IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee,

v.

RYAN G. URIBE
Staff Sergeant (E-5),
United States Air Force,
Appellant.

USCA Dkt. No. 20-0267/AF

Crim. App. Dkt. No. 39559

REPLY BRIEF

AMANDA E. DERMADY, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
amanda.dermady.1@us.af.mil
(240) 612-4770
C.A.A.F. Bar No. 36476

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

1. Judge Rosenow and Maj BJ were close personal friends.

The Government argues that Judge Rosenow and Maj BJ's relationship was not close enough to "create an automatic appearance of impartiality." (Gov't Br. at 10.) The Government concedes that Maj BJ's attendance at Judge Rosenow's bachelor party and wedding "creates a closer call." (Gov't Br. at 11.) However, they assert that a significant amount of time had passed between these two events – held in April and June 2015 – and SSgt Uribe's court-martial – held in March 2018 – minimizing the concern for impartiality. (Gov't Br. at 11; JA at 33.) Additionally, the Government argues that Judge Rosenow and Maj BJ's contact was "not frequent enough to call into question the military judge's impartiality," as the two only socialized once every three to four months over the 18-month period leading up to SSgt Uribe's court-martial.[1] (Gov't Br. at 12.) But the Government's temporal argument misses the mark as it is not the frequency of their contact that matters; rather, it is the nature of their relationship. *See, e.g. United States v. Sullivan*, 74

[1] Despite the Government's qualification of this contact as "infrequent", given the nature of Judge Rosenow and Maj BJ's jobs as a military judge and senior prosecutor, which requires that they travel frequently, it is significant that they still made time to see each other once every three to four months.

M.J. 448 (C.A.A.F. 2015); *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001); *United States v. Berman*, 28 M.J. 615 (C.A.A.F. 1989).

For instance, family members or close friends may go months or years without seeing each other, or only see each other for holidays or special occasions. However, no one would question the significance of those events or find that the infrequency of their visits affects the closeness of their relationship. Despite not seeing each other, their relationship remains intact including their personal feelings towards one another (i.e. love, friendship, fondness, respect, etc.).

As applied here, Judge Rosenow and Maj BJ had been friends since mid-2014. (JA at 33.) They were such close friends that Maj BJ was involved in Judge Rosenow's major life milestones including his bachelor party, wedding, and the birth of his children. (*Id.*) Once Judge Rosenow became a military judge, he maintained his friendship with Maj BJ and the two continued to personally socialize outside of work. (*Id.*) Regardless of the frequency of their interactions, Judge Rosenow and Maj BJ remained close personal friends at the time of this court-martial. Based on the nature of this relationship, Judge Rosenow should have recused himself; a fact that even Maj BJ recognized at trial.

Next, the Government asserts that the contact Judge Rosenow had with Maj BJ was a consequence of his service in the military and thus does not show that his impartiality might reasonably be questioned. (Gov't Br. at 14.) However, Judge Rosenow and Maj BJ's relationship is not the typical relationship this Court would expect to find between two Air Force judge advocates based solely on a shared military experience. Instead, Maj BJ attended Judge Rosenow's bachelor party and wedding – two exclusive events customarily celebrated with close friends and loved ones. Tellingly, there is also no evidence that any *other* judge advocates were invited to these events outside of Maj BJ. (JA at 33.)

Judge Rosenow and Maj BJ's socialization with one another was also not the result of a shared military mission (e.g., being on temporary duty together, working outside of regular duty hours, etc.). Nor did they limit their socializing to group settings. (*Id.*) Instead, Judge Rosenow and Maj BJ actively sought each other out to spend time together one-on-one and with their significant others, outside of the presence of other judge advocates. (*Id.*) Thus, the type of contact Judge Rosenow had with Maj BJ demonstrates that they were close personal friends outside of their military status.

