**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES,<br>Appellee<br><br>v.<br><br>Joseph B. Salyer,<br>Corporal (E-4)<br>U.S. Marine Corps<br><br>Appellant | **REPLY ON BEHALF OF APPELLANT**<br><br>Crim.App. Dkt. No. 201200145<br><br>USCA Dkt. No. 13-0186/MC |

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

**A. The Government flips the burden of persuasion. Appellant need not show prejudice; the Government must show the *absence* of prejudice. It cannot.**

***1. The Government shoulders a high burden on appeal.***

Three times the Government erroneously argues that "Appellant cannot show any concrete disadvantage" from the seating of the replacement military judge. (Appellee's Br. at 10, 28, 35.) This argument misstates the burden of persuasion on appeal. "Once . . . unlawful command influence has been raised, *the burden shifts to the government* to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted." *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006) (citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2004)) (emphasis added). As this Court has observed, "[t]his burden is

high because command influence tends to deprive servicemembers of their constitutional rights." *Lewis*, 63 M.J. at 413 (internal quotations and citations omitted). Despite its best efforts then, it is the Government who shoulders this "high" burden on appeal.

***2. Col Richardson reversed a finding of LtCol Mori. The record shows his crafted remedies were not implemented in full.***

Attempting to cleanse the unlawful command influence from the court-martial, Col Richardson--the replacement military judge--crafted two remedies: (1) he barred LtCol Mannle from the courtroom; and (2) he refused to reconsider any "defense friendly" rulings. (JA at 64-65, 216-18.) A close examination of the record reveals that Col Richardson failed to fully implement this second remedy. Specifically, Col Richardson reversed a "defense friendly" finding made by LtCol Mori. (JA at 226.)

The facts are straightforward. The Government sought to call Cpl Salyer's former wife to testify about the missing laptop that contained the child pornography. (JA 130-38, 246-47; *see also* Appellant's Br. at 28-29.) Defense Counsel invoked the husband-wife privilege under Military Rule of Evidence (M.R.E.) 504 to block this testimony. (JA at 130.) Defense Counsel noted that Ms. Salyer learned of the missing laptop during a conversation she had when she was married to her then-

husband, Cpl Salyer. (*Id.*) To escape privilege, the Government advanced two arguments. First, it argued that because the Salyers were contemplating divorce at the time of the relevant conversation, Rule 504 should not apply. (JA at 131, 134.) Second, it argued that Cpl Salyer waived his husband-wife privilege under M.R.E. 510. (JA at 135-38.)

Under M.R.E. 504, the husband-wife privilege requires a confidential communication.[1] Mil. R. Evid. 504(b)(1). LtCol Mori found that essential requirement: "I am going to find that *there was a confidential communication made*, that the issue really -- we are going to have to look at it from a waiver. I think that is the issue." (JA at 135 (emphasis added).)

Because that finding inured to the benefit of the defense, it should have been binding on the court-martial. That was Col Richardson's remedial ruling. However, Col Richardson failed to follow his previous ruling. After denying the defense's invocation of the privilege, Col Richardson made the exact opposite finding of LtCol Mori: "I find . . . that there was clearly a communication here, but that *that communication was never intended to be confidential*, and here -- I mean, specifically, the conversation about the computer." (JA at 226 (emphasis added).) In short, he reversed LtCol Mori.

[1] Col Richardson recognized this prerequisite under applicable case law. (JA at 224.)

Trial Counsel subsequently called Ms. Salyer to testify about the missing laptop, emphasized her testimony during closing argument on findings, and countered Defense Counsel's theory of the case. (JA at 246-47; Appellant's Br. at 27-28; Amicus Br. at 23.) Any argument that this testimony failed to impact the outcome of Cpl Salyer's case is belied by the Government's repeated attempts to introduce it.

More importantly, in light of this reversal, "the record fails to include evidence that key components of the remedy were implemented[.]" *United States v. Douglas*, 68 M.J. 349, 357 (C.A.A.F. 2010). Accordingly, "the presumption of prejudice flowing from the unlawful command influence has not been overcome." *Id.* This court should dismiss the charge with prejudice.

