IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Keith E. BARRY Senior Chief Special Warfare Operator (E-8) U.S. Navy, Appellant.	APPELLANT'S OPPOSITION TO APPELLEE'S MOTION TO CLARIFY POSITION IN RESPONSE TO QUESTIONS AT ORAL ARGUMENT USCA Dkt. No. 17-0162/NA Crim. App. No. 201500064

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

Pursuant to Rule 30(b) of this Court's Rules of Practice and Procedure, Senior Chief Special Warfare Operator (SOCS) Keith E. Barry, the Appellant, hereby opposes the Appellee's Motion to Clarify Position in Response to Questions at Oral Argument. The motion does not comply with Rule 40 and fails to state good cause for granting the motion.

On February 13, 2018, this Court ordered a hearing in the subject case.[1] The hearing took place on March 22, 2018,[2] and as it announced at the

[1] Hearing Notice, *United States v. Barry*, No. 17-0162 (C.A.A.F. Feb. 13, 2018).
[2] Oral Argument, *United States v. Barry,* No. 17-0162/NA (C.A.A.F. argued Mar. 22, 2018), http://www.armfor.uscourts.gov/newcaaf/CourtAudio6/20180322B.wma (Oral Argument).

conclusion of oral argument, this Court conferenced SOCS Barry's case immediately following argument.[3]

Rule 40 sets out the relevant procedure for hearings before this Court. It specifically details when and how this Court will hear argument, as well as both the manner and time allotted for presentation.[4] Under Rule 40, the parties are allotted "20 minutes to present oral argument," and during the course of the argument "counsel for the appellant or petitioner will open and close argument."[5]

Nowhere in Rule 40 does it permit for parties to supplement their oral argument with written responses eleven days later. "At some point, litigation must come to an end. That point has now been reached."[6] The Court heard oral argument and has presumably conferenced the case. To allow the government to supplement its argument in this fashion is without precedent. SOCS Barry, therefore, respectfully asks this Court to deny the subject motion.

Moreover, for several reasons the government has not demonstrated good cause to grant a motion "clarifying" its position, which should more accurately be captioned as a motion to retract no fewer than five case-dispositive concessions. A party, however, "is bound by concessions made in

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[3] Oral Argument at 46:45.
[4] C.A.A.F. R. 40(b).
[5] *Id.*
[6] *Facebook, Inc. v. Pac. Northwest Software, Inc.*, 640 F.3d 1034, 1042 (9th Cir. 2011).

its brief or at oral argument."[7] This Court has "every right to treat this concession at oral argument as binding[.]"[8]

Second, "no reason exists to permit what amounts to a third bite of the apple."[9] The government's motion reiterates the remedy the government has sought for nearly a year since the outset of litigation on the issues before this Court: "The United States respectfully requests this Court . . . remand for new post-trial processing."[10] Even after the *DuBay*[11] judge found that "[a]ctual or apparent unlawful command influence tainted the final action in this case[,]" the government's position never changed: "[T]his Court should remand the case to

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[7] *Hilao v. Estate of Marcos,* 393 F. 3d 987, 993 (9th Cir. 2004); *Crowe v. Coleman*, 113 F. 3d 1536, 1542 (11th Cir. 1997).

[8] *Stahl v. Simon*, 785 F.3d 1285, 1296 (9th Cir. 2015); *United States Trust Co. v. Shapiro*, 835 F. 2d 1007 (2nd Cir. 1987); *Mycrick v. Peck Elec. Co.*, 2017 VT 4, 10 (Vt. 2017)("A concession at oral argument is binding, the Court will treat a conceded point as having been waived.").

[9] *In re Reno*, 55 Cal. 4th 428, 477 (Cal. 2012).

[10] *Compare* Appellee's Mot. at 12, *with* Appellee's Mot. to Remand at 2 (May 11, 2017) ("[T]he United States respectfully requests that this Court remand this case to an appropriate convening authority for new post-trial processing."), *and* Appellee's Opposition to Appellant's Mot. for Appointment of a Special Master at 3 (May 11, 2017) ("[T]he United States respectfully requests that the Court . . . grant the United States' Motion to Remand[.]"), *and* Appellee's Response to Pet. for Reconsideration at 2 (May 11, 2017) ("[T]he United States respectfully requests that the Court . . . grant the United States' Motion to Remand for new post-trial processing."), *and* Appellee's Reply to Appellant's Opposition to Mot. to Remand at 2 (May 23, 2017) ("[T]he United States respectfully requests that the Court remand this case to an appropriate convening authority for new post-trial processing[.]").

[11] *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1967).

an appropriate, independent convening authority for new action[.]"[12] Therefore, the government has not demonstrated good cause to add twelve pages of unauthorized additional argument explaining why it continues to believe the appropriate remedy is to remand for new post-trial processing.

