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	BRIEF OF AMICUS CURIAE Crim. App. No. 201500064 USCA Dkt. No. 17-0162/NA

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

Index

Table of Authorities ii

Statement of Interest 1

Statement of Relevance 2

Issue Presented 3

Statement of Facts 4

Summary of the Argument 14

Argument 14

Conclusion 20

Certificate Of Compliance With Rule 24(d) 21

Certificate Of Service 21

Table of Authorities

Cases

Loving v. United States,
68 M.J. 1 (C.A.A.F. 2009).....20

United States v. DuBay,
37 C.M.R. 411 (C.M.A. 1967) 15

United States v. Hagen,
25 M.J. 78 (C.M.A. 1987) 14, 15

United States v. Sanchez,
No. ARMY 20140735, 2017 CCA LEXIS 203 (A. Ct. Crim. App. Mar. 28, 2017)..... 16, 17

United States v. Stombaugh,
40 M.J. 208 (C.M.A. 1994)……..... 17

United States v. Taylor,
60 M.J. 190 (C.A.A.F. 2004).....19

United States v. Travis,
66 M.J. 301 (C.A.A.F. 2008).....19

United States v. Wheelus,
49 M.J. 283 (C.A.A.F. 1998).....18

Statutes

10 U.S.C. § 806 …… 14,17
10 U.S.C. § 837 …… *passim*
10 U.S.C. § 860 …….. 4
10 U.S.C. § 864 …… 17

Other Authorities

R.C.M. 1206 …….. 17

Statement of Interest

LCDR Jonathan Dowling, JAGC, USN, served as the Acting Staff Judge Advocate and the Deputy Staff Judge Advocate for the post-trial processing in this case. On March 31, 2017, based on a conversation with a reserve judge advocate, LCDR Dowling recognized a potential post-trial error that may have prejudiced the Appellant – whether it was appropriate for Commander, Naval Legal Service Command (CNLSC), to advise the convening authority on a case given that CNLSC was the activity head for both Region Legal Service Offices and Defense Services Offices (J.A. 934-35). On April 21, 2017, LCDR Dowling raised this potential post-trial error to appellate government counsel who characterized the issue as "unlawful command influence" under Article 37, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 837 (J.A. 941). LCDR Dowling's action in coming forward with this information led to the current proceedings before this Court (J.A. 954-55). LCDR Dowling relayed his account to appellate government counsel, who in turn told her supervisor, who in turn told trial defense counsel, who in turn told appellate defense counsel, who in turn contacted the convening authority. This also resulted in trial defense counsel filing an affidavit with a distorted and inaccurate version of LCDR Dowling's conversation with appellate government counsel. *Id*. On March 22, 2018, during oral argument, the Court asked questions about the actions of the staff judge advocates. Two questions are

of special import: can the Staff Judge Advocate (SJA) or Deputy Staff Judge Advocate (DSJA) unlawfully influence a convening authority under Article 37, UCMJ, and if so, what is the remedy. These questions raise a new issue not encapsulated in the original certification or addressed by the parties and appear to misapprehend or overlook facts in the record. The questions raise an important issue: how far and with what arguments may a staff judge advocate advise a convening authority to approve or disapprove a court-martial without violating Article 37, UCMJ. There is no National Association of Staff Judge Advocates, as there is a National District Attorney Association, the National Association of Criminal Defense Lawyers, or similar organization, to represent the broad interests of the staff judge advocate community. Here, Amicus addresses an issue that is important for staff judge advocates Service-wide.

Statement of Relevance

Rule 26 provides that *Amicus curiae* briefs "that bring relevant matter to the attention of the Court not already brought to its attention by the parties may be of considerable help to the Court." The original certified issue before the *DuBay* hearing was "Whether senior civilian and military leaders exerted unlawful command influence on the convening authority?" The military judge in the *DuBay* hearing found that "[a]ctual or apparent unlawful command influence tainted the final action in this case." (J.A. 604). After the *DuBay* hearing, the Court revised

the certified issue to "Whether military officials exerted actual unlawful command influence on the convening authority or created the appearance of doing so? It is unclear whether this Court considered "military officials" to include the SJA and the DSJA. The *DuBay* hearing only tangentially addressed the post-trial processing and advice provided by the SJA and the DSJA while serving in an Acting capacity. The *DuBay* hearing did not consider evidence relating to such post-trial processing and advice that is still protected by the attorney-client privilege and that helps demonstrate that the SJA and the DSJA did not violate Article 37, UCMJ. Below, Amicus brings relevant matter to this Court's attention that was not addressed by Appellee and Appellant, and that is relevant to the current revised certified issue. Amicus proposes the issue to be as follows.

