IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Michael E. SULLIVAN Captain (O-6), United States Coast Guard, Appellant.	APPELLANT'S REPLY BRIEF USCA Dkt. No. 15-0186/CG Crim. App. No. 0001-69-13

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

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1

THE GOVERNMENT HAS NOT SHOWN THAT THE ARTICLE 25(D)(2) VIOLATION WAS HARMLESS

Instead of demonstrating that the convening authority's violation of Article 25(d)(2), UCMJ, was harmless, as it must in order to prevail, the government has offered a potpourri of arguments that are of no merit.

The parties are in agreement that this Court's review of issues arising under Article 25(d)(2), UCMJ is de novo, but the government also cites United States v. Gooch, 69 M.J. 353, 358 (C.A.A.F. 2011), for the proposition that the military judge's findings of fact are "entitled to deference unless they are clearly erroneous." (The cite could as well be to United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004).) More recently, however, the Court has indicated that issues of harmlessness are subject to de novo review. United States v. Norman, 74 M.J. ___, ___, 2015 WL 1936836 (C.A.A.F. Apr. 29, 2015) (No. 14-0524/MC) (quoting United States v. Hall, 66 M.J. 53, 54 (C.A.A.F. 2008)).

The government seems to take the position (at 8) that if you add up the number of years of active duty served by the members, that would moot the fact that the best qualified officers

– the admirals – had been excluded.[1] Similarly, it points to the numerous advanced degrees held by the captains who sat on Captain Sullivan's court-martial, although it fails to note the advanced degrees held by those flag officers for whom such information is in the record. See J.A. 434 (M.B.A.), 437 (two M.A.'s).[2] The problem, however, is not one of data; it is of the concept: in essence, it seems that the government's understanding is that if a panel en gros has advanced degrees and long experience, that suffices.

Accepting such an argument would gut this Court's precedents barring rank-based exclusions and render Article 25(d)(2) a hollow promise. In any event, it is beside the point because Article 25(d)(2) imposes a "best qualified" standard that focuses on the individual members ("such members") rather than on the panel as a whole. The "best qualified" criterion is applied on a retail basis, not wholesale.

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[1] The government stresses (at 17) the fact that one member of the panel had more active duty than some admirals. On inspection, however, that was so only because that captain had seven years' enlisted service. (J.A. at 294.) The Register of Officers makes it clear that the Coast Guard's flag officers typically had more commissioned service than did the captains who sat on this court-martial. (J.A. at 419.)

[2] The summary that appears at J.A. at 430 incorrectly states that RDML Paul F. Zukunft's highest degree was his B.S. from the U.S. Coast Guard Academy.

We do not wish to flay a dead horse, but surely "the thirteenth stroke of the clock"[3] in the government's argument is its implication that captains are more likely than their superiors to be blessed with the requisite judicial temperament. This remarkable notion surfaces on page 15, where the government observes that "some flag officers are quick to make decisive judgments, often before all the facts and circumstances are available." The government's theory seems to be that there is no harm done in excluding flag officers since some of them may be headstrong and impetuous.

On the same page, the government insists that if Captain Sullivan's submission that flag officers are by definition the best qualified, "they, and only they, should serve on every court-martial panel, regardless of [the] rank of the accused." Passing over the fact that this government argument is really a claim that there was no error in the exclusion (a matter the government failed to have the Judge Advocate General certify), as opposed to whether the error was harmless (the first of the two issues on which the Court granted review), it materially misstates Captain Sullivan's position. We do not suggest that flag officers must sit on every court-martial or even every

[3] See Alan P. Herbert, Uncommon Law 28 (6th ed. 1948) (referring to "thirteenth stroke of a crazy clock, which not only is itself discredited but casts a shade of doubt over all previous assertions").

court-martial of an O-6. Rather, as our opening brief made clear,[4] those officers cannot be excluded off the top, as the convening authority did here by not even making inquiries into the actual availability of any admirals. The statute requires convening authorities to detail those who are "best qualified," not simply those who, to use the government's shifting terminology, are "fully qualified" (at 7), "competent" (at 16), or "very well qualified to serve" (at 18).[5]

Flag officers must be in the mix to satisfy the statute and this Court's settled jurisprudence. All that is required is the modest time and effort needed to check on individual officers' actual availability. If this creates an insuperable practical problem for the government (which we do not for an instant believe), it should seek legislation.

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[4] On line 12 of the first full paragraph of page 15 of our opening brief, the words "something other than" should have appeared between "is" and "an improper delegation." We regret the oversight. It is apparent from the government's brief that they correctly understood our position despite the omission.

[5] The panel gets better and better as one turns the pages of the government's brief. By page 25, it has become "the best possible panel" whose members "carried out their duties with honor and integrity." (No record reference follows this assertion.) The government's rhetoric does seem to have gotten carried away in the end, referring (also at 25) to "the overwhelming evidence of guilt." If the evidence was so overwhelming, how come the members had to deliberate so long? As we have previously explained, every step in this trial was hotly contested . . . with the sole exception that the parties were of one mind that the judge should have recused himself.

Finally, the government seems to be throwing itself on the mercy of the Court by pointing out (at 12 & n.4) that Gooch had not been decided when this case went to trial. The implication both there and at pp. 13 and 22-23 is that there must be some kind of "good faith exception" to Gooch (or the dictates of the statute). But there is no such exception. Nor does the timing make any difference: the case is not here on collateral review; it is here on direct appellate review. Under Griffith v. Kentucky, 479 U.S. 314 (1987), and United States v. Mullins, 69 M.J. 113, 116 (C.A.A.F. 2010), that means Captain Sullivan is entitled to the benefit of the law as it currently stands -- including Gooch.