**B. The law of the case doctrine does not apply here.**

The Government argues that law of the case prevents Appellant from contending that "*voir dire* constituted actual or apparent unlawful command influence. . . ." (Appellee's Br. at 13.) The Government further argues that Appellant is similarly estopped from arguing that the phone call from LtCol Mannle "was actual command influence." (*Id.*) This reliance on law of the case doctrine is misplaced. It is inapplicable here.

This Court stated in *Lewis*, "Where neither party appeals a ruling of the court below, that ruling will normally be regarded

as law of the case and binding upon the parties. *Lewis*, 63 M.J. at 412 (citations omitted). Here, Appellant has appealed the ruling of the court below. At trial, Defense Counsel contended that both the phone call and the *voir dire*, together with the orchestrated actions of the Government, constituted UCI. (JA at 171.) Before the Navy-Marine Corps Court of Criminal Appeals (NMCCA), Appellant advanced these same arguments; that is why the NMCCA addressed them. (JA at 4-5.) Appellant once again raises these issues here. The law of the case, therefore, does not apply.

Indeed, if the law of the case doctrine estops any party, it is the Government. The following exchange at trial is relevant:

> TC: Because both the prior military judge and the defense has raised even the word "unlawful command influence," the government is prepared to answer the questions that are requested by case law, which would be --
>
> MJ: So in other words, you're conceding that the issue is already raised?
>
> TC: The issue has been raised, so it's now the government's burden beyond a reasonable doubt --
>
> MJ: Okay.
>
> TC: -- to prove that it isn't.
>
> MJ: You agree with that, Defense? That's good for you?
>
> DC: Yes, sir.
>
> MJ: That the government's conceding that the issue is

fairly raised; the specter is out there, so the burden now shifts to the government to disprove?

DC: Yes, sir.

MJ: Okay.

(JA at 172.) The specter of UCI infiltrated Cpl Salyer's court-martial. The Government conceded as much. *That* is the law of the case.

The Government next argues that the granted issue forfeits Appellant's UCI arguments, save the apparent UCI from the phone call. (Appellee's Br. at 12-13.) This argument stretches the law of the case doctrine too far. In *United States v. Doss*, this Court asked if the issues raised were "encompassed by the granted issue. . . ." 57 M.J. 182, 185 (C.A.A.F. 2002). Here, the granted issue sufficiently encompasses the issues preserved by Appellant. Even a cursory glance at the issue presented demonstrates this point. The first two sentences of the issue presented refer, generally, to the unlawful command influence that resulted in the recusal of the military judge. The second sentence, particularly, refers to the "government actions" that raised the UCI. The next sentence captures the three relevant and pivotal actions to which sentence two refers: (1) the phone call to CAPT Berger, (2) the accessing of the service record, and (3) the *voir dire*.

If more is needed, "[t]he law of the case doctrine is a matter of *discretionary* appellate policy and *does not prohibit* this court from reviewing the ruling below." *Lewis*, 63 M.J. at 412-13 (emphasis added) (observing law of the case inapplicable where "the lower court's decision is clearly erroneous and would work a manifest injustice. . . .") (internal quotations omitted). Here, this Court should review the rulings below because both the replacement military judge and the NMCCA made clearly erroneous findings of fact. Referring to LtCol Mannle's mid-trial phone call, Col Richardson found that "such a courtesy call is *widely accepted practice* in the military, especially when dealing with such a sensitive topic involving a high ranking officer." (JA at 62 (emphasis added).) This finding of fact is not supported by the record. A phone call from the prosecutor's supervisor to the military judge's supervisor--addressing a ruling, mid-trial--is anything but "widely accepted practice". It is carping to a judicial superior that this Court condemned in *United States v. Campos*. *See* 42 M.J. 253, 259 (C.A.A.F. 1995).