Issue Presented

A STAFF JUDGE ADVOCATE HAS A LEGAL DUTY TO GIVE ADVICE WHEN A CONVENING AUTHORITY IS DECIDING IF THE FINDINGS AND SENTENCE OF A COURT-MARTIAL OUGHT TO BE APPROVED. WHEN EXECUTING THIS DUTY, CAN THE STAFF JUDGE ADVOCATE VIOLATE ARTICLE 37, UCMJ, WHEN GIVING THAT ADVICE? AND IF SO, DOES THE RECORD SHOW THE STAFF JUDGE ADVOCATES HERE VIOLATED ARTICLE 37, UCMJ?

Statement of Facts

A. The Staff Judge Advocate discovered the legal error with the original Convening Authority action and directed corrective action.

CAPT Dominic Jones, JAGC, USN, the Staff Judge Advocate (SJA), was the first person to recognize that the Staff Judge Advocate Recommendation (SJAR) addendum, issued on February 26, 2015, incorrectly advised RADM Patrick J. Lorge, USN, that recent amendments to Article 60, UCMJ, 10 U.S.C. § 860, and ALNAV 51-14 restricted the convening authority from acting on the findings and sentence in Appellant's case (J.A. 908). LCDR Dowling, the Deputy Staff Judge Advocate (DSJA), had not previously seen the SJAR addendum because he "was either on leave or TDY when this document was processed." (J.A. 906). CAPT Jones directed LCDR Dowling to verify the error and take corrective actions (J.A. 909). The Navy-Marine Corps Appellate Government Division initially said the SJAR Addendum was correct but reconsidered after LCDR Dowling provided statutory language that indicated the Article 60 amendment only applied to offenses occurring after the effective date of June 24, 2014. *Id*. Before the case was remanded for a new convening authority action, CAPT Jones informed RADM Lorge of the error and clarified that he did have authority to disapprove the findings (J.A. 592, 910). CAPT Jones reemphasized to RADM Lorge that he could disapprove the finding in the SJAR Addendum issued on April 13, 2015 (J.A. 338-39).

B. The evidence shows the Staff Judge Advocate's Office conducted a neutral, independent, and extensive post-trial review of Appellant's case.

The Staff Judge Advocate's Office conducted a neutral and independent review of Appellant's case (J.A. 897-98). According to LCDR Dowling's testimony, CAPT Jones' guiding principle was to "be an umpire, just call strikes and balls about what's coming down the plate, and-- […] not try to become the pitcher yourself." (J.A. 903). After directing action to have the case remanded, CAPT Jones directed LCDR Dowling "to review in depth the record of trial[.]" (J.A. 912). This review process included the Assistant Staff Judge Advocate (Assistant SJA) who had previously "prepare[d] a memo to address all the legal errors that were raised by the defense." *Id.* LCDR Dowling "review[ed] all the issues that were raised by [the] defense and […] look[ed] through the record and the exhibits[.] *Id.* During his review, LCDR Dowling discovered a potential issue with Appellant's traumatic brain injury (TBI) that was raised during sentencing (J.A. 901). LCDR Dowling reached out to discuss the matter with civilian defense counsel (J.A. 946). The civilian defense counsel did not raise the TBI issue on the merits because he believed that the victim was not credible. *Id*.

C. In April 2015, before Joint Training Symposium West, LCDR Dowling and the Assistant Staff Judge Advocate met with RADM Lorge where he was considering all options including disapproving the findings.

