IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20230020
Specialist (E-4) **RICHARD N. GROCE**, United States Army,	Appellant	Tried at Fort Campbell, Kentucky, on 31 October 2022, 20 December 2022, 10–12 January 2023, before a general court-martial convened by the Commander, 101st Airborne Division (Air Assault) and Fort Campbell, Colonel Travis L. Rogers, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error[1]

I.

WHETHER THE IMPACT OF UNLAWFUL COMMAND INFLUENCE REQUIRES SETTING ASIDE THE FINDINGS AND SENTENCE.

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[1] The government has reviewed appellant's *Grostefon* matters and agrees with the appellate counsel that they do not warrant full briefing as an assignment of error. Furthermore, the government respectfully submits that they lack merit. The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

PANEL NO. 4

II.

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING PROSECUTION EXHIBIT 7.

III.

WHETHER APPELLANT'S CONVICTION FOR ASSAULT CONSUMMATED BY BATTERY IS LEGALLY AND FACTUALLY INSUFFICIENT.

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Statement of the Case

On 12 January 2023, an enlisted panel, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of aggravated assault in which substantial bodily harm was inflicted and one specification of assault consummated by battery, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2018) [UCMJ]. (R. at 472). The enlisted panel sentenced appellant to a bad conduct discharge.[2] (R. at 590). On 3 February 2023, the convening authority approved the findings and sentence as adjudged. (Action). On 14 February 2023, the military judge entered judgment. (Judgment).

Statement of Facts

A. During a New Year's Eve party outside the victim's residence, appellant grabbed the victim by the legs, picked him up, and then slammed him headfirst onto the cement.

On or about 31 December 2020, appellant attended a New Year's Eve party at Sergeant (SGT) [redacted]'s apartment in Clarksville, Tennessee. (R. at 236, 238, 240). Other people at the party included SGT [redacted] SGT [redacted]'s girlfriend; and Mrs. [redacted] SGT [redacted]'s wife. (R. at 241, 281).

After drinking alcohol, appellant got "a little aggressive and irritated with people in the house." (R. at 242–43). Later, appellant, SGT [redacted] and SGT [redacted] walked outside to the apartment's parking lot, and Mrs. [redacted] followed them. (R. at

[2] Appellant received nine days of pretrial-confinement credit and thirty-five days of judicially ordered credit. (Statement of Trial Results).

244, 247). Outside, appellant and SGT [redacted] joked with each other, but the conversation turned from "friendly to less friendly." (R. at 289). SGT [redacted] testified that it seemed as if SGT [redacted] "was making jokes," but appellant was "taking him [SGT [redacted] seriously." (R. at 290). SGT [redacted] and appellant started pushing and shoving each other. (R. at 244–45, 290).

SGT [redacted] testified that appellant then grabbed SGT [redacted] by the legs while SGT [redacted] was standing up "and then picked him [SGT [redacted] up and then slammed him" into the ground "headfirst." (R. at 290–91). SGT [redacted]'s "face hit the ground first, and then the rest of his body afterwards." (R. at 291).

Mrs. [redacted] also testified that appellant "squatted down really low and picked him [SGT [redacted] up from the bottom of his ankles, and picked him up, and that's when he had hit the cement." (R. at 245). Mrs. [redacted] added, "I thought he [SGT [redacted] was just almost knocked out maybe." (R. at 246).

B. SGT [redacted] was taken to the emergency room at Tennova Hospital, and then he was taken to Vanderbilt University Medical Center for surgery.

Later, Mrs. [redacted] and another person helped SGT [redacted] go back upstairs to his apartment. (R. at 247, 293). Mrs. [redacted] placed SGT [redacted] on a recliner, and his head was "falling in both" directions. (R. at 248). SGT [redacted] was also "bleeding, he had blood all over his clothes, and he was just very disoriented." (R. at 248).

After deciding what to do next, Mrs. [redacted] and SGT [redacted]'s girlfriend brought SGT [redacted] back downstairs in their arms, put him in a car, and drove him to the emergency room (ER) at Tennova Hospital in Clarkesville.[3] (R. at 250).

At the ER, a radiologist from Tennova Hospital conducted Computed Tomography (CT) scans of SGT [redacted]'s head and cervical spine. (R. at 251, 366; Pros. Ex. 1 for ID, pp. 2–3; Pros. Ex. 7). The reports on the CT scans describe SGT [redacted]'s injuries—not the cause of those injuries. (Pros. Ex. 7).

SGT [redacted] had "some swelling and bleeding in his brain" and a fracture along "the back of his spine"; and he had suffered a cervical spine fracture in his neck. (R. at 251, 275, 330). He also had a plate placed in his neck. (R. at 328). Mrs. [redacted] testified that she was "terrified knowing that his neck was broke." (R. at 275).

After being seen at Tennova Hospital, SGT [redacted] was transported to Vanderbilt University Medical Center ("Vanderbilt Hospital" or "VUMC"). (R. at 251). He then underwent surgery. (R. at 252–53, 379–80).

C. Later that night, appellant also grabbed Officer [redacted] by the vest even after Officer [redacted] reminded appellant to maintain an arm's length of distance.

Later that night, after attacking SGT [redacted] appellant had a confrontation with police. (R. at 316). Someone had called the police about a "suspicious person" around SGT [redacted]'s apartment. (R. at 237, 314). Officer [redacted] and another police

[3] Throughout the record and in this brief, the "Tennova Hospital" and the "Clarksville Hospital" are used synonymously. (R. at 366, 369–70, 373, 375).

officer responded to the call and encountered appellant. (R. at 313–14). During appellant's interactions with Officer [redacted] appellant "did get pretty close to" Officer [redacted]'s face. (R. at 316). Officer [redacted] told appellant, "Hey, sir, please maintain arm's length distance from me just for officer safety." (R. at 316). Later, appellant "got too close to [Officer [redacted] again, right in [his] face." (R. at 316). Officer [redacted] again reminded appellant to "maintain an arm's length distance," even putting a hand on appellant's chest "just to get distance." (R. at 316).

Appellant then grabbed Officer [redacted] by the vest. (R. at 316). Officer [redacted] commanded appellant to get his "hands off of [Officer [redacted] but appellant failed to comply. (R. at 316–17). The other officer wrapped his arms around appellant, and Officer [redacted] was able "to get [appellant's] hands pried off" Officer [redacted] (R. at 317).

After further struggling with appellant, the police put appellant in handcuffs and took him into custody. (R. at 318). Officer [redacted] decided to take appellant into custody because, among other things, appellant was "already a public nuisance" and "had put his hands on [Officer [redacted] (R. at 318). Using "some discretion," Officer [redacted] charged appellant with public intoxication and resisting arrest; but he also had "probable cause to charge [appellant] with the assault." (R. at 321).

D. On 29 October 2021, after appellant completed a pre-trial diversion program in civilian court, his civilian criminal case was dismissed.

On 30 April 2021, in civilian court, appellant "entered a pre-trial diversion program" to resolve state criminal charges stemming from the night of his

aggravated assault against SGT [redacted] and his battery against Officer [redacted] appellant successfully completed the pre-trial diversion program on 29 October 2021. (Appellant's Br. 3). The civilian court's docket entries for 29 October 2021, say "Diversion Dismissed" and "Dismissed, Terms of Diversion are complete." (App. Ex. III-A, bate-stamp GROCE000165).

E. After determining whether there was enough evidence to prefer charges, appellant's battery commander preferred charges against appellant.

About eight months after appellant completed the pre-trial diversion program, on 29 June 2022, appellant's battery commander, Captain (CPT) [redacted] preferred charges against appellant after determining "whether or not there was enough evidence to prefer charges." (R. at 38; Charge Sheet). Before preferral, CPT [redacted] reviewed the "evidence packet" for the offenses that would eventually be preferred. (R. at 30). The military judge found that CPT [redacted] reviewed 155 pages of evidence "in making his decision to prefer." (App. Ex. XXII, p. 3). In addition, both CPT [redacted] (the trial counsel) and CPT [redacted]'s first sergeant advised CPT [redacted] about preferral. (App. Ex. XXII, p. 2).