As for the NMCCA, it found that Col Richardson Barred LtCol Mannle "from any further participation in the proceedings." (JA at 5.) But that finding of fact is not true. Col Richardson

never fashioned that remedy. He simply barred LtCol Mannle from the courtroom.[2] (JA at 189, 217.)

Given the unique facts of this case, this Court's *de novo* standard of review, and considering that UCI is the "mortal enemy of military justice", *Lewis*, 63 M.J. at 407, manifest injustice would result if this Court did not review each facet of the UCI here. Law of the case should not apply.

**C. The Government's *ad hominem* attack on Appellant is unfortunate.**

On page thirty-five of its Answer, the United States Government lodges an unfortunate and bald *ad hominem* attack on Appellant. According to the Government, "Appellant levels several irrelevant allegations of intentional or negligent malfeasance against various members of the judge advocate community. . . ." (Appellee's Br. at 35.) But the Government does not identify these "several irrelevant allegations[.]" Instead, the Government continues on its warpath, much like it did during Cpl Salyer's court-martial. It states, "Unlawful command influence[] is not an appellate tool for vindictive retribution." *Id.*

There are several problems with this line of argument. First, it is a strawman. Similar to the Government's novel

[2] On this point, it is probative that the Government does not suggest that Col Richardson barred LtCol Mannle from further participation in the case. (Appellee's Br. at 29.)

argument that "quoting *Lewis* does not make this case *Lewis*", *see* Section D, *infra*, no one can reasonably argue against the novel line that UCI "is not an appellate tool for vindictive retribution." But just who is seeking "vindictive retribution"?

At trial, during a *voir dire* that the Government claims resulted from LtCol Mori's purported bias stemming from his marriage, trial counsel moved into a line of questioning entirely divorced from the age/marriage issue:

> TC: And, sir, an *additional* voir dire question.
>
> MJ: Yes.
>
> TC: Previously have you disqualified any of the trial counsel on any other cases?
>
> MJ: Have I ever disqualified a trial counsel?
>
> TC: Yes, sir.
>
> MJ: Not that I recall.
>
> . . . .
>
> TC: *All the trial counsel and the military justice officer*.
>
> MJ: Oh, yes, that's right . . . That was everybody, yes. . . .
>
> TC: Yes, sir.
>
> MJ: Was that Lauer's first or second court-martial?
>
> TC: The first one, sir.
>
> MJ: Okay. Did he have two?
>
> TC: *He didn't wind up having two, sir*.

MJ: But he was charged with the second one?

TC: Yes, sir.

MJ: Okay.

TC: But that was something that you had done in the past was disqualify --

MJ: Okay.

TC: *And myself, specifically*.[3]

(JA at 156-57 (emphasis added).) In the context of the Government's term--"vindictive retribution", this exchange illustrates what appears to be resentment on behalf of Trial Counsel. It was not just any trial counsel who was disqualified. It was she. But there is more.

Prior to *voir dire* and during an Article 39(a) session, LtCol Mori addressed Trial Counsel's opening statement. There, Trial Counsel had referenced an exhibit previously excluded by the military judge--Prosecution Exhibit 5 for identification:

MJ: . . . That was specifically excluded.

TC: Sir, that is effect on the listener.

MJ: Okay. And that was specifically excluded by me.

TC: The subpoena was, sir, but the effect on listener --

[3] Because Trial Counsel was one of the government counsel previously disqualified by Judge Mori, she definitely could have raised this issue when Judge Mori originally asked both parties whether they believed any grounds for *voir dire* existed. (R. at 5.) She did not. (*Id.*)

MJ: . . . But I am going to raise the issue I specifically excluded the subpoena and the letter and then you use it in argument. That may come in because you may have another witness; right?

TC: Sir, yes; however, he --

MJ: If -- if -- no.

TC: Sir, I --

MJ: I specifically excluded it.

TC: The subpoena --

MJ: We will deal with it -- I am not going to argue.

TC: Sir, it is the reason Detective Jatkowski --

MJ: Stop, stop, stop. I specifically excluded that piece of evidence. How are you going to get it in?

