IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellant v. Major (O-4) DAVID J. RUDOMETKIN U. S. Army Appellee	ANSWER TO APPELLANT'S BRIEF ON CERTIFICATION ARMY No. 20180058 USCA Dkt. No. 22-0105/AR

PHILIP D. CAVE
U.S.C.A.A.F. Bar No. 22647
Counsel for Appellee
1318 Princess St,
Alexandria, VA 22314
703-298-9562
mljucmj@court-martial.com

JONATHAN F. POTTER
U.S.C.A.A.F. Bar No. 26450
Senior Capital Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-693-1140

ANDREW R. BRITT
U.S.C.A.A.F. Bar No. 37398
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-693-0682

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

Certified Issues

I. WHETHER THE ARMY COURT ERRED BY NOT PROPERLY CONSIDERING THE MILITARY JUDGE'S POST-TRIAL 39(a) PROCEEDINGS RELATING TO APPELLANT'S REQUEST FOR MISTRAL.

II. WHETHER THE MILITARY JUDGE CLEARLY ABUSED HIS DISCRETION WHEN HE DID NOT GRANT A MISTRIAL AND FOUND THAT RELIEF WAS NOT WARRANTED UNDER *LILJEBERG v. HEALTH SERVICES CORP.*, 486 U.S. 847 (1988).

Statement of Statutory Jurisdiction

Appellee agrees this Court has jurisdiction under the Uniform Code of Military Justice (UCMJ) art. 67(a)(2), 10 U.S.C. § 967(a)(2).

Statement of the Case

Appellee agrees with Appellant's statement of the case.

Statement of Facts

Appellee agrees with Appellant's statement of facts relevant to the certified issues.

Summary of Argument

The question before this Court is whether this Court should reverse the decision of the Army Court of Criminal Appeals (the Army Court), even though (1) the military judge in Appellee's court-martial engaged in an inappropriate relationship with the wife of a prosecutor; (2) Appellee was charged and convicted of offenses similar to the conduct in which the military judge engaged; (3) the military judge never disclosed his inappropriate conduct; (4) the military judge was the finder of fact and the government's case relied solely on witness credibility; (5) the Army Court found, after looking at all the facts and the entire appellate record, that failing to remedy the error, in this case, would undermine the

public's confidence in the military justice process; and (6) the Army Court applied the correct test.

The question answers itself. As the Army Court found:

> In our view, a reasonable member of the public would lose confidence in the judicial process where the presiding judge fails to disclose that he is so intimately involved with the opposite-gendered spouse of a prosecutor in his jurisdiction that there is a belief he is engaging in an extra-marital affair while serving as a judge in a bench trial that involves similar charges of conduct unbecoming for engaging in openly adulterous relationships for which the military judge himself could have been charged.

JA 11.

This Court should consider the Army Court reviewed the case for both plain error and an abuse of discretion. The court concluded that the result would be the same, applying either standard, and set aside the findings and sentence.

Introduction

It is beyond cavil that an accused has the right to a fair trial. *United States v. Masusock*, 1 C.M.R. 32 *3 (C.M.A. 1951); citing *United States v. Atkinson*, 297 U.S. 157, 160 (1936). A constellation of Constitutional,

statutory, and regulatory provisions and appellate court decisions support that right.

> *A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end* no man can be a judge in his own case and *no man is permitted to try cases where he has an interest in the outcome. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties*. But to perform its high function in the best way "justice must satisfy the appearance of justice."

United States v. Graf, 35 M.J. 450, 465 (C.A.A.F. 1992), cert. denied *Graf v. United States*, 510 U.S. 1085 (1994) (emphasis in the original) (citations omitted).

> The appearance standard is designed to enhance public confidence in the integrity of the judicial system. The rule also serves to reassure the parties as to the fairness of the proceedings, because the line between bias in appearance and in reality, may be so thin as to be indiscernible.