2. Maj BJ was a party to this court-martial and actual bias is not required for recusal.

The Government argues that Maj BJ was not a party to this case and that recusal is not required unless SSgt Uribe can show bias for or against a party. (Gov't Br. at 16.) This is incorrect for at least two reasons. First, under R.C.M. 103(16)(B), Maj BJ was a party to this court-martial as he served as trial counsel representing the United States. Second, although the Government asserts that nothing in the record shows that Judge Rosenow was actually biased in favor of Maj BJ, this is not the standard. (Gov't Br. at 16-17.) The law requires a military judge to recuse himself based on the *appearance* of bias if "a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." *Sullivan*, 74 M.J. at 453. One of the main purposes of the recusal rule is to promote public confidence in the integrity of the judicial process. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-60 (1988). "The actions and deliberations of the court must not only be untainted, but must also avoid the appearance of impurity." *United States v. Kincheloe*, 14 M.J. 40, 48 (C.M.A. 1982) (internal citation omitted). "Recusal in the event of a conflict of interest is a critical element in assuring public confidence in

the fairness of the administration of justice." *Walker v. United States*, 60 M.J. 354, 357 (C.A.A.F. 2004). There is no requirement for SSgt Uribe to show that Judge Rosenow was actually biased. Rather, Judge Rosenow should have recused himself because of the appearance of bias due to his close personal friendship with Maj BJ.

Finally, the Government cites *Cheney v. United States Dist. Court*, 51 U.S. 913, 916 (2004), to argue that "while friendship is a ground for recusal of a [judge] where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue." (Gov't Br. at 16.) (emphasis in original). *Cheney* has no bearing on this case. The actual citation is, "while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue." *Cheney*, 541 U.S. at 916 (emphasis added). In *Cheney*, the Supreme Court distinguished recusal of its Justices from recusal of judges on a Court of Appeals, as a Justice's place is not simply taken by another Justice. *Id.* at 915-16. Further, the Supreme Court stated that a rule requiring Justices to recuse themselves each time official actions of friends were at

issue would be utterly disabling due to their typical personal relationships with the President and other officers of the Executive. *Id.* This case is similarly distinguishable as the standard for a military judge's recusal is different than that of a Supreme Court Justice.

Instead, the applicable standard is R.C.M. 902(a), which requires a military judge to disqualify himself if his "impartiality might reasonably be questioned." Because Judge Rosenow's close personal friendship with a party to this court-martial, Maj BJ, caused his impartiality to be reasonably questioned, he should have recused himself. And unlike *Cheney*, Judge Rosenow could have been replaced by another military judge without disabling the military justice process.

3. Defense Counsel's failure to question Judge Rosenow is a red herring.

The Government erroneously holds the fact that SSgt Uribe's defense counsel did not question Judge Rosenow against him. (Gov't Br. at 13, 19, 22, 31.) The Government argues that "the lack of voir dire further indicated Appellant's lack of concern that there would be any bias inherent in his court-martial as a result of the military judge's relationship with Major BJ." (Gov't Br. at 22.) This is a red herring.

SSgt Uribe was not required to question the military judge under R.C.M. 902(d)(2). Instead, his defense counsel properly identified the issue, requested an R.C.M. 802 conference to express his concerns to Judge Rosenow, and filed a motion to recuse Judge Rosenow, which the Government *did not oppose*. (JA at 29-48, 51-52.) The decision to question or not question Judge Rosenow is irrelevant to this Court's analysis of the issue. Despite the Government's assertion that SSgt Uribe "declined to voir dire the military judge at trial and did not develop any facts to support his claim," the Defense's motion to recuse, attachments to that motion including a summary of their interview with Maj BJ, and Judge Rosenow's findings of fact are more than sufficient to support SSgt Uribe's argument that Judge Rosenow should have recused himself. (Gov't Br. at 13.) Judge Rosenow also had a separate duty to *sua sponte* recuse himself. R.C.M. 902(d)(1).