In compliance with Rule for Courts-Martial (R.C.M.) 307(b), at preferral, CPT [redacted] "swore that he had personal knowledge of or has investigated the matters set forth in the charges and specifications, and that the matters set forth in the charges and specifications are true to the best of the knowledge and belief of the

signer." (App. Ex. XXII, p. 2). During his testimony, CPT [redacted] confirmed that he believed the oath he took at preferral was "true." (R. at 33).

The military judge stated that CPT [redacted] "thoroughly reviewed the evidence," and found his testimony "to be genuine, detailed, and credible. [CPT [redacted]'s] memory of his reasons and the procedure for preferring charges against the Accused was sincere, organized, and thoughtful." (App. Ex. XXII, pp. 4, 7).

1. CPT [redacted] explained that his reasons for preferring charges also included his relationship with appellant.

If CPT [redacted] did not prefer charges, he believed that the next battery commander, someone at the "battalion level," or even someone at brigade would prefer charges—"eventually" the charges "would be pursued." (R. at 22).

In explaining his preferral decision, CPT [redacted] testified, "I felt like I had a pretty good relationship and had built a good relationship with [appellant][.]" (R. at 23). CPT [redacted] added, "But I felt like if nothing else, going out of command, I felt that I should be the one to do this, as opposed to someone else that [appellant] doesn't have—I felt like there was a level of trust [appellant] had with me, and so by reading it, I felt like I wasn't necessarily betraying his [appellant's] trust." (R. at 23). He made clear, "I wasn't required to read the charges." (R. at 35). In a memorandum for record, CPT [redacted] recounted part of his conversation with CPT [redacted] about preferring charges: "The Company Commander [CPT [redacted] expressed his concern about preferring charges. CPT [redacted] explained to the Company

Commander that he should feel free not to prefer charges if he did not consider it appropriate." (App. Ex. IV-A, p. 1). Indeed, the military judge found that when CPT [redacted] inquired "what would happen if he did not prefer the case," CPT [redacted] stated that "someone else could prefer the case." (App. Ex. XXII, p. 2).

Even though CPT [redacted] received advice from CPT [redacted] CPT [redacted] said the following about his preferral decision: "[A]t the end of the day, as a commander, my job is to make that decision, and nobody else is, you know, charged with that." (R. at 31). CPT [redacted] believed that CPT [redacted] "worked at Division, in the legal cell or a legal cell," but he did not believe CPT [redacted] advised the division's commanding general directly; nor did CPT [redacted] believe that the commanding general was directing CPT [redacted] to prefer charges. (R. at 32). As CPT [redacted] testified, "If you want to point to one person, I guess Division is the commanding general, but in my mind, was it the commanding general standing behind me saying you need to do this? No." (R. at 32). Instead, CPT [redacted] believed that "the organization of Division" was looking at appellant's case and "determining if there was sufficient evidence to bring it to court-martial[.]" (R. at 33). CPT [redacted] did not "fear direct reprisal"; nor did he believe a senior commander would "reprimand" him if he failed to prefer charges. (R. at 33).

When discussing Officer Evaluation Reports (OERs) and general career considerations, CPT [redacted] said, "My driving force was not necessarily my OER, it

was everything else about the case. . . . But yes, was it, maybe, something? But I think irregardless [sic], I would have come to the same conclusion, at that time, based off the evidence I had." (R. at 35).

2. Before preferral, neither CPT [redacted] nor his trial counsel was aware of the disposition of appellant's civilian criminal case.

Before preferral, neither CPT [redacted] nor CPT [redacted] was aware of the pre-trial diversion program in appellant's civilian criminal case, as the military judge found. (App. Ex. XXII, p. 2). Later, in a memorandum for record, dated 19 November 2022, CPT [redacted] stated, "If I had known that SPC Groce had already been tried and punished in civilian court, I would not have preferred charges." (App. Ex. III-A, bate-stamp GROCE000172). In addition, at court-martial, defense counsel asked CPT [redacted] the following: If "Specialist Groce's case actually went through a system that went through a judge, or jury, or a trial, that he actually had received punishment, would that have changed your decision to prefer charges?" (R. at 26). CPT [redacted] replied, "Answer the question? Because if you word it that way, I would be less inclined to have preferred charges." (R. at 26). He later added, "I was required to make an assessment on the evidence that was given to me, and the advice I was given to either prefer charges, or not." (R. at 35).

There is no indication that appellant's civilian case was tried before a fact finder—judge or jury—to reach a verdict; instead, appellant went through a pre-trial diversion program that resulted in a dismissal of the case. (App. Ex. III-A,

bate-stamp GROCE000164–000165; Appellant's Br. 3; App. Ex. XXII, p. 7). As the military judge stated, "Indeed, there is no credible evidence before this Court that the civilian court even made any findings of fact." (App. Ex. XXII, p. 7).

F. After trial counsel was informed about the disposition of appellant's civilian criminal case, the Staff Judge Advocate advised the General Court-Martial Convening Authority about the civilian case.

Over a month after preferral, on 3 August 2022, at the preliminary hearing directed by appellant's brigade commander, the trial defense counsel told the trial counsel about the disposition of appellant's civilian criminal case. (App. Ex. XXII, p. 3; Preliminary Hearing Officer's Report, dated 8 August 2022). The trial counsel tried to get a copy of appellant's criminal file from the civilian court and civilian prosecutor, but the trial counsel was unable to procure the same paperwork that the trial defense counsel had gotten. (App. Ex. XXII, p. 3).

On 19 October 2022, the Staff Judge Advocate (SJA) advised the General Court-Martial Convening Authority (GCMCA) about the civilian case and recommended that the charges be referred to a general court-martial, which the GCMCA followed. (App. Ex. XXII, p. 3; SJA Advice, dated 19 October 2022). Army Reg. 27-10, Legal Services: Military Justice, para. 4-3(a) (20 November 2020) [AR 27-10], requires immediate commanders to inform the SJA if they learn "that a member of the command is facing prosecution by civilian authority or has been tried in a civilian court." AR 27-10, para. 4-3(c)(1), then says that if the

Summary Court-Martial Convening Authority (SCMCA) believes trial by court-martial is appropriate in a case "where civilian authorities exercised or plan to exercise criminal jurisdiction over the same matter," the SCMCA must prepare a "full written report" for the GCMCA. Finally, AR 27-10, para. 4-3(c)(2), says that the "GCMCA, after consulting with the supporting SJA, may, at the GCMCA's discretion, dispose of such charges." AR 27-10, para. 4-3(a), makes clear, "A GCMCA may authorize disposition of a case pursuant to the UCMJ . . . despite the exercise of civilian authority."

Assignment of Error I

WHETHER THE IMPACT OF UNLAWFUL COMMAND INFLUENCE REQUIRES SETTING ASIDE THE FINDINGS AND SENTENCE.

Additional Facts

Appellant filed a pre-trial motion to dismiss, claiming unlawful command influence (UCI). (App. Ex. III). Pressure from "division" had allegedly "coerced" CPT [redacted] into preferring charges. (Appellant's Br. 10). To support the UCI claim, appellant puts forth three specific factual allegations. (App. Ex. III, pp. 8–10; Appellant's Br. 9–13). First, when CPT [redacted] asked the trial counsel—who worked at the division level—what would happen if CPT [redacted] decided against preferral of charges, the trial counsel "responded that division had enough interest in the case to pursue the charges above him at the next higher commander." (App. Ex. III, p.

8). Second, legal advisers had not "correctly informed" CPT [redacted] about the disposition of appellant's civilian criminal case. (App. Ex. III, pp. 8–9). And finally, the government failed to follow AR 27-10, chapter 4. (App. Ex. III, pp. 9–10; Appellant's Br. 9–10).[4]

Standard of Review

"This Court reviews allegations of UCI de novo. We accept as true the military judge's findings of fact on a motion to dismiss for UCI unless those findings are clearly erroneous." *United States v. Gilmet*, 83 M.J. 398, 403 (C.A.AF. 2023) (citations omitted).