United States v. Quintanilla, 56 M.J. 37, 45 (C.A.A.F. 2001) (citations omitted).

In determining whether a military judge should have recused himself, military appellate courts ask whether reversal is warranted under the *Liljeberg* factors. *United States v. Martinez*, 70 M.J. 154, 159

(C.A.A.F. 2011). The *Liljeberg* factors look to whether (1) the accused suffered any personal injustice; (2) whether granting relief to an accused would encourage a more forthright examination of potential grounds for disqualification; or (3) whether, under an objective standard, the circumstances of the case risk undermining the public's confidence in the judicial process. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988).

The Army Court applied *Liljeberg*. (JA 1). The Army Court found "the third prong of *Liljeberg* [] dispositive." (JA 10). The Army Court correctly found the public would question whether Appellee received a fair trial because the presiding judge's impartiality and fitness for office were seriously compromised. (JA 1-2). Also, the impact of the judge's failure to disclose a basis for recusal was greatly aggravated in this military judge-alone trial. (JA 10-11). That Appellee ultimately chose a trial by judge alone should not be a factor against him because he was unaware of any ground for challenge at the time he selected the forum. *See United States v. Uribe*, 80 M.J. 442, 449 n.5 (C.A.A.F. 2021) (citations omitted).

Liljeberg was a civil suit, but the Appellee's trial was a criminal proceeding where his liberty and not merely money was at stake. Heightened sensitivity to prejudice, the possibility of prejudice against the accused, and the public's perception of military justice are appropriate.

The Appellant claims the Army Court's prior decisions in cases involving Judge Richard Henry should somehow have served as a blueprint for the Army Court's decision in Appellee's case. (App. Br. At 18). But the judges that determined that justice and the public's perception of the court-martial process demanded a retrial were familiar with the other Judge Henry cases considered by the Army Court. Judges Brookhart, Burton, and Walker decided *Rudometkin*. All three were part of the en banc panels in *United States v. Lopez*, No. ARMY 20170386, 2020 CCA LEXIS 161, at *3-4 n.5 (A. Ct. Crim. App. May 11, 2020) (en banc) and *United States v. Springer*, 79 M.J. 756, 757 n.3 (A. Ct. Crim. App. 2020) (en banc). Judge Brookhart was a panel member in *United States v. Anderson*, 79 M.J. 762, 764 n.4 (A. Ct. Crim. App. 2020). Judge Burton sat on the panel deciding *United States v. Campbell*, No. ARMY 20180107, 2020 CCA LEXIS 74, at *4 n.3 (A. Ct. Crim. App. Mar. 6, 2020).

The Appellant could not gather sufficient votes to gain reconsideration of the panel decision, and no member of the Army Court filed a dissenting opinion from the denial of reconsideration.

Therefore, Major Rudometkin's panel did not decide his case in a vacuum. Instead, the panel was (perhaps exhaustively) fully briefed and informed of the full context of LTC Henry's discredit and the impact that discredit inflicted on the military justice system in the Army. Accordingly, the Army Court, applying both a plain error and abuse of discretion standard of review, determined that justice demanded Appellee receive a rehearing.

I. WHETHER THE ARMY COURT ERRED BY NOT PROPERLY CONSIDERING THE MILITARY JUDGE'S POST-TRIAL 39(a) PROCEEDINGS RELATING TO APPELLANT'S REQUEST FOR MISTRAL.

A. As a threshold matter, the United States refuses to concede that Judge Henry was required to recuse himself.

First, this is not a case where a military judge opened himself up to voir dire and then declined to recuse himself upon challenge. *See United States v. Uribe*, 80 M.J. at 445; *United States v. Butcher*, 56 M.J. 87, 89 (C.A.A.F. 2001). In that circumstance, the military judge can weigh all the facts and circumstances and determine for herself whether she

believes recusal is appropriate, and be subject to review for an abuse of discretion. *Butcher*, 56 M.J. at 91. But the military judge in this case was involved in inappropriate behavior, behavior he hid from the public, indeed behavior that in some respects mirrored that for which Appellee was being tried.

