IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Ethan W. Tucker Seaman (E-3) U.S. Coast Guard, Appellant	13 October 2021 APPELLANT'S MOTION TO ATTACH MATERIALS TO THE RECORD OF TRIAL, FILED 05 JULY 2021 CGCMG 0380 DOCKET NO. 1472 ORDER

On 5 July 2021, Appellant moved to attach the following documents to the record of trial: the duplicate affidavit of Captain (CAPT) Stephen Adler; the duplicate affidavit of Commander (CDR) Erin Adler; the original affidavit of Mr. Jared Mark; and a copy of a ruling by the military judge in *United States v. Muentes*. On 17 September 2021, Appellant supplemented his motion with an affidavit from the military judge authenticating his ruling in *Muentes* and that the affidavits of CAPT and CDR Adler are the ones he considered in making his ruling. The Government opposes, asserting that attachment is impermissible under *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020). We disagree and partially grant the motion.

Appellant seeks to attach the materials on two issues: (1) whether CAPT Adler should have been disqualified from participating as staff judge advocate in Appellant's case; and (2) whether his continued participation created the appearance of unlawful command influence (UCI). Under long-standing precedents, Courts of Criminal Appeals (CCAs) are permitted—or even required—to consider newly-raised evidence of collateral issues such as these, irrespective of whether they were previously raised in the record.

The landmark case on appellate fact-finding, *United States v. DuBay*, demonstrates that UCI has long been one such issue. There, the court noted:

> In the nature of things, command control is *scarcely ever apparent on the face of the record*, and, where the facts are in dispute, appellate bodies in the past have had to resort to the unsatisfactory alternative of settling the issue on the basis of ex parte affidavits, amidst a barrage of claims and counterclaims.

37 C.M.R. 411, 413 (C.M.A. 1967) (emphasis added). It therefore directed the now-familiar process for ordering a hearing to engage in appellate fact-finding. *Id.* This process is now codified in Article 66(f), Uniform Code of Military Justice (UCMJ), and Rule for Courts-Martial 810(f).

DuBay's use of a hearing for appellate fact-finding may have been an innovation, but two of its citations reveal that considering evidence of UCI raised for the first time on appeal was not. In *United States v. Ferguson*, a two-judge majority held that "on a proper showing, a board of review has the power to ascertain the existence of such control, *even though no suggestion of it appears in the record of trial itself*." 17 C.M.R. 68, 82 (C.M.A. 1954) (emphasis added). In *DuBay*'s second cited case, *United States v. Shepherd*, Judge Latimer (the lone dissenter in *Ferguson*) grudgingly accepted that state of the law. 25 C.M.R. 352, 358 (C.M.A. 1958) (concurring in the result after noting that the court had "specifically held that pretrial influence by a commander could be raised for the first time on appeal.").

Cases since *Ferguson*, *Shepherd*, and *DuBay* are replete with examples of appellate consideration of evidence of UCI raised for the first time on appeal. *See, e.g., United States v. Accordino*, 20 M.J. 102, 103 (C.M.A. 1985); *United States v. Hamilton*, 41 M.J. 32, 34 (C.M.A. 1994); *United States v. Ayala*, 43 M.J. 296 (C.A.A.F. 1995); *United States v. Drayton*, 45 M.J. 180, 181 (C.A.A.F. 1996); *United States v. Bartley*, 47 M.J. 182, 186 (C.A.A.F. 1997); *United States v. Baldwin*, 54 M.J. 308, 310 (C.A.A.F. 2001). *See also United States v. Hutchins*, 72 M.J. 294, 312 (C.A.A.F. 2013) (Baker, J., dissenting) ("The framework for addressing unlawful command influence before this Court reflects the seriousness with which the issue is considered by Congress, the President, the military, and this Court. First, the framework is intended to promote the adjudication of the facts rather than a reliance on concepts of deference and waiver. Thus, this Court reviews allegations of unlawful command influence de novo. Furthermore, '[w]e have never held that an issue of unlawful command influence arising during trial may be waived by a failure to object or call the matter to the trial judge's attention.'") (citations omitted).

Our superior court has also allowed, or even required, consideration of extra-record evidence of disqualification without regard to whether the issue was previously raised in the record. *See, e.g., United States v. Lynn*, 54 M.J. 202, 203 (C.A.A.F. 2000) (considering extra-record evidence on whether an appellate judge of the lower court should have recused himself); *United States v. Edwards*, 45 M.J. 114, 114–15 (C.A.A.F. 1996) (reversing the CCA because of its refusal to reconsider its decision on the basis of an affidavit alleging, for the first time, that the legal officer's level of involvement deprived Edwards of his right to "a thoroughly fair and impartial review"); *United States v. Hardy*, 29 C.M.R. 337, 338 (C.M.A. 1960) (reversing the Army Board of Review because of its refusal to entertain the appellate defense counsel's motion to consider evidence supporting a claim, raised for the first time on appeal, that the post-trial review, while signed only by the staff judge advocate, was actually prepared by a disqualified

judge advocate; because "an accused is entitled to a fair and impartial review" and Hardy had "presented more than a naked charge of unfairness," the board of review was required to consider the evidence).