In April 2015, LCDR Dowling and the Assistant SJA met with RADM Lorge to discuss Appellant's case (J.A. 916). During the meeting, without any

prompting, RADM Lorge identified Appellant's traumatic brain injury as a significant factor in the case based on his own knowledge and experience (J.A. 916-17). At this point, RADM Lorge was actively considering all options "everything from disapproving the findings to approving them." (J.A. 917).

D. During Joint Training Symposium West, RADM Lorge met with Commander, Naval Legal Service Command, where they discussed Appellant's case.

On April 30, 2015, then RADM James Crawford, III, JAGC, Commander, Naval Legal Service Command (CNLSC), met with RADM Lorge at his office during Joint Training Symposium West where they discussed Appellant's case (J.A. 374, 1037). Although RADM Lorge does not recall the specific words, RADM Lorge testified that then RADM Crawford's sentiments were "disapproving a sexual assault case […] is going to bring big scrutiny upon the Navy." (J.A. 1038). RADM Lorge further testified that his "feeling as [he] came out of this meeting with him was 'yes, the pressure is still there, and it's intense, and it needs to be done correctly, […] you have to scrutinize this now because it's going to be out there, and folks are going to be looking over your shoulder like – everywhere[.] *Id.* RADM Lorge recognized at this point that he could disapprove the conviction, but that doing so would bring greater scrutiny upon the Navy (J.A. 1065). As for his recollection of the meeting, VADM Crawford testified that RADM Lorge was "struggling with how to deal with the case, whether to sustain

the finding or whether to execute his authority not to[.]" (J.A. 772). VADM Crawford further testified that "[t]he most specific advice [he] gave [RADM Lorge] was 'work with your lawyers, let them help you figure this out.'" *Id*.

E. The May 12, 2015 SJAR Addendum addressed a potential error raised by Appellant concerning his sworn testimony during sentencing that required resolving the impact of two unpublished appellate decisions.

In response to additional clemency submitted by Appellant, LCDR Dowling, while Acting SJA, issued an SJAR addendum on May 12, 2015, that provided the following:

> [T]he accused raised three allegations of legal error. Having reviewed these allegations of legal error, it is my opinion that corrective action is not warranted on the findings or sentence at this time. With respect to the appropriate scope of an accused's testimony during sentencing, *United States v. Ashley*, 2005 CCA LEXIS 168 (N-M.C.C.A. 2005) and *United States v. Fuller*, 2007 CCA LEXIS 545 (N-M.C.C.A. 2007) provide seemingly different guidance that requires resolution by the appellate authority.

(J.A. 358, 928). LCDR Dowling did not include a bottom line recommendation on how RADM Lorge should ultimately dispose of the case — he deferred to CAPT Jones' previous recommendation to approve the findings and sentence in the SJAR addendum issued on April 13, 2015 (J.A. 338-39, 358, 928-29).

F. After Joint Training Symposium West, RADM Lorge indicated that he was going to approve the findings but wanted to submit a letter into the record to express his concerns about the case.

In May 2015, LCDR Dowling met with RADM Lorge to discuss Appellant's case (J.A. 919). During this meeting, RADM Lorge stated words to the effect of

"Jim said not to put a target on my back; he said I've got smart lawyers, let them figure it out." (J.A. 919). LCDR Dowling testified that the comment was "based on an in-person meeting during JTS West" with then RADM Crawford (J.A. 920, 924). LCDR Dowling recognized that the statement concerning a "target on the back" could have been a "distillation of a more nuanced and carefully-phrased conversation" between RADM Lorge and then RADM Crawford (J.A. 405, 957). Notably though, the "target on the back" comment is reminiscent of RADM Lorge's "feeling" from his meeting with then RADM Crawford that "folks are going to be looking over your shoulder like – everywhere[.]" (J.A. 1038). And even VADM Crawford testified "[t]he most specific advice [he] gave [RADM Lorge] was 'work with your lawyers, let them help you figure this out.'" (J.A. 1038). Both facts corroborate LCDR Dowling's account of his conversation with RADM Lorge that he memorialized in his declaration on June 5, 2017 before the *DuBay* hearing (J.A. 395).