Second, Chief Judge Stucky made several relevant and vital points in his *Uribe* dissent that are particularly apt here. "Judges, like Caesar's wife, should always be above suspicion. An impartial and disinterested trial judge is the foundation on which the military justice system rests, and avoiding the appearance of impropriety is as important as avoiding impropriety itself." 80 M.J. at 454 (Stucky, C.J., dissenting) citing *Liljeberg v. Health Svcs. Acquisition Corp.*, 486 U.S. at 864.

As Judge Stucky further observed, the issue is not whether there was error or injustice but whether there was "the *risk* of injustice to the *parties*." 80 M.J. at 454. "There was a significant risk of injustice to Appellant in this case, as the military judge was required to make important discretionary rulings." *Id*. at 455.

Also, as Judge Stucky noted, "[The military judge] was required to assess the credibility of the witnesses, determine whether Appellant was

guilty and, after finding him guilty, exercise broad discretion in selecting an appropriate sentence." *Id*. at 455.

It is a bedrock principle of our military justice system that it not only *be* a fair system of criminal justice, but that it always be *perceived* as fair. There is a long history of "scrupulously avoid[ing]" the appearance or perception of unfairness "in the military justice system." *See, e.g., United States v. Conley*, 4 M.J. 327, 330 (C.M.A. 1978). "[W]e believe it incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979). "[D]espite the absence of any specific provision to this effect in the Code or the Manual, any relationship of a judge of the Court of Military Review which casts suspicion upon his fairness or impartiality provides a basis to seek his disqualification." *United States v. Kincheloe*, 14 M.J. 40, 48 (C.M.A. 1982).

Yet, the government nevertheless disputes whether LTC Henry should have recused himself, even though it cites the very rule that establishes Judge Henry should have indeed recused himself. A "military

judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might *reasonably* be questioned." (Appellant's Brief at 11 (emphasis in the original.)) The Government suggests it is unreasonable to question LTC Henry as the trial judge, even though it is human nature to minimize your own misconduct. The Government argues it is unreasonable to consider that this military judge may have been constantly looking over his shoulder for the investigators to arrive, and instead insists LTC Henry was an unbiased, impartial judge representing the Army judiciary. The Government's position in this case is relevant to the public perception of the fairness of Appellee's trial under *Liljeberg*. A member of the public, reading the government's brief, may indeed believe the system is less than fair.

The government says, "While *Appellant does not concede* that Judge Henry should have recused himself, this Court need not reach that conclusion[.]" (Appellant's Brief at 12, emphasis added.) LTC Henry's compromised status is relevant to the third *Liljeberg* factor.

This Government position is at odds with the United States in *Butcher*. "In its brief before our Court, *the Government makes it clear that 'the United States neither expects nor asks this Court to put its stamp of*

approval' on the military judge's actions, and we shall not do so." *United States v. Butcher*, 56 M.J. at 92 (emphasis added.). In *Butcher*, a panel of members decided guilt and the sentence, not a military judge sitting alone.

The Government seeks comfort in that neither the command investigation nor Judge Watkins could prove adultery. (Appellant's Brief at 9 n. 12). The Government fails to consider is that Judge Watkins noted possible violations of UCMJ art. 92, 10 U.S.C. § 892 (dereliction of duty) and UCMJ art. 133, 10 U.S.C. § 933 (conduct unbecoming) violations presented in the command investigation. This point is relevant to the overall *Liljeberg* analysis.

The Government also ignores LTC Henry's self-interest in minimizing his behavior to the investigators, minimization that is on display in his answer to a bar complaint filed by Appellee. (JA 333-334.) Lieutenant Colonel Henry's dubious behavior did not cease after his removal from the bench. LTC Henry submitted his letter answering Appellee's bar complaint months after his removal. (JA 333-334). Yet he used "Trial Judiciary" letterhead in providing his response to the bar

complaint.[1] (JA 333). This misuse of the letterhead could be viewed by those reviewing LTC Henry's conduct as implying that the Army Trial Judiciary somehow supported him or even endorsed his reply.