Law

A. Unlawful Command Influence

"No person subject to this chapter [UCMJ] may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter[.]" Article 37(a)(3), UCMJ, 10 U.S.C. § 837(a)(3) (Supp. III 2022). For UCI violations under this subsection, the newly added "attempt to influence"

[4] Appellant does not allege—nor is there any indication—that any legal adviser intentionally hid from CPT [redacted] information about appellant's pre-trial diversion program. (Appellant's Br. 3–13; R. at 46–47; App. Ex. XXII, p. 2–3).

language now makes clear that an unintentional act would fail to amount to a successful UCI claim: no person "may attempt to coerce" or "attempt to influence." *United States v. Garrett*, ARMY 20210298, 2022 CCA LEXIS 638, at *16–17 (Army Ct. Crim. App. 21 Oct. 2022) (mem. op.) ("The court then dismissed [a] conviction with prejudice based upon the unintentional acts of a senior officer towards the convening authority . . . . The language [in Article 37 (a)(3), UCMJ] added by Congress would prohibit that result in future cases." (internal quotation marks omitted)).

1. Actual UCI.

"To establish a prima facie claim of actual UCI, the accused bears the burden of presenting 'some evidence' of UCI—facts that if true, would constitute UCI. Although this initial burden is low, the accused must present more than mere allegations or speculation." *Gilmet*, 83 M.J. at 403 (citations omitted).

At the second step, once the accused makes a prima facie case, the burden shifts to the government, and the government must (1) "disprove the predicate facts upon which the UCI allegation is based"; (2) "persuade the Court that the facts do not constitute UCI"; or (3) prove "that the UCI will not affect the proceedings." *Id.* at 403, 403 n.4 (citing *United States v. Biagase*, 50 M.J. 143, 150–51 (C.A.A.F. 1999)). The government must persuade beyond a reasonable doubt. *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018).

2. Apparent UCI.

In a similar way, to make a prima facie case of apparent UCI, "an accused bears the initial burden of presenting 'some evidence' that unlawful command influence occurred." *United States v. Horne*, 82 M.J. 283, 286 (C.A.A.F. 2022) (citation omitted). But unlike in actual-UCI analysis, "a meritorious claim of the appearance of unlawful command influence does not require prejudice to an accused. Instead, the prejudice is what is done to the public's perception of the fairness of the military justice system as a whole." *Id.* at 287 (cleaned up). And one "significant factor in determining whether the unlawful command influence created an intolerable strain on the public's perception of the military justice system is whether the appellant was not personally prejudiced by the unlawful command influence." *Id.* at 287 (internal quotation marks omitted).

At the second step, once the accused makes a prima facie case, the framework for apparent-UCI analysis and the framework for actual-UCI analysis offer two of the same options to the government: it must prove beyond a reasonable doubt that either "(a) the predicate facts proffered by the appellant do not exist, or (b) the facts as presented do not constitute unlawful command influence." *Id.* at 286 (internal quotation marks omitted). And under apparent-UCI analysis, if the government cannot prove either of these two options, "it must prove beyond a reasonable doubt that the unlawful command 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 proceeding."[5] *Id.* at 286–87 (internal quotation marks and brackets omitted).

B. Material Prejudice.

The recently enacted Article 37(c), UCMJ, effective 20 December 2019, applies here and contains a new requirement of material prejudice for UCI claims: "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial

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[5] Article 37(c), UCMJ, now requires "a showing of material prejudice to the substantial rights of the accused before a finding or sentence of a court-martial may be held incorrect." *United States v. Gattis*, 81 M.J. 748, 754 (N.M. Ct. Crim. App. 2021). Because of this recent amendment, a claim of apparent UCI is no longer available to the accused. As some courts have held, the amendment seems to "vitiate the prior apparent UCI 'intolerable strain / disinterested observer' jurisprudence." *Id.* at 755, 755, n.31; *see also United States v. Alton*, ARMY 20190199, 2021 CCA LEXIS 269, at *13–14, n.5 (Army Ct. Crim. App. 2 Jun. 2021) (same). Senior Judge Ryan noted that Congress "amended Article 37, UCMJ, 10 U.S.C. § 837, to make even more clear that an appellant must prove actual prejudice to prevail on a claim of UCI." *Horne*, 82 M.J. at 290 (Ryan, J., concurring). And in discussing apparent UCI, Judge Ryan said the following: "There must be something more than an appearance of evil to justify action by an appellate court in a particular case. Proof of command influence in the air, so to speak, will not do." *United States v. Boyce*, 76 M.J. 242, 256 (C.A.A.F. 2017) (Ryan, J., dissenting) (cleaned up). Judge Ryan then elaborated that courts must not presume that a decision maker "has been influenced simply by the proximity of events which give the appearance of command influence in the absence of a connection to the result of a particular trial." *Id.* Nonetheless, appellee will still analyze this case under the traditional apparent-UCI framework; indeed, appellee would prevail with or without the availability of this framework.

rights of the accused." Article 37, UCMJ, now requires "a showing of material prejudice to the substantial rights of the accused before a finding or sentence of a court-martial may be held incorrect on the ground on a violation of that section." *United States v. Gattis*, 81 M.J. 748, 754 (N.M. Ct. Crim. App. 2021). To establish a "material prejudice to the substantial rights of the accused," appellant "must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Norwood*, 81 M.J. 12, 20 (C.A.A.F. 2021) (internal quotation marks omitted).

Argument

A. Appellant's claim of actual UCI fails because he failed to provide "some evidence" of UCI, the relevant facts of this case do not amount to UCI, and any UCI did not affect the proceedings.

1. Appellant fails to make a prima facie case of UCI because, even if his factual allegations were true, they would not show "some evidence" of UCI.

Appellant's three sets of factual allegations, even when taken as true, fail to make a prima facie case and fail to show "some evidence" of UCI, because none of them shows any attempted coercion or attempted improper influence.

a. Trial counsel allegedly told CPT [redacted] that, if CPT [redacted] did not prefer charges, another commander would prefer charges instead.

First, even if the trial counsel told CPT [redacted] that—if CPT [redacted] did not prefer charges—preferral would be sought "at the next higher commander," such facts, without more, do not constitute evidence of coercion or improper influence. (App.

Ex. III, p. 8). There is nothing unlawful about telling a potential accuser that—if the potential accuser declines to prefer charges—another commander would prefer charges instead; in fact, such a statement tends to prevent any potential pressure because it would give a potential accuser an off-ramp if he felt hesitant. *See, e.g.*, *United States v. Miller*, 31 M.J. 798, 799, 803 (A.F.C.M.R. 1990) (finding no unlawful command influence in a case in which an accuser testified "that he preferred appellant's charges only because the staff judge advocate told him that, if he did not, a higher authority would do so").

In *Miller*, 31 M.J. 798, the Air Force Court of Military Review reviewed a claim of UCI and found none, but the court did find some concerning events and listed them. *Id.* at 803. Nonetheless, none of the concerning events listed by the court included the fact that the SJA told the accuser that, if he did not prefer charges, "a higher authority would do so." *Id.* at 799, *aff'd*, *United States v. Miller*, 33 M.J. 235, 236, 237 n.1 (C.M.A. 1991) ("[W]e are not persuaded that the Court of Military Review erred as a matter of law in concluding, after the ordered *Dubay* hearing, that no command influence existed in this case.").

b. CPT [redacted]'s legal advisers allegedly failed to tell him about appellant's completion of the pre-trial diversion program in his civilian criminal case.

Second, even if CPT [redacted]'s legal advisers had failed to inform CPT [redacted] about appellant's completion of the pre-trial diversion program, such a fact fails to

serve as evidence of coercion or improper influence. Indeed, appellant does not allege that CPT [redacted]'s legal advisers hid the civilian-disposition information from CPT [redacted] in an attempt to influence his preferral decision. (Appellant's Br. 2–13).

Whether CPT [redacted] knew about appellant's pre-trial diversion program would have had no bearing on the preferral decision, because CPT [redacted]'s task in preferral was only to determine whether the charges were "true, to the best of the knowledge and belief of the signer." Article 30(b)(2), UCMJ, 10 U.S.C. §830(b)(2) (Supp. III 2022); R.C.M. 307 (b)(2)(B); *see also Miller*, 33 M.J. at 237 ("his task in preferral was only to determine whether the Charges and specifications were 'true in fact.'" (quoting an older version of Article 30, UCMJ)). As CPT [redacted] also acknowledged, his role at preferral was "to make an assessment on the evidence." (R. at 35). Because no apparent verdict or findings of fact were ever made during appellant's pre-trial diversion program, whether CPT [redacted] knew about this pre-trial diversion program would not have affected his determination of whether the charges were true. (App. Ex. III-A, bate-stamp GROCE000164–000165; App. Ex. XXII, p. 7).

c. The government allegedly failed to follow AR 27-10, chapter 4.