4. SSgt Uribe's decision to be tried by military judge alone was a legitimate tactical choice.

The Government argues that SSgt Uribe's "request to be tried by the military judge significantly contributes to the perception of fairness in his court-martial." (Gov't Br. at 21-22.) Citing *Burton* and *Cornett*, the Government asserts that this Court should consider SSgt Uribe's

request to be tried by Judge Rosenow as evidence that he lacked concern for any bias and believed he would receive a fair trial. (Gov't Br. at 22.) However, this Court's analysis in *Burton* is inapplicable to this case as the appellant did not move to challenge the military judge pursuant to R.C.M. 902(a) at trial, but rather did so for the first time on appeal. *See United States v. Burton*, 52 M.J. 223 (C.A.A.F. 2000). In *Cornett*, this Court discussed that an appellant may request a bench trial after moving to recuse the military judge for "a legitimate tactical choice." *United States v. Cornett*, 47 M.J. 128, 131 (C.A.A.F. 1997) (citing *United States v. Sherrod*, 22 M.J. 917, 922 (A.C.M.R. 1986)). The Court in *Sherrod* stated:

> [I]n order to avoid the hazards connected with a highly emotional trial on charges relating to two burglaries of military quarters and assaults of two young Army dependents in their bedrooms, the appellant was willing to risk trial by (a "disqualified") judge alone and *hoped* that he would receive a fair trial.

Sherrod, 22 M.J. at 922 (emphasis in original). The Court found that "in view of the nature of the crimes . . . . the trial defense counsel may well have made a sound tactical choice in requesting trial by judge alone." *Id.*

Here, SSgt Uribe was charged with two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ) for digitally penetrating his wife's vagina while she was asleep on divers occasions and digitally penetrating her anus. 10 U.S.C. § 920 (2012). (JA at 1-3.) SSgt Uribe and his wife were married for over seven years and shared three children together. (JA at 3.) As this Court is well aware, numerous factors go into an accused's decision on forum selection and there are any number of reasons why SSgt Uribe may have not wanted panel members to try his case.

To be sure, SSgt Uribe's defense counsel stated that they "briefed him extensively on the advantages and disadvantages of each potential forum." (JA at 110, 113.) One defense counsel stated, "I felt all the forum choices had positive and negative attributes." (JA at 113.) Indeed, SSgt Uribe stated he was advised that the disadvantage of choosing panel members was that they "can be swayed by emotion," "that [the complaining witness] looked the part on the stand," and that "she looked like a victim and that she was a single mom and that wouldn't be in my favor with the jury." (JA at 115.) Alternatively, SSgt Uribe was advised that the judge "sees facts" and "would make the decision based on the law

alone." (*Id.*) Further, military judges hear hundreds of cases involving sexual assault allegations, while members – often sitting on a court-martial panel for the first time – have less experience and exposure to the topic.

Thus, once Judge Rosenow denied the Defense's motion to recuse him, SSgt Uribe was left to decide between the lesser of two evils – proceed with a potentially emotionally charged panel or with Judge Rosenow. Similar to *Cornett* and *Sherrod*, SSgt Uribe made a legitimate tactical choice in choosing the military judge to try his case and this Court should decline the Government's invitation to hold it against him.

5. Reversal is required because this error prejudiced SSgt Uribe and undermined public confidence in the judicial process.

First, the Government incorrectly argues that this case is similar to *Martinez*. (Gov't Br. at 24.) In *Martinez*, the issue of whether the military judge should have recused himself was raised for the first time on appeal, and thus this Court examined it under a plain error standard, looking at "whether the error materially prejudiced Martinez's substantial rights." *United States v. Martinez*, 70 M.J. 154, 157-59 (C.A.A.F. 2011). Here, SSgt Uribe raised this issue at trial; thus, this Court reviews it under an abuse of discretion standard.