LCDR Dowling testified that "[a]fter Admiral Lorge had indicated what Admiral Crawford had said, the marching orders as [he] took them to be were that [RADM Lorge was] going to approve the conviction, but [that he] wanted to put Senior Chief Barry in the best possible position on appeal." (J.A. 920). LCDR Dowling recalled "being very disappointed because it meant that the TBI issue was not going to be explored, and [he] thought it should have been explored." (J.A.

921). "One of the aspects that [RADM Lorge] was considering was actually putting language directly into the Convening Authority action." (J.A. 925). LCDR Dowling reports that he sent an email dated May 18, 2015 to the Assistant SJA that shows that RADM Lorge communicated his interest in placing a letter in the record to express his concerns about the case, and to encourage the appellate court to take a strong look at the record to determine whether Appellant received a fair trial.[1]

G. The Staff Judge Advocate's Office analyzed the conversation between Commander, Naval Legal Service Command, and the convening authority under the framework of unlawful command influence.

After CAPT Jones returned from overseas towards the end of May, LCDR Dowling reported his concerns about then RADM Crawford speaking with RADM Lorge because the conversation appeared to influence RADM Lorge's decision-making process (J.A. 929-30). CAPT Jones and LCDR Dowling considered the issue within the framework of unlawful command influence. *Id*. They "looked at the aspect that they were both two-star admirals, [that] they were not in the same chain of command[,]" and concluded that it was not unlawful command influence under Article 37, UCMJ. *Id*. CAPT Jones and LCDR Dowling, however, did not discuss RADM Crawford's reporting relationship with the Chief of Naval Operations (i.e., mantle of command authority) or whether such conversation was

[1] RADM Lorge's communications to LCDR Dowling are no longer privileged due to a limited waiver by the Navy, but the email documenting this communication is still privileged.

authorized or unauthorized under Article 37, UCMJ.

H. LCDR Dowling contacted Code 20, Criminal Law, Office of the Judge Advocate General, to determine if RADM Lorge could express his concerns in the Convening Authority action.

At some point after his meeting with RADM Lorge in May, LCDR Dowling contacted Code 20, Criminal Law, Office of the Judge Advocate General, to determine if a convening authority could express his concerns about a case in the Convening Authority action (J.A. 925). The Code 20 representative "said, 'Well, he's the Convening Authority; he can do whatever he wants with the Convening Authority action,' or words to that effect." *Id*. LCDR Dowling testified "that was sufficient for [the Staff Judge Advocate's Office] to start drafting language to place in the Convening Authority action that would give Senior Chief Barry the best chance of success on appeal" as directed by RADM Lorge. *Id*.

I. RADM Lorge contacted Commander, Naval Legal Service Command, to discuss the option of expressing his concerns about the case directly in the Convening Authority action.

RADM Lorge contacted then RADM Crawford by phone about the option to express his concerns in the Convening Authority action (J.A. 1040). When asked "Did Admiral Crawford try to convince you to approve the finding in this case?", RADM Lorge responded "I think he did with how he spoke with me on the phone." (J.A. 1061). The military judge in the *DuBay* hearing found that "RADM Lorge was influenced by his conversations with […] VADM Crawford when

taking action in this case." (J.A. 603).

J. RADM Lorge's struggle--approve or disapprove--demonstrates that the Staff Judge Advocate's Office consistently advised the convening authority that he could disapprove the findings.

LCDR Dowling testified that "prior to the Convening Authority action and throughout this process as we were reviewing [the case, CAPT Jones had expressed that] the Admiral was struggling and was thinking about flipping the case[.]" (J.A. 923). When pressed during examination about his authority to order a new trial, RADM Lorge testified that he was "unsure" as to whether CAPT Jones said "you can't do it" or "I recommend against it[.]" (J.A. 1087).

K. RADM Lorge signed a second Convening Authority action that included the requested language expressing his concerns about the case and restoring Appellant to the rank of Chief (E-7) after his confinement.

The Staff Judge Advocate's Office prepared two versions of the second Convening Authority action that LCDR Dowling presented to RADM Lorge – one version ordered executed the findings and sentence, and another version that reduced Senior Chief (E-8) Barry to E1 while in confinement but restored him to Chief (E-7) after he finished serving his confinement (J.A. 931). Both versions included the language that RADM Lorge originally requested to address his concerns about the case. *Id.* RADM Lorge signed the version that allowed the Appellant to keep his Chief anchors on June 3, 2015. *Id.* LCDR Dowling's advice addressed the facts of the case and the law, not any external factors (J.A. 358).