Third, even if the government failed to follow the steps in AR 27-10, chapter 4, appellant does not specify how this failure caused coercion or improper influence; after all, many criminal procedural rules exist, but not every violation of them is necessarily an act of UCI. (Appellant's Br. 2–13). CPT [redacted]'s task was

only to determine whether the charges were "true" under Article 30(b)(2), UCMJ, and appellant fails to specify how following the requirements of AR 27-10 would have swayed this determination one way or another.[6] (Appellant's Br. 2–13).

2. Even if appellant made a prima facie case of UCI, the government has shown that the relevant facts here do not amount to UCI.

Even if appellant made a prima facie case of UCI, under the second step of actual-UCI analysis, the government has satisfied the option of showing that all the relevant "facts do not constitute UCI." *See Gilmet*, 83 M.J. at 403, 403 n.4 (listing three options to satisfy the second step of actual-UCI analysis). In other words, the government has shown that the facts and circumstances establish that nobody engaged in—or attempted to engage in—coercion or improper influence under Article 37(a)(3), UCMJ.

a. CPT [redacted] reviewed the evidence, believed that the charges were true, knew he did not have to prefer charges, decided to prefer charges, and re-affirmed the oath he had taken at preferral.

CPT [redacted] was not "coerced into preferring charges that he does not believe are true." *See United States v. Hamilton*, 41 M.J. 32, 36 (C.M.A. 1994). He believed that the charges were true at preferral because he "swore that . . . the

[6] Appellant cites the U.S. Department of Justice's *Petite* policy to support his UCI claims, but appellant cites no authority showing that the *Petite* policy governs actions under the UCMJ. (Appellant's Br. 9). Furthermore, it "is apparent that the *Petite* policy is intended to be no more than self-regulation on the part of the Department of Justice. . . . The Supreme Court has never compelled the dismissal of a prosecution pursuant to the *Petite*[.]" *United States v. Snell*, 592 F.2d 1083, 1088 (9th Cir. 1979) (internal quotation marks omitted, italicizations added).

matters set forth in the charges and specifications are true to the best of the knowledge and belief of the signer." (App. Ex. XXII, p. 2). CPT [redacted] also re-affirmed that this oath was "true." (R. at 33). CPT [redacted] properly followed R.C.M. 307(b)(2)(B) by reviewing the evidence to determine whether the charges were true, and then making a decision about whether to prefer charges. (R. at 30, 38).

In addition to believing that charges were true, CPT [redacted] was not coerced into preferring charges, because—when discussing his decision to prefer charges—he testified, "I wasn't required to read the charges." (R. at 35). Indeed, when discussing his preferral decision, CPT [redacted] explained his independent role in the following way: "[A]t the end of the day, as a commander, my job is to make that decision, and nobody else is, you know, charged with that." (R. at 31).

CPT [redacted] believed that if he declined to prefer charges, someone else would eventually prefer charges, but that belief did not mean CPT [redacted] was coerced or improperly influenced into preferring charges. (R. at 22). After all, under R.C.M. 307(a), any person subject to the UCMJ can prefer charges, not just the immediate commander—and CPT [redacted]'s belief merely reflected a proper way R.C.M. 307(a) can be applied: if one person declines to prefer charges, another person can later make an independent assessment of the evidence and prefer charges.

CPT [redacted] also did not coerce CPT [redacted] (App. Ex. IV-A, pp. 1–2). As the military judge found, when CPT [redacted] asked "what would happen if he did not

prefer the case," CPT [redacted] stated that someone else "could prefer the case." (App. Ex. XXII, p. 2). CPT [redacted] recounted that CPT [redacted] had "expressed his concern about preferring charge," but CPT [redacted] had "explained to [CPT [redacted] that he should feel free not to prefer charges if he did not consider it appropriate." (App. Ex. IV-A, p. 1). Nor did CPT [redacted] feel any type of division-level pressure from CPT [redacted] or any other source. (R. at 32). CPT [redacted] viewed CPT [redacted] as a Captain who "worked at Division, in the legal cell or a legal cell," but CPT [redacted] did not believe that CPT [redacted] advised the commanding general directly; nor did CPT [redacted] believe that the commanding general was directing CPT [redacted] to prefer charges. (R. at 32). CPT [redacted] did not "fear direct reprisal"; his career considerations had no material effect on his decision; nor did he believe a senior commander would "reprimand" him for failing to prefer charges. (R. at 32–33, 35).

One other reason CPT [redacted] decided to prefer charges was because of the professional relationship he had developed with appellant; this reason arose from CPT [redacted] himself. (R. at 23).

As the evidence establishes beyond a reasonable doubt, CPT [redacted] reviewed the evidence, knew he was not required to prefer charges, believed that the charges were true, decided to prefer charges, and later re-affirmed the oath he had taken at preferral. (R. at 30, 33, 35, 38; App. Ex. XXII, p. 2).

b. CPT [redacted]'s lack of knowledge about appellant's pre-trial diversion program does not constitute UCI.

Before preferral, the legal advisers' failure to inform CPT [redacted] about appellant's pre-trial diversion program did not amount to UCI, because the trial counsel and Military Justice Advisor (MJA) were unaware of the disposition—thus their failure to advise about the disposition could not constitute an attempt to coerce or an attempt to improperly influence. (App. Ex. XXII, p. 2; R. at 46–47).

Even if the legal advisers knew about the pre-trial diversion program and failed to include it in the evidence presented to CPT [redacted] there would be no UCI, because knowing about the pre-trial diversion program would not have affected CPT [redacted]'s role in deciding whether to prefer charges. CPT [redacted]'s task in preferral was only to determine whether the charges were "true, to the best of the knowledge and belief of the signer," Article 30(b)(2), UCMJ; and because no apparent verdict or findings of fact were ever made during the pre-trial diversion program, knowledge of this pre-trial diversion program would have been an irrelevant piece of evidence when determining whether the charges were true. *See Miller*, 33 M.J. at 237 ("his task in preferral was only to determine whether the Charges and specifications were 'true in fact.'" (quoting an older version of Article 30, UCMJ)).

In addition, appellant implies that CPT [redacted] would not have preferred charges if he had known about appellant's pre-trial diversion program, but nothing in the record supports such a specific assertion. (Appellant's Br. 4). To be clear,

CPT [redacted] did state that he would have declined to prefer charges if appellant had "already been tried and punished in civilian court," (App. Ex. III-A, bate-stamp GROCE000172); and CPT [redacted] later clarified that he would be "less inclined" to prefer charges if "Specialist Groce's case actually went through a system that went through a judge, or jury, or a trial, [and] that he actually had received punishment." (R. at 26). But none of CPT [redacted]'s statements show how his knowing about a pre-trial diversion program would have affected his preferral decision; rather, CPT [redacted]'s statements tend to show only how his knowing about a regular civilian trial may have affected his preferral decision. (App. Ex. III-A, bate-stamp GROCE000172; R. at 26). Appellant's pre-trial diversion program was not a trial; in fact, no apparent verdict or findings of fact were ever made. (App. Ex. III-A, bate-stamp GROCE000164–000165; Appellant's Br. 3; App. Ex. XXII, p. 7).

