at 117. In Furth, the appellant failed to report for duty, went absent without leave, yet continued to collect pay for approximately six months—totaling more than $27,000. *Id*. at 115. After more than twenty-one months absent, the appellant finally turned himself in, having spent all the money he had collected during that time. *Id*. at 116. The appellant submitted a request for Resignation for Good of the Service, which was recommended disapproved at every level of his command. *Id*. The appellant then entered into a pretrial agreement, and was sentenced to a

reprimand, confinement for three months, and dismissal. *Id*. One month after the appellant pled, his Resignation request was approved but the convening authority approved the adjudged sentence, and the Resignation approval was ultimately rescinded and voided. *Id*.

This Court held that given the facts of the case—including that the Resignation for Good of the Service had been recommended disapproved all the way up the chain of command—there was no reasonable probability that the appellant would have rejected the plea offer even if his defense counsel's performance had not been deficient. *Id*. at 118–119. Therefore, the appellant did not demonstrate prejudice. *Id*. at 119.

As in *Furth*, Appellant's Plea Agreement was highly favorable given the overwhelming evidence supporting the charges against him. Appellant's Plea Agreement allowed him to avoid convictions for the prostitution offense, and potential sex offender registration stemming from such a conviction. Appellant wanted to avoid sex offender registration, which he confirmed in his Affidavit. (J.A. 359.)

Trial Defense Counsel advising Appellant of this potential risk, and negotiating a plea agreement that avoided the risk, was not deficient and in no way prejudiced Appellant. *See supra* II.C.2. Furthermore, even taking the prostitution charge out of consideration, the Plea Agreement was highly favorable to Appellant.

Appellant faced a maximum confinement of seventy years for the charges and specifications to which he pled guilty. He received only five years total confinement. Appellant therefore avoided significant possible confinement time.

Like *Ginn*, Appellant does not seek a path to allow himself to plead not guilty by seeking a set-aside of the findings. *See* 47 M.J. at 247. Instead, without citing any authority, he requests that the Findings and Sentence be set aside and all charges be dismissed with prejudice. (*See* Appellant's Br. at 35.)

If the Plea Agreement is set aside, Appellant would once again face charges that could require sex offender registration. (J.A. 150–56.) As he has stated, registration is something he wishes to avoid. (J.A. 359.) Therefore, there is no indication that if the Findings and Sentence are set aside, Appellant would then choose to plead not guilty. Thus, with such a favorable Plea Agreement at stake and faced with insurmountable evidence, this Court should conclude that Appellant would have still pled guilty.

2. The lower court was correct in finding no prejudice to Appellant, and this Court should agree.

The lower court correctly found that "[t]here 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." (J.A. 11.) Appellant argued on appeal to the lower court—as he also does now before this Court—that "the guilty plea was a result of the unlawful command influence and the inability to identify

fellow Marines who would testify regarding Appellant's military character and limited participation in the drug enterprise." (J.A. 11; *See* Appellant Br. at 33–35.)

But the lower court pointed out that Appellant's Stipulation of Fact contradicted that claim. (J.A. 11.) Appellant signed and later discussed the stipulation on the Record, and had numerous opportunities to dispute its veracity, yet failed to do so. (J.A. 11.) Therefore, the lower court was unconvinced that "the [unlawful command influence] was the forcing factor behind the plea agreement and [was] convinced beyond a reasonable doubt that Appellant knowingly, intelligently and willingly entered into that agreement because it was in his best interest to do so in light of the evidence against him." (J.A. 11–12.) This Court should agree with that assessment.

Appellant relies on *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010) to argue that the United States had and failed to meet the burden of showing that the "presentation of a good character defense was unfeasible." *Id*. at 356. (Appellant Br. at 35.) However, in that case, the appellant presented no favorable character testimony. *Id*. at 356. Therefore, this Court was unable to determine the "theoretical efficacy of the [military judge's] crafted remedy." *Id*. Ultimately, this Court held that "[w]hen a military judge crafts a reasonable and tailored remedy to remove unlawful command influence, and if the record reflects that the remedy has been implemented fully and no further objections or requests were made by the

defense, then rather than requiring the government to prove a negative we would be satisfied that the presumptive prejudice had been eliminated." *Id*. at 356–57.

Here, the Convening Authority crafted remedies. The Military Judge also crafted remedies. While not all the remedies were executed, they were rendered moot by Appellant's own decision to enter a Plea Agreement and plead guilty, waiving all motions and therefore not raising any additional objections. *See supra* Section I.D. Therefore, this Court should follow its precedent in *Douglas* that when remedies have been crafted and implemented, and there are no further objections or requests by the accused, then this Court can be satisfied that the presumptive prejudice has been eliminated.

E. <u>If the Court finds Appellant would have not pled guilty, the remedy is to set aside the Findings, allow Appellant to plead not guilty, and permit the United States to retry Appellant</u>.

The appropriate remedy for ineffective assistance of counsel depends on when the ineffective assistance occurred. *See United States v. Scott*, 24 M.J. 186, 193 (C.M.A. 1987); *Davis*, 60 M.J. at 475 (applying the remedy for the sentence only). If the Court finds merit in the alleged error that Counsel was ineffective, the remedy is to set aside the findings, allowing him to plead not guilty. *See Scott*, 24 M.J. at 193.

III.