B. The Government incorrectly claims ACCA failed to consider Judge Watkins's ruling during his post-trial Article 39(a) session.

Questions of both law and fact are present here. The law is relatively clear.[2] However, one point that may need clarification—was Appellee's case in the appeal process at the post-trial session to litigate LTC Henry's recusal. A clear, bright-line suggests yes, it was. Appellee likens Judge Watkins's hearing to a *Dubay* hearing ordered by a court of criminal appeals during appellate review. "Courts of Military Review have employed *Dubay* mechanisms in a growing miscellany of circumstances where extra-record fact determinations were necessary predicates to resolving appellate questions." *United States v. Parker*, 36 M.J. 269, 272 (C.A.A.F. 1993); *United States v. Lofton*, 69 M.J. 386, 391 (C.A.A.F. 2011).

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[1] Letterhead is for "official use." ¶1-16, 6-6, Army Regulation 25-50, Preparing and Managing Correspondence. Available at https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN32225-AR_25-50-003-WEB-6.pdf

[2] Appellee has already alluded to Chief Judge Stucky's dissent in *Uribe*, *supra*.

Critical facts differentiate Appellee's case from the "small body of case law related to LTC Henry's misconduct." (Appellant's Brief as Appellee, in answer to Appellant's Assignments of Error at the Army Court, at 23.)

Appellant suggests that the panel "mistakenly applied Butcher[,]" because the motion was raised "after the close of evidence." (Appellant's Brief at 13.) Appellant misreads *Butcher's* application here. In *Butcher*, the recusal motion was made after the presentation of evidence was closed but before "the members completed their deliberations" on the merits. *Butcher*, 56 M.J. at 89. So clearly, the abuse of discretion did occur during the trial. The recusal motion was directed to the judge whose recusal was sought. *Id*. at 90. The military judge allowed the parties to conduct voir dire before ruling on the recusal and mistrial motions. This Court applied the abuse of discretion standard of review correctly to those circumstances.

The same is not true here; the only recusal motion was made after the court adjourned and to a different judge than the one who had the duty to recuse himself. And LTC Henry's failure to disclose possible grounds for recusal at Appellee's trial deprived the parties of voir dire

and the opportunity to make a record on his views on whether he should have recused himself, a record that then would have been reviewed for an abuse of discretion. Unlike *Butcher* and *Uribe,* cited by Appellant, the issue was not about personal or social relationships "in the world of career [judge advocates] with professional relationships the norm and friendships common" between a military judge and trial counsel. LTC Henry should have recused himself because of his ongoing inappropriate and perhaps criminal conduct.[3] There are indeed "special concerns" here. *Uribe*, 80 M.J. at 447. This Court generally approves of situations where there is disclosure and voir dire. *See, e.g.*, *United States v. Salyer*, 72 M.J. 415, 426 (C.A.A.F. 2013) ("the normative method for addressing potential issues of disqualification is voir dire.")

A reasonable bright-line rule would be that any post-trial motions after the court had adjourned are reviewed as if "on appeal" unless the sessions are a continuation of motions raised before adjournment. But this Court need not address that issue here.

[3] *See infra* adverting to the cognizable offenses of dereliction of duty and conduct unbecoming an officer.

Appellant received full and fair consideration of its arguments under either standard of review. As Appellee argued in his opposition to reconsideration before the Army Court, it is common to find courts reject arguments in a single line, sentence, or sometimes even in a footnote rather than the body of text. Federal courts view summary disposition as sufficient to have established a full and fair consideration of an issue. *See, e.g., Faison v. Belcher*, 496 Fed. Appx. 890, 891 (10th Cir. 2012); *Yongo v. United States*, No. 5-10-CV-220-F, 2013 U.S. Dist. LEXIS 73273 (D.E.D. N.C, May 23, 2013) (memorandum op. and order) citing *Faison*; *Brimeyer v. Nelson*, 712 Fed. Appx. 732, 736 (10th Cir. 2017) ("We have 'consistently held full and fair consideration does not require a detailed opinion by the military court.'"). The Army Court often issues one-line summary dispositions. The same point is valid here.