The evidence establishes beyond a reasonable doubt that the legal advisers' failure to inform CPT [redacted] about the pre-trial diversion program did not constitute any coercion or improper influence, because the trial counsel and MJA were unaware of the pre-trial diversion program; the civilian court apparently never reached a verdict or issued findings of fact; and the existence of the pre-trial diversion program would not have affected whether CPT [redacted] thought the charges were true for purposes of preferral. (App. Ex. XXII, pp. 2, 7; R. at 46–47; App. Ex. III-A, bate-stamp GROCE000164–000165).

c. The alleged failure to follow AR 27-10, chapter 4, does not constitute UCI, as evidenced by the government's attempt to follow the regulation once it learned about appellant's pre-trial diversion program

The government has shown that no UCI arose from the government's conduct under AR 27-10, chapter 4, because the alleged failure to follow AR 27-10, chapter 4, did not constitute an attempt to coerce or an attempt to improperly influence the proceedings. (App. Ex. XXII, pp. 3, 7). Indeed, after the trial counsel learned about appellant's pre-trial diversion program, the SJA advised the GCMCA about appellant's civilian criminal case, in accordance with AR 27-10, para. 4-3. (App. Ex. XXII, pp. 3, 7; SJA Advice). And after receiving the SJA's advice, the GCMCA referred the case to a general court-martial. (SJA Advice).

Far from constituting UCI, the government's actions show an attempt to follow AR 27-10, chapter 4, as applicable, upon learning about the pre-trial diversion program. (App. Ex. XXII, pp. 3, 7). AR 27-10, chapter 4, contemplates a scenario in which the immediate commander informs the SJA about the civilian criminal case and the SCMCA writes a full report about why "trial by court-martial is appropriate," but by the time trial counsel here had learned about the pre-trial diversion program, the brigade commander had already directed a preliminary hearing; so the government attempted to follow AR 27-10, chapter 4, as much as applicable, based on when it actually learned of the pre-trial diversion program. (Preliminary Hearing Officer's Report; App. Ex. XXII, pp. 3, 7).

3. Even if appellant made a prima facie case of UCI, the government has shown that the UCI did not affect the proceedings.

Even if appellant made a prima facie case of UCI, under the second step of actual-UCI analysis, the government has also satisfied the option of showing "that the UCI will not affect the proceedings." *See Gilmet*, 83 M.J. at 403, 403 n.4 (listing three options for the government to satisfy the second step of actual-UCI analysis). Accordingly, appellant's claim of actual UCI must also fail because any acts of UCI were either negated or corrected through subsequent actions.

First, if CPT [redacted] believed that another commander would prefer charges if he declined to do so, CPT [redacted] made clear during his testimony that his preferral decision was unaffected by any coercion or improper influence. He testified that he reviewed the evidence to determine whether the charges were true, and then he made a decision about whether to prefer charges. (R. at 30, 38; Charge Sheet; App. Ex. XXII, p. 7). When discussing his decision to prefer charges, he also testified, "I wasn't required to read the charges." (R. at 35). At court-martial, he also confirmed that the oath he took at preferral was true. (R. at 33).

Second, at preferral, CPT [redacted]'s lack of knowledge about appellant's pre-trial diversion program would not have affected his role of determining whether the charges were "true, to the best of the knowledge and belief of the signer." Article 30(b)(2), UCMJ. As the evidence showed, no apparent verdict or findings of fact were ever made during the pre-trial diversion program, so knowledge of

such a program would have no bearing on whether CPT [redacted] thought the charges true. (App. Ex. III-A, bate-stamp GROCE000164–000165; Appellant's Br. 3; App. Ex. XXII, p. 7). Indeed, even after learning about appellant's civilian criminal case, CPT [redacted] re-affirmed the oath he took at preferral. (R. at 33).

Third, the purported failure of the immediate commander and the SCMCA to follow AR 27-10, chapter 4, did not affect the proceedings. Once the trial counsel learned about appellant's pre-trial diversion program, the SJA advised the GCMCA about appellant's civilian criminal case. (App. Ex. XXII, pp. 3, 7; SJA Advice). Here, the ultimate result of the proceedings was unaffected, because the GCMCA referred the case to court-martial—which is the same result that would have occurred if the immediate commander had reported the civilian criminal case to the SJA and if the SCMCA had sent a full report to the GCMCA on why "trial by court-martial is appropriate," under AR 27-10, para. 4-3. (SJA Advice).

B. Appellant's claim of apparent UCI fails because he failed to provide "some evidence" of UCI; the relevant facts of this case do not amount to UCI; any UCI did not place an intolerable strain upon the public's perception of the military justice system; and an objective, disinterested, and fully informed observer would not harbor a significant doubt about the fairness of the proceeding.

1. Appellant fails to make a prima facie case of UCI because, even if his factual allegations were true, they would not show "some evidence" of UCI.

In this case, because this first step in apparent-UCI analysis would be the same as the first step in actual-UCI analysis, appellee incorporates Subsection 1 of

Section A, under the Argument of Assignment of Error I, to show that appellant's claim of apparent UCI must fail for lack of a prima facie case.

2. Even if appellant made a prima facie case of UCI, the government has shown that the relevant facts here do not amount to UCI.

In this case, because this option under the second step of apparent-UCI analysis is the same as the corresponding option under the second step of actual-UCI analysis, appellee incorporates Subsection 2 of Section A, under the Argument of Assignment of Error I, to show that the claim of apparent UCI fails.

3. Even if appellant made a prima facie case of UCI, the government has established that any UCI did not place an intolerable strain on the public's perception of the military justice system; and that an objective, disinterested, and fully informed observer would not harbor a significant doubt about the fairness of the proceeding.

Even if appellant made a prima facie case of UCI, the government has still established "that the unlawful command 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 proceeding." *Horne*, 82 M.J. at 286–87 (internal quotation marks and brackets omitted). Accordingly, appellant's claim of apparent UCI must fail.

First, CPT [redacted]'s decision to prefer was based on evidence and was unaffected by any UCI. In CPT [redacted]'s testimony, he made clear that, at preferral, he determined "whether or not there was enough evidence to prefer charges"

before deciding to prefer charges. (R. at 38; Charge Sheet). CPT [redacted] reviewed 155 pages of evidence "in making his decision to prefer." (App. Ex. XXII, p. 3). And he "thoroughly reviewed the evidence." (App. Ex. XXII, p. 7). Despite any claims of UCI in the preferral process, CPT [redacted] made clear, "I wasn't required to read the charges." (R. at 35).

Under R.C.M. 307(b), CPT [redacted] swore that the charges "are true to the best of the knowledge and belief of the signer"—an oath he later re-affirmed at court-martial. (App. Ex. XXII, p. 2; R. at 33). CPT [redacted]'s "memory of his reasons and the procedure for preferring charges against the Accused was sincere, organized, and thoughtful." (App. Ex. XXII, p. 4). Based on CPT [redacted]'s testimony, no objective person or member of the public could have any doubt about the fairness of the preferral or a negative perception of the military justice system.

Second, at preferral, CPT [redacted]'s lack of knowledge about appellant's pre-trial diversion program would not have affected his role of evaluating the evidence and determining whether the charges were true under Article 30(b)(2), UCMJ. In appellant's civilian criminal case, no apparent verdict or findings of fact were ever made, so knowledge of such a program would have had no bearing on the truth of the charges evaluated. (App. Ex. III-A, bate-stamp GROCE000164–000165; Appellant's Br. 3; App. Ex. XXII, p. 7). Indeed, even after learning about appellant's civilian criminal case, CPT [redacted] re-affirmed his oath at preferral. (R. at

33). Based on all the facts and circumstances surrounding CPT [redacted]'s lack of knowledge about appellant's pre-trial diversion program, no objective person or member of the public could have any doubt about the fairness of the preferral or a negative perception of the military justice system.

Third, after considering the surrounding circumstances, the alleged failure by the immediate commander and the SCMCA to follow AR 27-10, chapter 4, would not cause any objective person or member of the public to have any doubt about the fairness of the pre-referral proceedings or a negative perception of the military justice system. The purported violations of AR 27-10, chapter 4, arose because the trial counsel had not learned about appellant's completion of the pre-trial diversion program until the preliminary hearing; but when the government learned of the civilian disposition, the SJA advised the GCMCA about appellant's civilian criminal case, in accordance with AR 27-10, para. 4-3. (App. Ex. XXII, pp. 3, 7; SJA Advice). In addition, the result of the proceedings was ultimately unaffected, because the GCMCA referred the case to court-martial—which is the same result that would have occurred if the immediate commander had notified the SJA about the civilian criminal case and if the SCMCA had sent to the GCMCA a full report about why "trial by court-martial is appropriate." (SJA Advice).