Second, addressing the first *Liljeberg* factor, the Government asserts that SSgt Uribe cannot show a risk of injustice because he failed to allege that the military judge erred on certain issues on appeal. *Liljeberg*, 486 U.S. at 864. (Gov't Br. at 24-26.) However, this is not the standard. In considering the risk of injustice to the parties, this Court looks at whether the military judge was "called upon to exercise discretion on any matter of significance." *Butcher*, 56 M.J. at 92.[2] In this case, he was. Throughout the entirety of trial, Judge Rosenow ruled on numerous motions and objections. (JA at 66-69, 74-96.) Most importantly, Judge Rosenow was responsible for determining SSgt Uribe's guilt or innocence in findings and adjudged sentence – the ultimate matters of significance. Thus, the risk of injustice to SSgt Uribe is that a potentially biased judge ruled on and determined *everything* throughout his court-martial.

---

[2] S*ee also United States v. McIlwain*, 66 M.J. 312, 315 (C.A.A.F. 2008) (finding the risk of injustice to the parties was high when a military judge who stated her bias presided over a court-martial – even though she did not act as the trier of fact – because she was responsible for making numerous decisions that could impact the members' decision on guilt or innocence).

Third, the Government asserts that the risk of injustice is low when the appellate court has reviewed the case and found no error. (Gov't Br. at 27-28, 33-34.) However, this is unpersuasive as there are plenty of cases where this Court has found that a service Court of Criminal Appeals has erred. Furthermore, this is not the applicable standard.

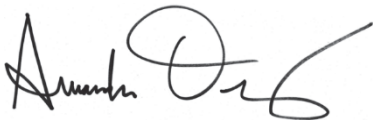
Fourth, SSgt Uribe does not concede that the second *Liljeberg* factor does not apply in this case. *Liljeberg*, 486 U.S. at 864. (Gov't Br. at 29.) Rather, SSgt Uribe asserts that reversal is required based on the first and third factors.

Finally, addressing the third *Liljeberg* factor, the Government argues that SSgt Uribe "has failed to show a specific instance where the military judge was biased in favor of Major BJ or otherwise abused his discretion with any ruling." *Id.* (Gov't Br. at 32.) In considering the risk of undermining the public's confidence in the judicial process, this Court looks at whether the case involves factors that could undermine the basic fairness of the judicial process. *Butcher*, 56 M.J. at 93. Thus, despite the Government's assertions, SSgt Uribe is not required to show actual bias. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *McIlwain*,

66 M.J. at 315 (citing *Liljeberg*, 486 U.S. at 869-70) (internal quotation marks and citation omitted). Where, as here, a military judge is allowed to preside over and act as the factfinder of a case that is prosecuted by his close personal friend, the appearance of bias is enough to undermine the public's confidence in the judicial process.

WHEREFORE, SSgt Uribe respectfully requests that this Honorable Court set aside the finding and sentence.

Respectfully submitted,

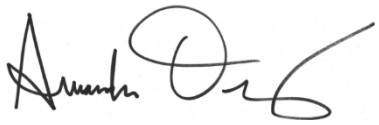


AMANDA E. DERMADY, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road Suite 1100
Joint Base Andrews NAF, MD 20762
amanda.dermady.1@us.af.mil
(240) 612-4770
C.A.A.F. Bar No. 36476

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Clerk of Court on September 14, 2020, pursuant to this Court's order dated July 7, 2020, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

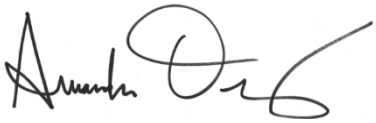


AMANDA E. DERMADY, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road Suite 1100
Joint Base Andrews NAF, MD 20762
amanda.dermady.1@us.af.mil
(240) 612-4770
C.A.A.F. Bar No. 36476

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 2,665 words.

This brief complies with the typeface and type style requirements of Rule 37.



AMANDA E. DERMADY, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road Suite 1100
Joint Base Andrews NAF, MD 20762
amanda.dermady.1@us.af.mil
(240) 612-4770
C.A.A.F. Bar No. 36476