Jessie, in contrast, was about a complaint concerning post-conviction prison conditions raised for the first time on appeal; the court's exploration of its own precedents was thus limited to "cases addressing the scope of the CCAs' *review of sentences* under Article 66(c), UCMJ." 79 M.J. at 440, 443 (emphasis added). On that topic, it found "three distinct lines of precedent." *Id.* at 440. The first established the general rule that when reviewing the sentence, CCAs must restrict appellate review to the "entire record" before it. *Id*. at 441 (quoting Article 66(c), UCMJ). The other two established exceptions to this general rule: a CCA may consider extra-record materials to review the sentence (1) when deciding "issues that are raised by materials in the record but that are not fully resolvable by those materials"; and (2) when deciding "a limited class of issues even though those issues are not raised by anything in the record." *Id*. at 440.

Addressing these lines of precedent on what a CCA may consider in its sentence review, the court was careful to explain it was reconciling, not overruling, past precedents. *Jessie*, 79 M.J. at 444–45. It noted that the leading case for the first line of precedent, *United States v. Fagnan*, 30 C.M.R. 192, 194 (C.M.R. 1961), adhered to a strict interpretation of Article 66(c) and "limited the CCAs to considering only materials included in the 'entire record' when reviewing sentences." *Jessie*, 79 M.J. at 441. In *Fagnan*, the appellant had asked the Army Board of Review to consider, in its sentence appropriateness review, a post-trial psychiatric report and a letter concerning Fagnan's conduct during post-trial confinement. The board refused. 30 C.M.R.at 193. The Court of Military Appeals affirmed, holding "that a board of review is limited in its consideration of information relating to the appropriateness of sentence to matters included in 'the entire record.'" Thus, "the board here properly refused to consider, on the question of the appropriateness of accused's sentence, the psychiatric report and letter regarding his good conduct in post-trial confinement." *Id.* at 195.

Notably, the same three judges who decided *Fagnan* had also, three years earlier, agreed that the court may consider fresh evidence of UCI, even when the issue was not raised in the record. *Shepherd*, 25 C.M.R. at 358. Yet *Fagnan* does not even mention *Shepherd* and the precedent supporting it, let alone overturn it. The reason for this is simple: whether a CCA can consider extra-record evidence of post-conviction prison conditions to assess sentence appropriateness is distinct from whether it can consider extra-record evidence to assess a claim implicating the fairness and legitimacy of the proceedings themselves, such as UCI.

As *Jessie* noted, cases after *Fagnan* allowed extra-record evidence of prison conditions in the context of previously-unraised Article 55, UCMJ, or Eighth Amendment claims. *Jessie*, 79 M.J. at 443 (citing *United States v. Pena*, 64 M.J. 259

(C.A.A.F. 2007); *United States v. Erby*, 54 M.J. 476 (C.A.A.F. 2001)). These cases were like *Fagnan* in that they involved post-trial conditions unrelated to the fairness or legitimacy of the proceedings themselves; the court thus considered them inconsistent with *Fagnan*. The court, however, did not overturn them. It instead deemed them exceptions to the general rule on what may be considered in sentence review, but declined to extend them beyond their Article 55/Eighth Amendment context to other types of claims pertaining to prison conditions. *Jessie*, 79 M.J. at 444–45.

But just as *Fagnan* did not impeach prior precedents allowing extra-record evidence for issues such as UCI, nor did *Jessie*. Precedents such as *DuBay*, *Hardy*, and many others remain undisturbed, and under them, we may consider the proffered evidence on the issues of UCI and disqualification.

With this backdrop, we conclude that the affidavits of CAPT Adler, CDR Adler, and Mr. Mark are relevant to the issues of whether CAPT Adler's relationship with CDR Adler disqualified him from acting as staff judge advocate and whether his participation in the case created the appearance of UCI. The military judge's ruling in an unrelated case, on the other hand, is not evidence and is not relevant for our appellate consideration.

Accordingly, on consideration of Appellant's Motion to Attach Materials to the Record of Trial, it is, by the Court, this 13th day of October, 2021,

ORDERED:

That Appellant's Motion to Attach is hereby granted as to the affidavits of CAPT Adler, CDR Adler, and Mr. Mark and denied as to the ruling in *United States v. Muentes*.

For the Court,

VALDES.SARAH.P.1503854704 Digitally signed by VALDES.SARAH.P.1503854704 Date: 2021.10.13 11:00:02 -04'00'

Sarah P. Valdes
Clerk of the Court

Copy: Office of Military Justice
Appellate Government Counsel
Appellate Defense Counsel