LCDR Dowling was not aware that RADM Lorge spoke again with then RADM Crawford over the phone before signing the Convening Authority action (J.A. 924).

L. During the week after the Convening Authority action was signed, RADM Lorge indicated that he wanted to write a letter to a Flag Officer to express his concerns about the military judge and the TBI issues in the case.

At some point during the week after the Convening Authority action had been signed, LCDR Dowling and the Assistant SJA met with RADM Lorge (J.A. 932). During this meeting, RADM Lorge "expressed that he wanted to draft [a] letter" to address his concerns about the military judge and the TBI issues in the case. *Id.* LCDR Dowling recommended "writing to the Chief Judge," but RADM Lorge indicated that "flags only write to flags." *Id.* It was RADM Lorge's direction and guidance that led the Staff Judge Advocate Office to draft a letter to the Judge Advocate General of the Navy to express his concerns about the case. *Id.*

M. The military judge in the *DuBay* hearing focused on the certified issue and did not release and/or consider privileged documents that would have assisted in establishing a clear time line of events and a better understanding of the advice provided by the Staff Judge Advocate's Office.

The military judge in the *DuBay* hearing "focused on the particular issue presented" by this Court: "Whether senior civilian and military leaders exerted unlawful command influence on the convening authority?" (J.A. 596, 603). The military judge also did not release privileged information because it "did not relate

to the certified issue for the *DuBay* hearing." (J.A. 596). LCDR Dowling testified that "there had been some limited waivers of privilege with communications and some of the documents," but that he believed that there were some aspects that had not been waived by the Navy or subject to a court order to disclose privileged information (J.A. 902). The government also objected to LCDR Dowling's answer concerning his conversation with CAPT Jones about the case (J.A. 922). The military judge's ruling did not clearly indicate how he would consider LCDR Dowling's testimony as it related to such conversation (J.A. 923). Significantly, the military judge did not review *in camera* many of the privileged documents in this case prior to the *DuBay* hearing (J.A. 726, 729 - 732). And lastly, the military judge found LCDR Dowling to be a credible witness in this case (J.A. 601).

N. This Court heard oral argument in Appellant's case on March 22, 2018 and asked whether the SJA and DSJA can violate Article 37, UCMJ.

The second issue already before the Court asks if "military officials exerted actual unlawful command influence on the convening authority or created the appearance of doing so?" During argument, the Court asked questions about staff judge advocates violating Article 37, UCMJ; two that are especially relevant here. First, "[c]an the Staff Judge Advocate or Deputy Staff Judge Advocate unlawfully influence a convening authority under Article 37?" (Audio Recording, 8:24).[2] And

[2] Time-hack references are to the oral recording publicly available on this Court's website.

second, what's to be done "in a situation like this where we have, basically, a collusion between the SJA and the Deputy SJA to keep their boss from doing what he wants to do and then on top of that, a sort of imprimatur added by the TJAG saying the same thing for all the same reasons, it is going to make the Navy look bad, it is going to cause an issue, it is going to cause a problem, even going as far to give incorrect advice? (Audio Recording, 23:38).

Additional relevant facts are set forth in the argument below.

Summary of the Argument

A staff judge advocate can violate Article 37, UCMJ, when advising the convening authority on post-trial actions in a court-martial. The evidence of record does not demonstrate that the SJA and DSJA committed or "colluded" to violate Article 37, UCMJ, in Appellant's case. The Court should order a hearing to be held in accordance with *United States v. DuBay* to develop the facts further.

Argument

A. Should this Court specify and address the issue raised by Amicus?

1. In *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987), Judge Sullivan counsels that:

> *The convening authority may seek legal advice through his assigned legal advisor or through superior legal officers including the Judge Advocate General*. Art. 6(b), UCMJ, 10 U.S.C. § 806(b). But let only legal advice, not policy suggestions, from the convening authority's superior flow through these channels.
> . . .