Appellant's claim of apparent UCI fails at this step, too, because—based on the circumstances of CPT [redacted]'s preferral decision and the purported violations of

AR 27-10, chapter 4—the government has established that any acts of UCI did not place an intolerable strain upon the public's perception of the military justice system; and that an objective, disinterested, and fully informed observer would not harbor a significant doubt about the fairness of the proceeding.

C. The findings and sentence should not be disturbed because any acts of actual or apparent UCI did not materially prejudice the substantial rights of appellant.

Even if acts of actual or apparent UCI occurred, the findings and sentence should remain undisturbed because no UCI materially prejudiced the substantial rights of appellant, under Article 37(c), UCMJ; in other words, there is no "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Norwood*, 81 M.J. at 20.

First, if CPT [redacted] had not told CPT [redacted] about what would occur after a declination of preferral of charges, CPT [redacted] should have still made the same preferral decision, because his role was to review the evidence and determine whether the charges were true. (R. at 33, 38; Charge Sheet). Indeed, on the day he preferred charges, he believed the oath he took was true; and on the day he testified in court, he believed the oath was true. (R. at 33; Charge Sheet).

Even if CPT [redacted] knew about the pre-trial diversion program, his preferral decision would not have been materially affected, because the pre-trial diversion program did not have any bearing on the veracity of the charges; instead, the pre-

trial diversion program contained no apparent verdict or findings of fact. (App. Ex. III-A, bate-stamp GROCE000164–000165; App. Ex. XXII, p. 7).

Lastly, even if the immediate commander had notified the SJA about appellant's civilian criminal case and even if the SCMCA had sent a full report to the GCMCA about why trial by court-martial was appropriate, in accordance with AR 27-10, para. 4-3, those hypothetical differences would not have changed the GCMCA's decision to refer the case to a general court-martial. (SJA Advice). The GCMCA decided to refer the case to court-martial after being advised by the SJA about the civilian criminal case; so an SCMCA's report in support of trial by court-martial only adds reasons for the GCMCA to refer the case to court-martial. (SJA Advice). And even though the immediate commander did not notify the SJA about the civilian case, the trial counsel did; and there is no indication that this difference would have changed the GCMCA's decision. (App. Ex. XXII, p. 3).

Because there is no reasonable probability that the alleged UCI would have changed the outcome of the proceedings, there is no material prejudice to appellant's substantial rights, and the findings and sentence should remain intact.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING PROSECUTION EXHIBIT 7.

Additional Facts

A. At trial, Mr. [redacted] testified as an expert in emergency medicine.

At trial, Mr. [redacted] testified as an expert "in emergency medicine as a physician assistant." (R. at 346, 353–54). At the time of Mr. [redacted]'s testimony, he worked at Blanchfield Army Community Hospital (Blanchfield), and he had previously worked at Tennova Hospital's ER. (R. at 346–47, 349).

Mr. [redacted] testified about the use of radiologists' findings, in general. (R. at 364). He discussed how radiologists review images and write reports; and how, after radiologists write their reports, they send the reports to the ER. (R. at 364–65). After the ER receives a radiologist's report, the ER places the report into its own medical "chart," and then the ER will treat or transfer the patient according to the findings of the radiologist's report. (R. at 365). The ER can adjust a treatment plan based on a radiologist's findings. (R. at 365).

B. Mr. [redacted] testified about SGT [redacted]'s injuries and how patients are transferred.

Mr. [redacted] testified that SGT [redacted] suffered a fracture around his head and face that "extended from the upper right part of the forehead down along the side of the nose through the orbital floor and into the axillary [sic] sinus"; SGT [redacted] also

suffered "three fractures to the C5 vertebrae, which is in the lower part of the neck on the left side, and also to the upper part of the C6 vertebrae." (R. at 378–79).

When discussing the victim's treatment, Mr. [redacted] said that SGT [redacted] had been "sent down to Vanderbilt and did indeed have the surgery on his neck to stabilize that injury"; Mr. [redacted] added that, based on his experience, SGT [redacted]'s surgery could not have been done at Tennova Hospital, because that hospital lacks the necessary "specialty" to conduct a more "delicate and invasive surgery." (R. at 379–80).

Mr. [redacted] added that, at Blanchfield, "when we get really bad trauma patients, you know, we basically just stabilize and get them to a better facility, usually Vanderbilt." (R. at 382). Blanchfield has a trauma designation of level three, but Vanderbilt Hospital has a designation of level one; and Vanderbilt Hospital sees a higher number of trauma patients than Blanchfield does. (R. at 382–83).

C. Mr. [redacted] testified about Prosecution Exhibit 1 for identification.

During testimony, Mr. [redacted] also reviewed the second and third pages of Prosecution Exhibit 1 for identification, which were medical records for SGT [redacted] (R. at 366; Pros. Ex. 1 for ID, pp. 2–3). Mr. [redacted] identified the two pages as being Tennova Hospital's CT scan of "the head" and CT scan of "the cervical spine." (R. at 366). The two pages had been made by a radiologist. (R. at 366). Mr. [redacted] stated that these two pages would be something he would use to help create a

treatment plan for an ER patient; and it is standard practice to have such records for the treatment of an ER trauma patient. (R. at 366–67).

The first page of Prosecution Exhibit 1 for identification also included a declaration from a medical-records custodian from the Center for Health Information Management Department ("Department") at VUMC; she was authorized to certify records as authentic. (Pros. Ex. 1 for ID, p. 1). The custodian's declaration certified that the declaration's attached medical records were "records of VUMC for the individual named in the request"; that the records "were prepared by personnel employed by or affiliated with VUMC, and maintained in or provided to the [Department at VUMC] in the ordinary course of business"; that "these records were made at or near the time of the occurrence of the matter set forth in the records"; and that "the records were kept in the ordinary course of regularly conducted activity of healthcare, at or near the time of the act, condition, or event." (Pros. Ex. 1 for ID, p. 1).

D. Counsel at trial discussed Prosecution Exhibit 1 for identification.

When the prosecution moved to admit into evidence the second and third pages of Prosecution Exhibit 1 for identification, appellant objected based on hearsay and authentication.[7] (R. at 367; Appellant's Br. 13). Appellant objected

[7] At trial, appellant also objected based on the Best Evidence Rule—saying that every page of SGT [redacted]'s medical records should be admitted into evidence—but no longer presses this objection on appeal. (R. 374–75, 396; Appellant's Br. 13–18).

based on "authentication" because the two disputed pages were Tennova Hospital records that were "scanned into a Vanderbilt record," but the certifying custodian for these records was from VUMC. (R. at 369–70).

During a discussion in court, appellant agreed that these two disputed pages of medical records were created "at the hospital in Clarksville," i.e., Tennova Hospital; and he agreed that when SGT [redacted] was sent to VUMC, "the records created there at Vanderbilt incorporated the documents that were created in the Clarksville hospital [Tennova Hospital]." (R. at 370; Pros. Ex. 1 for ID, pp. 2–3).

The military judge noted that the custodian's declaration broadly covered those "affiliated" with VUMC; and the military judge said that VUMC and the Clarksville Hospital were "affiliated" because if the Clarksville Hospital cannot handle certain patients, "they [Clarksville Hospital] send them [the patients] on to Vanderbilt because that is the nearest higher trauma hospital." (R. at 371). The military judge also explained, "It is in the ordinary course of business when someone arrives in an emergency room or in an ICU or a higher-level trauma area that they bring with him not only the patient, but they bring with him all of the medical documentation that has been created thus far."[8] (R. at 371). The military judge then overruled appellant's objections. (R. at 374, 376).

[8] Of note, in an attachment to appellant's pretrial motion to dismiss, there is an MRI report "performed" by Vanderbilt Hospital, signed on 1 January 2021; and this MRI report shows that Vanderbilt Hospital used "outside" CT scans of the

But when Prosecution Exhibit 1 for identification was about to be admitted, trial defense counsel noted that it was "only certain pages of [Prosecution Exhibit 1 for identification] that were being moved." (R. at 377–78). The prosecution then later moved to admit only the second and third pages of Prosecution Exhibit 1 for identification but as a newly prepared Prosecution Exhibit 7. (R. at 395–96; Pros. Ex. 1 for ID, pp. 2–3; Pros. Ex. 7). Trial defense counsel objected to Prosecution Exhibit 7 based on hearsay and authentication, and said, "Your Honor, defense just renews its objection due to authentication for the record"; counsel did not object based on the absence of the custodian's declaration from Prosecution Exhibit 7. (R. at 370, 396). The military judge overruled the objections and admitted Prosecution Exhibit 7. (R. at 396).