TC: Effect on the listener, sir. It is the reason -- it is part of the investigation that is --

MJ: Okay, I am not going to allow that in.

TC: But it wouldn't be for the truth of --

MJ: It is not coming in. That is a piece of evidence that ties the accused.

TC: And the government would be amendable --

MJ: No --

TC: -- to a limiting instruction if we couldn't get some sort of --

MJ: Well, it's either going to be a *mistrial* if you don't get it in somewhere else.

TC: Sir, the --

MJ: Just listen. That is my ruling. We aren't going to address that.

TC: Yes, sir.

(JA at 148-49 (emphasis added).) Thus, a mistrial warning by the military judge preceded the government's actions that formed the basis of this UCI appeal. A mistrial warning preceded the accessing of the military judge's service record. A mistrial warning preceded the phone call to the military judge's immediate supervisor. And a mistrial warning preceded the *voir dire* of LtCol Mori.

Once the new military judge was seated, he expressly acknowledged the soft-on-sentencing reputation of LtCol Mori. (JA at 248-50.) He couched that reputation in terms of LtCol Mori not awarding punitive discharges at the same rate as other military judges. (JA at 248-49.) But he acknowledged the widespread nature of it: "[I]f your question is, whether or not he has some sort of a reputation *within the judge advocate community*, I would in fairness say that I believe he does." (JA at 248 (emphasis added).) Presumably then, there were times when LtCol Mori denied Government requests to adjudge a punitive discharge. Each of these above examples shows that it was the Government, not Appellant, who sought retribution here.

Regarding the Government's unfortunate suggestion that Appellant is attacking "various members of the judge advocate community", the Government "misconstrue[s] the purpose of

appellate review in the military justice system. It is not a vehicle to protect the professional reputation of military attorneys involved in command-influence cases." *United States v. Mabe*, 33 M.J. 200, 206 n.6 (C.M.A. 1991).[4] Rather, the purpose of appellate review is "to insure that servicemembers receive a fair court-martial in accordance with law. . . ." *Mabe*, 33 M.J. at 206 n.6. Accordingly, this Court should reject these Government arguments.

**D. The facts make *Lewis* applicable, not the number of quotations.**

The Government smartly argues that "quoting *Lewis* does not make this case *Lewis*." (Appellee's Br. at 33.) Appellant cannot contest the logic of this point. The number of citations to *Lewis* does not draw Appellant's case into the orbit of *Lewis*; the facts do. Here, just as in *Lewis*, there was coordinated action by the Government to unseat a military judge. (JA at 150-51, 183); *Lewis*, 63 M.J. at 414. Here, just as in *Lewis*, an SJA and trial counsel were integral actors involved in the

[4] In *Mabe*, the Chief Judge of the Navy-Marine Corps Trial Judiciary sent a letter to the Chief Judge of the Transatlantic Judicial Circuit. *Mabe*, 31 M.J. at 201. That letter voiced concerns over the tendency of judges within that circuit to afford lenient sentences for unauthorized absence. *Id.* at 201-02. No specific judge was singled out, and no specific Appellant was named. *Id.* That letter was received two months before the court-martial of the appellant there. Here, by contrast, a phone call was made during an active court-martial. The call addressed a specific judge and, more precisely, his specific ruling.

unseating. (JA at 175-209); *Lewis*, 63 M.J. at 406-10. And here, just as in *Lewis*, the government's coordinated actions "invaded" the "deliberative process" of the military judge causing "second guessing" of rulings and warranting recusal. (JA at 67-71, 164); *Lewis*, 63 M.J. at 411. In light of these remarkable similarities, *Lewis* governs Appellant's case. It prompts the drastic relief of dismissal with prejudice. *Lewis*, 63 M.J. at 416.

Admittedly, there are some differences between this case and *Lewis*. But these differences militate in favor of the remedy fashioned there. For example, before *voir dire*, the military judge in *Lewis* did not:

- issue a valid mistrial warning;
- rule against the Government on more than one occasion;
- disqualify government counsel in a prior case;
- learn of a Government phone call to her judicial superior in the aftermath of an unfavorable ruling; or
- get confronted with portions of her service record in open court.