APPELLANT WAIVED REVIEW OF WHETHER UNLAWFUL COMMAND INFLUENCE AFFECTED HIS COURT-MARTIAL WHEN HE BARGAINED FOR AND ACCEPTED A PLEA AGREEMENT THAT WAIVED ALL WAIVABLE MOTIONS.

A. The standard of review is de novo.

Whether an appellant has waived an issue is reviewed de novo. *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019).

B. Appellant waived review of the unlawful command influence issue as part of his bargained-for agreement.

"Waiver can occur either by operation of law, or by the 'intentional relinquishment or abandonment of a known right.'" *Haynes*, 79 M.J. at 19. When an "appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal." *Id.*

In a guilty plea context, the "military judge shall inquire to ensure: (i) that the accused understands the agreement; and (ii) that the parties agree to the terms of the agreement." R.C.M. 910(f)(4)(A). A plea agreement may include "[a]ny other term or condition that is not contrary to or inconsistent with this rule." R.C.M. 705(c)(2)(G).

"An unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings." *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010). "When a criminal defendant has solemnly admitted in open court

that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

The waiver doctrine exceptions are narrow and relate to situations in which, on its face, the prosecution may not constitutionally be maintained. *Bradley*, 68 M.J. at 282 (citing *United States v. Broce*, 488 U.S. 563, 574–76 (1989); *Menna v. New York*, 423 U.S. 61, 61–63 (1975)); *see also, United States v. Pratchard*, 61 M.J. 279, 280 (C.A.A.F. 2005) (speedy trial not waived); *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004) (multiplicity not waived when offenses "facially duplicative").

C. Appellant explicitly waived—both in writing and while under oath—appellate review of his unlawful command influence Motion.

In *United States v. Gattis*, 81 M.J. 748 (N-M. Ct. Crim. App. 2021) (Pet. denied), a command master chief sent text messages directing members of the command not to speak with defense counsel. *Id*. at 752. The appellant ultimately pled guilty pursuant to a pre-trial agreement in which he agreed to waive all waivable motions. *Id* at 753.

The *Gattis* court affirmed that claims of unlawful command influence related to the adjudicative process, as may occur when defense access to witnesses is impeded, are not waived by mere failure to raise the issue, but that an appellant

may "initiate an affirmative and knowing waiver of an allegation of [unlawful command influence] . . . in order to secure the benefits of a favorable [plea] agreement." *Id*. (quoting *United States v. Weasler*, 43 M.J. 15, 19 (C.A.A.F. 1995)). If an appellant intentionally waives a known right at trial, that right is extinguished and cannot be appealed. *Id*.

Ultimately, the *Gattis* appellant "affirmatively, knowingly, and consciously waived potential [unlawful command influence] issues and remedies in his case." *Id* at 755. The appellant and his trial defense counsel were aware of the circumstances surrounding the text messages and filed a motion to dismiss. *Id*. It was only after the military judge denied the motion that the appellant entered into the plea agreement which contained the waiver of all waivable motions. *Id*.

During the guilty plea proceedings, the *Gattis* appellant confirmed that he and his defense counsel had read and discussed the plea agreement, and that he understood all its terms. *Id*. While the military judge did not specifically address the "waive all waivable motions" provision, he asked if there were any provisions that the appellant wanted to cover in more depth, to which the appellant responded in the negative. *Id*. The *Gattis* court then found that as the unlawful command influence motion had been previously raised, the appellant intentionally relinquished a known right by waiving the issue in the agreement. *Id*.

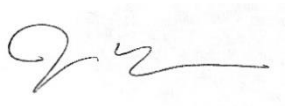
As in *Gattis*, the Military Judge here inquired into the voluntariness and knowingness of the waiver provision under R.C.M. 910(f)(4)(A). (J.A. 552–56.) As part of the Agreement, Appellant specifically agreed to waive all motions except those that are non-waivable under R.C.M. 705(c)(1)(b) or otherwise. (J.A. 349, 552.) During the plea colloquy, the Military Judge specifically asked Appellant if he understood what this provision meant, to which Appellant replied that his Counsel had explained the provision to him. (J.A. 552–53.) The Military Judge further informed Appellant that this provision would mean he was waiving his right to appellate review of motions previously litigated in the court-martial, to include the Motion to Dismiss for Unlawful command influence. (J.A. 554.)

The Military Judge conducted the appropriate inquiry under R.C.M. 710(f)(4)(A), and Appellant confirmed that he knew what he was waiving and believed this to be a beneficial provision. (J.A. 552–56.)

Conclusion

The United States respectfully requests that this Court affirm the Findings and Sentence as adjudged below.

CANDACE G. WHITE
Major, U.S. Marine Corps
Government Appellate Counsel
Navy-Marine Corps Appellate
Review Activity

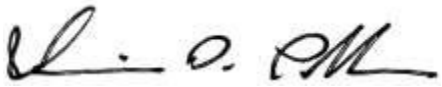


JAMES P. WU ZHU
Lieutenant Commander, JAGC, U.S. Navy
Government Appellate Counsel
Navy-Marine Corps Appellate
Review Activity

Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7295, fax (202) 685-7687
candace.g.white.mil.mil@us.navy.mil
Bar no. 36701

Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-4623, fax (202) 685-7687
james.p.wuzhu.mil@us.navy.mil
Bar no. 36943

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714



IAIN D. PEDDEN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-2947, fax (202) 685-7687
Bar no. 33211

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CANDACE G. WHITE
Major, U.S. Marine Corps
Appellate Government Counsel