2

JUDGE FELICETTI ABUSED HIS DISCRETION BY FAILING TO RECUSE HIMSELF AND THE GOVERNMENT HAS NOT SHOWN THAT THAT ABUSE OF DISCRETION WAS HARMLESS

Our opening brief recited the fact that both parties to this hotly contested case thought the judge had a duty to recuse himself. Throwing its engines into reverse, the government now claims (at 26-32) that there was no abuse of discretion in his refusal to do so, but that if there was, it was harmless (at 33-35). We disagree on both counts.

The military judge's own conduct evinced recognition that the case should indeed be tried by a judge from some other armed force. There is no need to belabor the uniquely tight-knit Coast

Guard officer corps (of which he was a part), so many of whose members attended the same college, and seem to know one another's class year by heart. Worse yet, the evidence of clubbiness is all over the record, which is larded with first-name communications between "Tom" and "Don," (J.A. at 297), "Andy" and "Don," (J.A. at 452), "Don" and "Dan," (J.A. at 453), "Kip" and "Don," (J.A. at 306), "Mike" and "Don," (J.A. at 321), and "Pat" and "Don." (J.A. at 330, 332.) When there seemed to be an improper effort by the head of the Coast Guard Investigative Service to communicate ex parte with the judge, it was "Gary" and "Jack." (J.A. at 392, 401.) No wonder the military judge thought an objective outsider might find disturbing the web of relationships going back years and years. (J.A. at 280.)

Judge Felicetti was absolutely right to feel impelled to take corrective action by getting another judge who would be free from all these entanglements (not least of which was the fact that he and Captain Sullivan were both eligible for promotion to Rear Admiral (Lower Half), although Judge Felicetti worked overtime to sidestep that by pointing out that Captain Sullivan was effectively "flagged" as a result of the charges and he himself, as a judge advocate, was unlikely to be selected in any event. (J.A. at 383 & n.4.)

Still, the judge took steps to secure a replacement. It is not surprising that the government would seek to write this off

as having been done in an abundance of caution. If there was no basis for recusal, he had a duty to sit; and if there was, he had a duty to recuse. Judge Felicetti may have been ambivalent, but the way he responded to his own ambivalence was an abuse of discretion. He attached conditions that were plainly unlawful, as explained in our opening brief at 24 n.6. See generally (J.A. at 120) (substitute judge would have to be a senior O-6 available on the established trial date). The government's brief is silent on this critical dimension.

As a matter of candor to the forum, we invite the Court's attention to the fact that the defense accepted the military judge's "offer." (J.A. at 121); see also (J.A. at 124.) That acceptance was not a waiver of the defense's right to object to unlawful conditions, but if it is, the government has itself "waived the waiver" by failing to invoke it at any time. In any event, the "offer" was illusory because it did not bind the judge to do anything other than make inquiries. Moreover, the conditions imposed by the judge were blatantly illegal. The Court should make clear that recusal is too serious a matter from the standpoint of public confidence in the administration of justice to be permitted to become a subject of negotiation. It should also make clear that once they give up a case, trial judges may not continue to rule it from the grave – and that trial dates must not be treated as so sacrosanct that all else –

including the powers of successor judges -- must yield to them. See (J.A. at 120.)

That leaves the question of harmlessness, as to which the government has the burden of proof. Norman, supra. The factors the government cites from United States v. McIlwain, 66 M.J. 312, 315 (C.A.A.F. 2008), contrary to the government's claim, do not get it where it needs to be. Thus, our Supplement identified a variety of issues as to which we believe the judge committed error, including but not limited to his failure to police compliance with Article 25(d)(2) and to require the government's outside testing laboratory to disclose its current standard operating procedures as well as his allowing a narcotics expert to provide general profile evidence. See generally Supplement to Petition for Grant of Review. He also refused to afford the defense additional peremptory challenges. (J.A. at 244.)

The second factor concerns impacts on other cases. It weighs in Captain Sullivan's favor. It is rare indeed for both sides in a criminal prosecution to seek the recusal of a judge. The situation calls for a clear denunciation by the Court so there will be no question if and when comparable circumstances arise in the future. Moreover, since a new trial is required in any event as a result of the first granted issue, and since Judge Felicetti is once again sitting as a general court-martial

judge (albeit not the only one), the danger of a reprise cannot be dismissed.

Finally, public confidence in the administration of justice precludes a finding of harmlessness. The Coast Guard has been around since 1790 in one form or another; there is no sign of its withering away. Its personnel happily do not generate many disciplinary issues, but neither is it a crime-free zone. See generally FY14 Annual Report of the Code Committee on Military Justice 136 (2015). Members of this small armed force have a right to expect that those who preside over its infrequent courts-martial will not be enmeshed in a web of relationships as longstanding, variegated and pervasive as those apparent on this record. Judge Felicetti was not imagining things when he commented that an observer might wonder. (J.A. at 280.) He should have been more decisive instead of trying to have it both ways. This Court should seize the opportunity to underscore the importance of avoiding situations that threaten public confidence in the administration of justice in the armed forces.

Conclusion

For the foregoing reasons and those previously stated, the decision of the Court of Criminal Appeals should be reversed.

Respectfully submitted,

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Certificate of Filing and Service

I certify that the foregoing Reply Brief was electronically filed with the Court and served on Appellate Government Counsel on 6 May 2015.

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Certificate of Compliance

This Reply Brief complies with the page limitations of Rule 24(c) because it contains less than 7000 words. Using Microsoft Word version 2010 with 12-point-Courier-New font, it contains 2,621 words.

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