The Court should give deference to the Army Court's decision-making here. The Army Court considered the whole record, some of which has developed since Judge Watkins held his hearing. The decision was not made in a vacuum, because the panel had the benefits of knowing, understanding, and reviewing a small body of cases related to LTC Henry's misconduct. "This Court recognizes a CCA's 'broad discretion in

conducting its Article 66(c) review.' Thus, a CCA's actions under Article 66(c) are 'generally review[ed] ... for an abuse of discretion,'" *United States v. Guinn*, 81 M.J. 195, 199 (C.A.A.F. 2021).

While the Appellant argues for deference to Judge Watkins, that deference cannot be so great as to substitute his judgment for that of a court of criminal appeals exercising its Article 66 power.

> This awesome, plenary, de novo power of review grants unto the Court of Military Review authority to, indeed, "substitute its judgment" for that of the military judge. It also allows a "substitution of judgment" for that of the court members. In point of fact, Article 66 requires the Court of Military Review to use its judgment to "determine[], *based on the whole record,*" which findings and sentence should be approved.

United States v. Cole, 31 M.J. 270, 272 (C.A.A.F. 1990) (emphasis added). Did Judge Watkins sufficiently articulate the underlying reasons for his conclusion? Appellee thinks not.

C. The ACCA did not err when it found the third prong of *Liljeberg* required reversal.

In LTC Henry's February 2019 letter to his bar, he writes on Army Judiciary letterhead, "As is standard procedure, I was *temporarily* suspended from my duties as a military judge." (Emphasis added.) But LTC Henry had been removed from the bench for some time before he responded to the bar complaint. He would know whether the removal was

temporary or permanent by then. His continued use of the judiciary letterhead suggests that the removal was only temporary—or he misrepresented something to his Bar. To the extent LTC Henry's credibility is relevant to the prejudice analysis, here is one of several examples that he lacks credibility. If he is being truthful in the letter, it questions whether the Army took serious remedial measures regarding LTC Henry.

In his letter, LTC Henry claims:

> a. "[H]owever, *no adverse impact*, except to CPT X personally was noted. No impact *to any cases* was documented or even mentioned, even in those in which CPT X was involved." (Emphasis added.)
> b. "I ask that the decision of the Army Judge Advocate General regarding my punishment and ability to serve as a licensed attorney be honored."

The Staff Judge Advocate, on January 17, 2019, recommended to the convening authority that "no corrective action is necessary" on the recusal issue. And no corrective action was taken by the Convening Authority.

But The Judge Advocate General of the Army took action that is telling in considering Appellee's case. He determined it was appropriate to immediately remove—recuse—LTC Henry from hearing any case.

(The government's current argument that LTC Henry had no duty to recuse stands in stark contrast to the then Judge Advocate General of the Army). Thus, the Army (through the Judge Advocate General) believed his recusal from all cases was necessary and proper, even if it was only temporary as LTC Henry claimed. But that remedial measure was not published and did nothing to rectify the public's perception of what occurred in Appellee's case.

And as to LTC Henry's fate, the record is silent. Were his certifications revoked? That appears unlikely per LTC Henry's letter?[4] Was there disciplinary action—a court-martial as happens to many or a UCMJ art. 15, 10 U.S.C. § 815, proceeding? Was LTC Henry allowed to retire in grade? Was any professional responsibility action taken within the Army—apparently not? LTC Henry's state bar looked at the issues based on a complaint and took no public disciplinary action, presumably based on LTC Henry's letter.[5] A member of the public, viewing Appellee's case and unaware of whether anything ever happened to the military judge presiding, would lose confidence in the judicial process, and be left

[4] UCMJ art. 26, 27, 10 U.S.C. § 826. 827.
[5] https://www.tbpr.org/attorneys/018034

to wonder about the quality of the investigation and thus any remedial measures.