The military judge also made clear that he was not taking any judicial notice in regard to Prosecution Exhibit 1 for identification; the military judge noted that Mr. [redacted] had already testified about the referral of patients to hospitals. (R. at 392).

E. Mr. [redacted] testified about potential causes of injury, and appellant's counsel put forth potential causes of injury during opening statement and closing argument.

During appellant's opening statement, trial defense counsel asked the panel to think about how SGT [redacted] received his injuries. (R. at 234–35). Counsel stated,

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"head and cervical spine dated 12/31/2020" as a "comparison." (App. Ex. III-A, bate-stamp GROCE00030). And Tennova Hospital's two CT scans of the victim's head and cervical spine contain an "exam date and time" of "12/31/2020." (Pros. Ex. 7).

"There has to be no doubt in your mind that the defendant . . . is the one who should be held liable for the injuries that the alleged victim had to in that night [sic]. And that he [the victim] is not somehow partially responsible, whether it be through Specialist Groce defending himself or an accident occurring that night." (R. at 234–35). Counsel also stated that "unfortunately, an accident occurred with no intent to injure one another severely or even at all." (R. at 234).

Later, Mr. [redacted] on cross-examination, conceded that the victim's injuries could possibly be consistent with walking up stairs and falling, falling down multiple flights of stairs, and "a lot of" other causes. (R. at 385–87).

During appellant's closing argument, counsel stated that the case was about "one night, two friends, and an accident." (R. at 440). Counsel also asked, "Were [SGT [redacted]'s] neck injuries due to him falling on the ground the first time? . . . Or were his injuries because he was carried by two drunk girls up three flights of stairs back to his apartment? Why did they move him even in the first place?" (R. at 442). Counsel noted that appellant "was upset that his friend was hurt." (R. at 443). Near the end of argument, he concluded, "There is reasonable doubt of how [SGT [redacted] was injured. There is reasonable doubt at what point [SGT [redacted] was injured. There is reasonable doubt of who may have accidentally injured [SGT [redacted] after the fight." (R. at 451).

Standard of Review

This court "reviews a military judge's decision to admit evidence for an abuse of discretion. A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020) (internal quotation marks omitted).

Law

A. Hearsay and authentication.

Military Rule of Evidence (Mil. R. Evid.) 803(6) provides a hearsay exception for any "record of an act, event, condition, opinion, or diagnosis" if

> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a . . . business, institution, association, profession, organization, occupation, or calling of any kind, whether or not conducted for profit;
> (C) making the record was a regular practice of that activity;
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Mil. R. Evid. 902(11) . . . ; and
> (E) the opponent does not show that the source of information or the method or circumstance of preparation indicate a lack of trustworthiness. Records of regularly conducted activities include . . . physical examination papers[.]

In general, to satisfy the requirement of "authenticating or identifying" an item of evidence, the proponent "must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Mil. R. Evid. 901(a). And Mil. R. Evid. 902(11) allows for the self-authentication of the "original or a copy of a domestic record that meets the requirements of Mil. R. Evid. 803(6)(A)-(C), as shown by a certification of the custodian."

B. Forfeiture.

Forfeiture is the failure to make the timely assertion of a right, and courts review "forfeited issues for plain error." *United States v. Rich*, 79 M.J. 472, 475–76 (C.A.A.F. 2020) (internal quotation marks omitted).

C. Prejudice.

Article 59(a), UCMJ, provides that the "finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859(a) (2018). "For nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings. In conducting the prejudice analysis, this Court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (internal quotation marks omitted).

Argument

A. Prosecution Exhibit 7 was properly admitted because it was part of a self-authenticating record, and it fell under a hearsay exception.

Prosecution Exhibit 7 was admissible because it was part of a larger record that had been self-authenticated under Mil. R. Evid. 902(11), and it fell under Mil. R. Evid. 803(6)'s hearsay exception.

1. Authentication.

Prosecution Exhibit 7 comes from Prosecution Exhibit 1 for identification, which had been authenticated by a custodian's declaration that met the requirements of Mil. R. Evid. 803(6)(A)-(C). (Pros. Ex. 1 for ID, p. 1). In addition, the expert witness, Mr. [redacted] who had worked at Tennova Hospital, testified that the second and third pages of Prosecution Exhibit 1 for identification (i.e., Prosecution Exhibit 7) were Tennova Hospital's CT scans that had been made by a radiologist. (R. at 366). Because all this information could "support a finding" that Prosecution Exhibit 7 comprises the medical records of SGT [redacted] the military judge did not abuse his discretion in finding that the exhibit had been properly authenticated. Mil. R. Evid. 901(a), 902(11).

On appeal, appellant argues that the custodian's declaration should have also been admitted into evidence as part of Prosecution Exhibit 7. (Appellant's Br. 17). But the military judge had already examined the custodian's declaration when he analyzed the admissibility of Prosecution Exhibit 1 for identification. (R. at 369–

71). And because no rule or authority required the military judge to have the panel review Prosecution Exhibit 7 alongside the custodian's declaration, the military judge acted within his discretion when declining to admit the custodian's declaration. *See*, *e.g.*, *United States v. Qualls*, 613 Fed. Appx. 25, 28 (2d Cir. 2015) ("The district court denied the request, holding that the certification executed by an IG Markets employee was sufficient to authenticate the records under 18 U.S.C. § 3505. At trial, the certification was not offered into evidence, nor was it described for or viewed by the jury." (citation omitted)).

Furthermore, after argument about Prosecution Exhibit 1 for identification, when the exhibit was about to be admitted, trial defense counsel interrupted and stated that it was "only certain pages of [Prosecution Exhibit 1 for identification] that were being moved." (R. at 377–78). And the military judge could have reasonably interpreted defense counsel's statement to mean this: if appellant could not keep out the entire exhibit, he at least wanted to keep out all the exhibit pages—including the custodian's declaration—other than the second and third pages. (R. at 377–78; Pros. Ex. 1 for ID). Because this interpretation of trial defense counsel's statement is a possible reasonable one, the military judge's admission of Prosecution Exhibit 7 fell within his range of discretion.

To be clear, when the military judge reviewed the authenticity of Prosecution Exhibit 7, he was doing so for purposes of ruling on admissibility

under Mil. R. Evid. 104(a), but the panel itself had to still decide whether Prosecution Exhibit 7 was authentic—after all, counsel could still have presented evidence questioning the authenticity of the admitted exhibit. As the U.S. Court of Appeals for the Armed Forces (CAAF) has said, "Generally speaking, the proponent of a proffered item of evidence needs only to make a prima facie showing that the item is what the proponent claims it to be." *United States v. Lubich*, 72 M.J. 170, 174 (C.A.A.F. 2013) (internal quotation marks and ellipsis dots omitted). Once the proponent has made the prima facie showing, "the trial court should admit the item, assuming it meets the other prerequisites to admissibility . . . in spite of any issues the opponent has raised about flaws in the authentication. Such flaws go to the weight of the evidence instead of its admissibility." *Id.* Here, the military judge's "admission of the exhibit means only that the fact finder may consider the item of evidence during its deliberations. The fact finder remains free to disregard the item if the trial evidence overcomes the preliminary showing of authenticity." *Id.*

Furthermore, at trial, appellant did not object to this particular authentication issue—that Prosecution Exhibit 7 should include the custodian's declaration—and he has thus forfeited the issue. (R. at 367–70, 374, 396).

2. Hearsay.

The military judge also properly admitted Prosecution Exhibit 7 because it fell under the hearsay exception of Mil. R. Evid. 803(6). The requirements of Mil. R. Evid. 803(6)(A)-(C) were satisfied, and appellant failed to show any untrustworthiness about the exhibit. (Pros. Ex. 1 for ID, p. 1; R. at 366). And the custodian's declaration showed that Tennova Hospital and VUMC were affiliated in furtherance of the same healthcare activity. (Pros. Ex. 1 for ID, p. 1; R. at 371).