Additionally, *after* the seating of the new military judge, the defense in *Lewis* did not:

- receive a Government motion for reconsideration of the former military judge's rulings; or
- have a prior finding reversed by the new military judge, which enabled the Government to counter the defense's theory of the case.

These facts depict a Government hyper-focused on winning, not justice. They depict a court-martial *not* free from the taint of unlawful command influence. The Government is right in one respect; this case is not *Lewis*. This case is worse than *Lewis*.

**E. A dismissal with prejudice would not chill voir dire.**

On page twenty-two of its Answer, the Government identifies a purported "paradox" in Appellant's argument. (Appellee's Br. at 22.) In its view, Appellant's contention that this *voir dire* triggered LtCol Mori's recusal means that every *voir dire* could trigger recusal. This parade-of-horribles argument must be rejected. To begin, Appellant acknowledges the important role that a robust *voir dire* can play in safeguarding a fair and impartial tribunal. But the instant *voir dire* perverted that role. By triggering the recusal of Judge Mori, this *voir dire* ensured that Cpl Salyer would not get a fair and impartial tribunal. His original judge was simply too defense friendly for the Government's liking. So he had to go.

To be sure, every *voir dire* "could cause a military judge to quote *Lewis*. . . ." (Appellee's Br. at 22.) But that scenario is only likely where the *voir dired* military judge learns: (1) that his superior judicial officer has been telephoned by the officer-in-charge of trial counsel to complain about a specific ruling; (2) that trial counsel has accessed portions of his service record without permission; and (3) that,

in light of a personal decision made "ten years and three children later," his personal judgment is called into question on an issue that Col Richardson described as a "flip of the coin" type ruling.[5] (JA at 70, 194.) Put differently, the Government's feared scenario is not likely at all.

Two additional points are worth noting. First, if the courtesy call from LtCol Mannle was truly a "well-intentioned" "courtesy" focused primarily on administrative matters, (JA at 176, 182, 206), then he should have included Defense Counsel on the phone call. Second, and relatedly, Article 46, UCMJ, provides that "[t]he trial counsel, the defense counsel, and the court-martial shall have *equal opportunity* to obtain witnesses and other evidence. . . ." 10 U.S.C. § 846 (2006) (emphasis added). Here, there is no evidence in the Record that Defense Counsel had equal access to the service record of LtCol Mori. (JA at 210.) Nor is there evidence in the Record that the Officer-in-Charge, Military Justice Officer, or Trial Counsel provided Defense Counsel with an opportunity to view the service record in advance of *voir dire*. The Government cannot reasonably argue that it chose this cloaked path to shield an

[5] Despite the stated rationale of LtCol Mori and the acknowledgement by Col Richardson that the ruling was so close that it could be decided as a "flip of the coin," the Government still describes the age ruling as "perplexing". (Appellee's Br. at 9.)

accused criminal from learning a military judge's next-of-kin information; after all, it presented the document in open court.

**Conclusion**

If Cpl Salyer's "conviction is allowed to stand, it will create the appearance that a command can de-select military judges and orchestrate the parties to a court-martial, which raises serious doubt about the fairness of the military justice system." *Lewis*, 63 M.J. at 412. Just as in *Lewis*, "the Government's conduct was outrageous, was not harmless beyond a reasonable doubt, and cannot be allowed to stand without penalty." *Id.* The remedies crafted by Col Richardson fell short. (Appellant's Br. at 34.) And even if they were sufficiently remedial, the record indicates that they were not fully implemented. Dismissal with prejudice is the only appropriate remedy. Anything short of that will give the Government exactly what it wanted--a trial for Cpl Salyer by any judge other than LtCol Mori.

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I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on March 27, 2013.

**Certificate of Compliance**

This supplement complies with the type-volume limitations of Rule 21(c) because it contains no more than half of the type-volume specified in Rule 24(c)(1). Using Microsoft Word version 2003 with 12-point-Court-New font, this reply contains 3,797 words.

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