But another "remedial" action to be considered—is a judicial one, and the Army Court exercised it. The Army Court saw the problem with the perception in this case and set aside Major Rudometkin's convictions. That is the best remedial measure for LTC Henry's delicts.

The Army Court, in any event, did consider Judge Watkins's post-trial hearing and written decision. It then exercised its power under UCMJ art. 66(c), 10 U.S.C. § 866(c), to decide that LTC Henry presiding over Appellee's trial judge-alone court-martial reflected so unfavorably on the military justice process that a reasonable person would lose faith in that process. (JA 10-11). The government has pointed to nothing that should compel this Court to reverse that decision.

LTC Henry's misconduct reflected adversely on him as an officer, lawyer, and judicial officer. But, more importantly, his conduct while a sitting military judge reflected adversely on the Army Trial Judiciary, the Army JAG Corps, the United States Army, and Army military justice in the eyes of reasonable members of the public.

The Army Court evaluated the recusal issue under the "plain error" standard and the "abuse of discretion" standard. (JA 6 at n. 6). This Court should affirm the Army Court because, under either standard, LTC Henry should have been recused. The Army Court correctly applied this Court's precedent in its review. Accordingly, the totality of the facts substantiates the basis for LTC Henry's disqualification, and the Army Court was correct in setting aside the findings and sentence.

The court should consider that LTC Henry never disclosed a potential disqualification at a time when counsel could have conducted voir dire, challenged the military judge, or given an affirmative waiver of any disqualification. "In federal civilian courts, parties may raise the recusal issue by motion, *but the judge also has a* <u>*sua sponte*</u> *duty* to determine whether they should continue to preside over a proceeding. *Quintanilla*, 56 M.J. at 45. *See also United States v. Goodell*, 79 M.J. 614, 619 (C.G. Ct. Crim. App. 2019) (fact of nondisclosure at trial "magnifies the risk factor, compared to a case in which the question of disqualification was litigated. We view the resulting risk as unacceptably high.").

Further, as the Army Court found, "At the time of appellant's trial on the merits, the evidence demonstrates that LTC Henry and Mrs. KC's relationship had become pervasive, secretive, and intimate." (JA 10.) It was likely still ongoing on March 12, 2018, at the first UCMJ art. 39(a), 10 U.S.C. § 839(a), post-trial session in Appellee's case. LTC Henry was relieved of judicial duty in April 2018.

II. WHETHER THE MILITARY JUDGE CLEARLY ABUSED HIS DISCRETION WHEN HE DID NOT GRANT A MISTRIAL AND FOUND THAT RELIEF WAS NOT WARRANTED UNDER *LILJEBERG V. HEALTH SERVICES CORP.*, 486 U.S. 847 (1988).

A. The Army Court recognized CPT AC was not associated with Appellee's case, but found the third prong of *Liljeberg* required a rehearing.

The Government argues that the Army Court erred in finding the appropriate remedy is a rehearing because CPT AC's did not participate in the appellant's case. On the contrary, the Army Court recognized that CPT AC was not involved in Appellee's case, but found a reasonable member of the public nevertheless would lose confidence in the military justice system because LTC Henry was the fact-finder engaging in very similar conduct to that of which Appellee was accused. (JA 10-11).

The government also chides the Army Court in deciding Appellee's case differently from other LTC Henry cases. But as established earlier, the panel that considered Appellee's case was well-aware of other cases tainted by LTC Henry, yet still determined the appropriate sanction, in this case, was a rehearing. Moreover, this case is not a "one-off" situation, so the small but significant number of cases tainted by LTC Henry is relevant to the *Liljeberg* analysis.