> Real or perceived policy considerations in the operation of military departments have no place in determining the guilt or innocence of an individual charged with a crime under the laws of our land. Superior commanders and staff officers, *as well as military or civilian legal officers, must never, directly or indirectly, interfere with a convening authority's exercise of his lawful duty*. The convening authority must make his or her own decision on the case.

Id., at 87 (Sullivan, J., concurring) (emphasis added). SJA's are the legal officers or advisors referred to in the opinion. While *Hagen* is a referral decision case, there is no reason to suggest it's principles do not apply to post-trial actions. Importantly, *Hagen* alludes to legal or policy advice of the staff judge advocate, while most Article 37, UCMJ, cases involve actions of a superior to the Convening Authority or someone acting with the mantle of command authority. *Id*. at 87. Is the *Hagen* principle to be applied to SJA's, and, if so, what are the limits or how far can the SJA go into a discussion of applicable policies before they violate Article 37, UCMJ? Regardless of the left and right limits, the facts of this case do not support a finding that the SJA or the DSJA violated Article 37, UCMJ here.

2. The second issue before the Court and the questions raised during oral argument imply a potential violation of Article 37, UCMJ, by the SJA's involved in Appellant's case. Amicus argues that the best practice is to now specify the issue for briefing, and if necessary order a hearing, to be held in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to further develop the relevant facts.

B. A SJA can violate Article 37, UCMJ, when advising a general court-martial convening authority (GCMCA) on the results of a court-martial.

1. A staff judge advocate has various opportunities to influence a general court-martial convening authority (GCMCA) in a specific court-martial case: advice under Article 34, UCMJ, selection of members of a court-martial panel, acceptance of pretrial agreements; and, relevant here, the decision to approve court-martial findings and sentence.

2. A SJA can violate Article 37(a) by words or acts that are an "attempt to coerce" or "by any unauthorized means, influence" the "action of any convening authority approving or reviewing authority with respect to his judicial acts." Article 37(a), UCMJ. The Army Court of Criminal Appeals recently affirmed that unlawful influence can be committed by a person who does not possess the mantle of command authority. The Army Court noted the following framework for addressing violations of this provision:

> While most claims under Article 37, UCMJ, allege the unlawful influence was committed by someone wearing the mantle of command authority, that is not a prerequisite to establishing a claim under Article 37, UCMJ. Both unlawful command influence and unlawful influence are proscribed by Article 37, UCMJ, but the latter does not require the act be done with the mantle of command authority. The test for unlawful influence is the same as the test for unlawful command influence, except that if an appellant meets his initial burden, the government need only rebut the allegations by a preponderance of the evidence.

United States v. Sanchez, No. ARMY 20140735, 2017 CCA LEXIS 203, at *9 (A. Ct. Crim. App. Mar. 28, 2017) (citations omitted); *see also United States v. Stombaugh*, 40 M.J. 208, 210-11 (C.M.A. 1994). The real question is what words or acts are improper and create an Article 37, UCMJ, concern? The formulaic staff judge advocate recommendation under R.C.M. 1206, which may recommend approval of the findings and sentence, is an influence over the convening authority that is authorized under Articles 6 and 64, UCMJ, 10 U.S.C. §§ 806 & 864. And R.C.M. 1206(d)(5) specifically recognizes that this "recommendation […] may include […] any additional matters deemed appropriate by the staff judge advocate or legal officer [including] matters outside the record."

C. The facts here do not demonstrate the SJA or DSJA violated Article 37(a), UCMJ, either alone or together.

1. The SJA advice in the SJAR addendum issued on February 26, 2015 and the initial convening authority action were erroneous. Errors in the SJA advice and convening authority action unfortunately occur on occasion. *See, e.g., United States v. Wheelus*, 49 M.J. 283, 286 (C.A.A.F. 1998). Yet, no court, including this Court, has found that an erroneous legal advice violates Article 37, UCMJ, nor has a court hinted at such a conclusion. Here, the SJA caught the error, initiated affirmative corrective action, and moved to ensure the fullest consideration of Appellant's case according to the clemency rules applicable to his case. The steps

taken once the error was caught contradict an intent or a desire to intentionally or unintentionally violate Article 37, UCMJ.