Additionally, to the extent the government wants to take back concessions of error it made at oral argument, its "clarified" position neither changes the law nor the record before this Court—a record that includes the following:

- The DuBay judge found that "RADM Lorge believed [at the time of his final action], and continues to believe, the appellant's guilt was not proven beyond a reasonable doubt at his court-martial."[13]

- RADM Lorge made the following statement in a sworn declaration: "I believed then, and I believe now, that I should have disapproved the findings[.]"[14]

- In response to a question about his meeting with VADM Crawford on April 30, 2015, RADM Lorge testified as follows: "The real question I had . . . was, you know, disapproving a sexual assault case, you know, is that going to bring big scrutiny upon the Navy. And he told me yeah."[15]

- A "week or two" after the meeting, RADM Lorge's Staff Judge Advocate (SJA) suggested putting novel language in his final action to communicate RADM Lorge's concerns about SOCS Barry's case.[16] As RADM Lorge recalled, the purpose of this language was to trigger action from an appellate court. "[T]he appellate court is going to realize that [convening authority's]

[12] Appellee's Br. at 51.
[13] JA at 0599.
[14] JA at 0414.
[15] JA at 1038.
[16] JA at 1039.

don't do that, and they need to take a look at this, and they should probably overturn it . . . They can make political decisions; you really can't."[17]

- The DuBay judge found that at some point after the SJA's "advice, and prior to taking action, RADM Lorge then had a telephone call with VADM Crawford to discuss the proposed plan for action, i.e., putting language in the action that would communicate RADM Lorge's reservations about the case."[18] RADM Lorge "c[a]me away from the telephone call believing his proposed plan was the best he could do in the appellant's case."[19]

- The sole purpose of the phone call was to discuss SOCS Barry's case.[20]

- RADM Lorge testified the he recalled asking during the phone call whether "some extra stuff in my [convening authority's] action would do something[.]"[21] And VADM Crawford's advice was to "trusting [sic] this and this will--this will work out for Senior Barry."[22]

- In response to the following question from the government: "Did Admiral Crawford advise you on your legal options in this case?" RADM Lorge responded: "I believe so."[23]

- In response to the following question from the government: "Did Admiral Crawford try to convince you to approve the findings in this case?" RADM Lorge responded: "I think he did with how he spoke with me on the phone."[24]

- "RADM Lorge does believe that pressure was placed on him by senior military leaders."[25]

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[17] *Id.*
[18] JA at 0599.
[19] *Id.*
[20] JA at 1068.
[21] JA at 1040.
[22] *Id.*
[23] JA at 1061.
[24] *Id.*
[25] JA at 0602.

- RADM Lorge expressed to his Public Affairs Officer that he believed "the Navy" "wanted to get tough on sexual assaults, justice be damned[.]"[26]

- "RADM Lorge did not take the action he wanted to take in this case[.]"[27]

- "[B]ased on comments by VADM DeRenzi (unrelated to the case at hand), comments by VADM Crawford (related to the case at hand), and confusing and difficult advice from his SJA at the time, RADM Lorge felt compelled to take the action taken in appellant's case."[28]

- "RADM Lorge was influenced by conversations with senior military leaders; specifically VADM DeRenzi and VADM Crawford when taking action in this case."[29]

- "Actual or apparent unlawful command influence tainted the final action in this case."[30]

- "[T]he final action taken in this case is unfortunate as it does not engender confidence in the processing of this case or the military justice system as a whole."[31]

The government's "clarified" position takes the same tact as its original position. It makes an argument based on the factual scenario it "wishes could be found in the record"[32] rather than the record established at the *DuBay* hearing and briefly outlined above. But as this Court is aware, just as the government cannot change the record by simply "suggesting" the *DuBay*

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[26] JA at 1197.
[27] JA at 0603.
[28] JA at 0602.
[29] JA at 0603.
[30] JA at 0604.
[31] JA at 0603.
[32] *Helfrich v. Lehigh Valley Hosp.*, 2005 U.S. Dist LEXIS 4420 *8 n.2 (E.D. Penn. 2005).

judge's "findings are 'maybe' or 'probably wrong,'"[33] it cannot change the record by retracting concessions of obvious error after oral argument.

"[T]he record is established" and this Court should "apply the record facts to the applicable law" [34]—Article 37, UCMJ. Given that the subject motion does not comply with Rule 40, and otherwise fails to demonstrate good cause, SOCS Barry respectfully asks this Court to deny it.

WHEREFORE, Appellant respectfully asks this Honorable Court to deny Appellee's Motion to Clarify Position in Response to Questions at Oral Argument.

Respectfully submitted,

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[33] *United States v. Leedy*, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007).
[34] *Id.*

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CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on April 4, 2018, pursuant to this Court's order dated July 22, 2010, and that a copy was served via electronic mail on the Navy-Marine Corps Appellate Government Division on April 4, 2018.

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