Even if Tennova Hospital were an unaffiliated, outside third party, the Tennova Hospital records in Prosecution Exhibit 7 can still be admitted as part of VUMC's own business records, because "'a document prepared by a third party is properly admitted as part of a second business entity's records if the second business integrated the document into its records and relied upon it in the ordinary course of its business.'" *United States v. Foerster*, 65 M.J. 120, 125 (C.A.A.F. 2007) (quoting *United States v. Grant*, 56 M.J. 410, 414 (C.A.A.F. 2002)). Admission of a third-party record requires the following: (1) the record must be procured by the second entity in the normal course of business; (2) the second entity must show that it relied on the record; and (3) there must be other circumstances indicating the trustworthiness of the document. *Id.*

These three elements are met because (1) these Tennova Hospital records were "maintained in or provided" to VUMC's Center for Health Information

Management Department "in the ordinary course of business" (Pros. Ex. 1 for ID, p. 1; R. at 369–71); (2) VUMC relied on Tennova Hospital's records in treating SGT [redacted] by, for example, using them for "comparison" (App. Ex. III-A, bate-stamp GROCE00030; R. at 364–67, 369–71, 379); and (3) these records were made by a radiologist conducting important healthcare activities for an actual patient at Tennova Hospital and are thus trustworthy (Pros. Ex. 7; R. at 366–67, 369–71). Indeed, at trial, appellant agreed that when SGT [redacted] went to Vanderbilt Hospital, "the records created there at Vanderbilt incorporated the documents that were created in the Clarksville hospital [Tennova Hospital]." (R. at 370; Pros. Ex. 7).

B. Even if Prosecution Exhibit 7 were erroneously admitted into evidence, appellant's substantial rights were not materially prejudiced.

Because Prosecution Exhibit 7 described SGT [redacted]'s injuries—not their cause—even if the military judge abused his discretion by admitting Prosecution Exhibit 7, appellant's substantial rights were not materially prejudiced, because appellant's focus at trial was to cast doubt on the cause of the injuries—not to cast doubt on the very existence of the injuries. (R. at 234–35, 385–87, 442–43, 451).

As to the first factor in *Kohlbek*, 78 M.J. at 334, even without Prosecution Exhibit 7, the prosecution had introduced strong evidence—including detailed descriptions of the severity of the attack and of SGT [redacted]'s injuries—that would lead a fact finder to conclude that SGT [redacted] had suffered fractures to the spine and skull. For example, Mrs. [redacted] testified that SGT [redacted] had "swelling and bleeding in his

brain," a fracture along "the back of his spine," and a neck that "was broke." (R. at 251, 275). SGT [redacted] said that he suffered a cervical spine fracture, neck injuries, and a head injury; and he said that he had a plate in his neck. (R. at 325, 328, 330). Mr. [redacted] also testified that SGT [redacted] suffered a fracture around his head and face along with multiple fractures to his vertebrae. (R. at 378–79). In a detailed description of the attack, SGT [redacted] said appellant "picked him [SGT [redacted]] up and then slammed him" into the ground "headfirst." (R. at 290–91).

As to the second factor in *Kohlbek*, 78 M.J. at 334, during opening statement, cross-examination, and closing argument, the defense focused on casting doubt on the cause of SGT [redacted]'s injuries and did not dispute the existence of his injuries, so the defense's case disputing the existence of injuries was essentially nonexistent. (R. at 234–35, 385–87, 442–43, 451).

As to the third factor in *Kohlbek*, 78 M.J. at 334, Prosecution Exhibit 7 only showed that SGT [redacted] was injured; it did not show the cause; so Prosecution Exhibit 7 was reiterative of the other evidence showing the existence of SGT [redacted]'s injuries. (R. at 251, 275, 325, 328, 330).

As to the fourth factor in *Kohlbek*, 78 M.J. at 334, even if Prosecution Exhibit 7 had reliable and trustworthy qualities, it proved a reiterative point that was already made through other witnesses and that the defense did not seriously dispute. (R. at 234–35, 385–87, 442–43, 451).

Assignment of Error III

WHETHER APPELLANT'S CONVICTION FOR ASSAULT CONSUMMATED BY BATTERY IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

This court conducts a de novo review of legal and factual sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

A. Factual sufficiency.

To test factual sufficiency under Article 66, UCMJ, 10 U.S.C. § 866 (2018), courts decide "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (cleaned up). When conducting this review, this court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *Washington*, 57 M.J. at 399.

B. Legal sufficiency.

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (internal quotation marks omitted). The standard for legal sufficiency involves a very low threshold to sustain a conviction. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019).

C. Assault consummated by battery.

Here, the elements for assault consummated by battery under Article 128, UCMJ, are the following: (1) that the accused did bodily harm to a certain person; (2) that the bodily harm was done unlawfully; and (3) that the bodily harm was done with force or violence. 10 U.S.C. § 928; Manual for Courts-Martial, United States (2019 ed.) [MCM], pt. IV, ¶77.b.(2). "Bodily harm" means "an offensive touching of another, however slight." MCM, pt. IV, ¶77.c.(1)(a). An act can be a battery even if there is no touching of a person: "It may be a battery to . . . cut another's clothes while the person is wearing them though without touching or intending to touch the person . . . ." MCM, pt. IV, ¶77.c.(3)(c).

Argument

A. The conviction for assault consummated by battery is factually sufficient because, among other things, appellant grabbed Officer [redacted] by the vest even after Officer [redacted] put a hand on appellant's chest and twice reminded appellant to maintain "arm's length distance."

Officer [redacted]'s testimony established that appellant's conduct met the three elements of assault consummated by battery. (R. at 316). First, appellant committed bodily harm (i.e., an offensive touching) when he grabbed Officer [redacted]

by the vest after Officer [redacted] put a hand on appellant's chest and twice reminded him to keep an "arm's length distance." (R. at 316). The offensiveness of appellant's touching is further evidenced by the fact that Officer [redacted] then commanded appellant to get his "hands off of me [Officer [redacted] but appellant failed to comply; and that another officer had to wrap his arms around appellant to help "get [appellant's] hands pried off" Officer [redacted] (R. at 316–17).

Second, appellant's grabbing of Officer [redacted] was unlawful because the grabbing occurred after Officer [redacted] reminded him twice to keep his distance and put a hand on appellant's chest to maintain officer safety. (R. at 316). Officer [redacted] did not consent to, welcome, or otherwise permit the grabbing. (R. at 316).

Third, appellant's grabbing of Officer [redacted] was done with force and violence because grabbing a police officer's vest—after being told to keep an arm's length of distance—is inherently a violent and forceful act; in addition, appellant kept holding onto Officer [redacted] even when commanded to stop.[9] (R. at 316–17).

Because the evidence establishes that appellant's conduct met the three elements of assault consummated by battery, the conviction should be upheld.

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[9] Appellant uses a definition of "offensive" that includes causing "displeasure, anger or resentment." (Appellant's Br. 21–22). But even if appellant's definition is correct, his grabbing of Officer [redacted] caused "displeasure," at the very least—and was thus offensive—because Officer [redacted] had previously twice told appellant to keep his distance. *See, e.g.*, *United States v. Sever*, 39 M.J. 1, 4 (C.M.A. 1994) (citing with approval the proposition that it "is a battery for a man to kiss a woman against her will").

B. Appellant's conviction is legally sufficient.

Because appellant's conviction is factually sufficient, it would certainly endure a legal-sufficiency review, which "involves a very low threshold to sustain a conviction," *King*, 78 M.J. at 221(internal quotation marks omitted), and which involves a review "in the light most favorable to the prosecution," *Robinson*, 77 M.J. at 297–98 (internal quotation marks omitted).

Conclusion

WHEREFORE, the government respectfully requests that this honorable court affirm the findings and sentence.

[redacted]

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CERTIFICATE OF SERVICE, U.S. v. GROCE (20230020)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] n the 15th day of January, 2024.

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