2. The facts demonstrate that the SJA and the DSJA, in the amended SJARs following the remand, were acting well within their authority to advise the convening authority on his action. That RADM Lorge was struggling with whether to approve or disapprove the findings up until and prior to signing the Convening Authority action demonstrates that CAPT Jones consistently recommended against "flipping" the case, not that RADM Lorge lacked the authority to do so. There is no violation of Article 37, UCMJ, when the SJA maintains that the findings and sentence should be approved even when the GCMCA expresses doubt. Although LCDR Dowling was not present for the conversations between RADM Lorge and CAPT Jones, LCDR Dowling's assessment remains the same - CAPT Jones "handled this case aboveboard." (J.A. 954). CAPT Jones was "trying to do the right thing and just assess the errors that were being raised by defense[.] *Id*. There is also no evidence of bias or animus from the staff judge advocate office toward or about Appellant. The facts do not demonstrate an effort to coerce the convening authority to take an action that he did not think appropriate. The facts do not demonstrate an effort by the SJA or DSJA to influence the convening authority to take an action based on anything but the facts and the law. They were clear with the GCMCA that he could approve or

disapprove the findings and sentence based on the record of trial and the matters submitted in clemency by Appellant.

3. The SJA and DSJA's actions were consistent with this Court's admonishment to ensure objective and neutral advice. *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004). During this review process, the DSJA identified the possible effects of TBI in Appellant's case, as did RADM Lorge. While not raised as legal error, this is evidence that the staff judge advocate office was pursuing a proper internal review of the trial. The actions of the staff judge advocate office show a "commonsense approach to guarantee" appellant a full and fair post-trial consideration. *United States v. Travis*, 66 M.J. 301, 304 (C.A.A.F. 2008). The record does not indicate a tone or argument that could be construed as coercive or an unlawful influence. The record indicates that the SJA and DSJA advice was well within the bounds expected of them and well within the constraints of the law in executing their legal duty to advise the GCMCA. As the timeline above demonstrates, the SJA Office was acting pursuant to RADM Lorge's expressed intent and direction, albeit an intent that was influenced by his conversations with Commander, Naval Legal Service Command.

D. <u>If necessary, this Court should order an additional *DuBay* hearing to assess the advice provided by the SJA Office</u>.

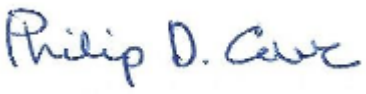
In the alternative and if necessary for the resolution of Appellant's case, this Court should order a *DuBay* hearing and charge the military judge to address the

issue presented above after ordering the release of all privileged documents, to fully assess the advice provided by the SJA Office, and to obtain an accurate timeline of events, which would include when personnel were serving in an Acting capacity. *Loving v. United States*, 68 M.J. 1, 4 (C.A.A.F. 2009) ("At the *DuBay* proceeding, the parties had full opportunity to present witnesses, documentary evidence, and legal arguments. The military judge considered the evidence and arguments of the parties, applied the standard set forth in our prior opinion, and *addressed the issues identified in our remand order*.").

Conclusion

WHEREFORE, amicus respectfully asks this Court to specify the suggested issue, and if appropriate to order a *DuBay* hearing to determine additional facts.

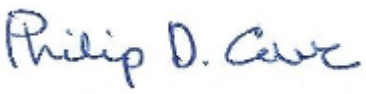
Respectfully submitted,



Philip D. Cave
Counsel for Amicus
U.S.C.A.A.F. Bar No. 22647
Law Office
1318 Princess St.
Alexandria, VA 22314
703-298-9562
mljucmj@court-martial.com

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

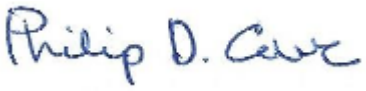
This brief complies with the type-volume limitations of Rule 24(c), because it is less than 7000 words, and is typeface and style compliant with Rule 37.



Philip D. Cave

CERTIFICATE OF SERVICE

I certify that the forgoing was electronically submitted to this Court, and that a copy electronically delivered to counsel for the parties, on 8 April 2018.



Philip D. Cave