The Army Court found no comfort in the military judge's mixed findings. And that makes sense. The Army Court was aware of the range of LTC Henry cases and undoubtedly factored in the effect LTC Henry's conduct, and indeed hypocrisy, had on his decision-making, impeded by worry about what his supervisors and investigators might think should his misconduct come to light, as it eventually did.

For example, in *United States v. Guardado*, 77 M.J. 90, 94 (C.A.A.F. 2017), the Government argued there was no prejudice against the accused because the member panel reached mixed findings of guilt. *Guardado* issue is analogous. "It simply does not follow that because an individual was acquitted of a specification that evidence of that specification was not used as improper propensity evidence and therefore

had no effect on the verdict." 77 M.J. at 94. Moreover, whether the military judge's actions were unbiased or for an improper motive is irrelevant—it is the appearance "that is enough." *In re Al-Nashiri*, 921 F.3d 224, 237 (D.C. Cir. 2019). LTC Henry's last words on the merits convicted Appellant of serious charges.

The Government also cites a footnote in *United States v. Vazquez,* 72 M.J. 13, 19 n. 5 (C.A.A.F. 2013). In that case, the Air Force Court considered sua sponte how the trial judge substituted members after presenting some evidence. As a result, the Air Force Court decided the trial judge should have declared a mistrial. The Air Force Court decision was set aside by this Court because the intermediate court had failed to conduct a plain error analysis of the trial judge's actions. 72 M.J. at 16. This Court concluded that the trial judge did not err in the procedures he followed, especially as the defense acquiesced without objection. *Id.*

Footnote 5 of *Vazquez* responds to Chief Judge Baker's concurrence in the result and is pure dicta. But it is also inapposite to this case. Here, the trial judge engaged in misconduct allegedly similar to charges for which he was trying Appellee. Here, the Army Court conducted not just a plain error analysis but also an abuse of discretion analysis.

The Appellee agrees with the government that *United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2003) applies here. But the lesson of *Diaz* is that "[e]ach situation must be judged on its facts." 59 M.J. at 91, quoting *United States v. Pastor*, 8 M.J. 280, 284 (C.M.A. 1980). As the Army Court found, the facts in this case would undercut a reasonable person's confidence in the military justice system. (JA 10-11).

The Government also cites *United States v. Seward*. In *Seward,* the mistrial ruling "merely served to end the valid referral of charges to the first court-martial and permit the prosecution to seek referral anew." *United States v. Seward*, 49 M.J. 369, 372 (C.A.A.F. 1998). It notes that a military judge has considerable latitude in granting a mistrial. *Id.* at 371. But the Army Court found that prong three of *Liljeberg* compelled the court to afford Appellee a rehearing. And the Army Court's decision here does not foreclose a retrial. *United States v. Garces*, 32 M.J. 345 (C.M.A. 1991), also cited by the Government, was a members case, a clear distinction with this case.

The Government also cites *Dooley*, 61 M.J. 258 (C.A.A.F. 2005). However, in *Dooley,* the issue was whether, for a speedy trial violation, dismissal with prejudice was a proper remedy rather than dismissal

without prejudice. 61 M.J. at 258. A dismissal without prejudice would have permitted the Government to proceed to try Dooley again, but the military judge determined Dooley was harmed by the delay, and dismissed with prejudice. *Id.* at 265. This Court found the Navy-Marine Corps Court erred in reversing the military judge's decision to dismiss with prejudice. *Id.* *Dooley* is similar to Appellee's case only in that it involves a service court overturning the decision of a military judge. Otherwise it adds nothing helpful to the government's argument.

B. The Army Court found that, pursuant to its analysis of Appellee's case applying the *Liljeberg* factors, Appellee should be granted a rehearing.

Assuming arguendo Judge Watkins's ruling is reviewed for an abuse of discretion, no deference is due for several reasons. First, crucially, Judge Watkins did not fully address LTC Henry's alleged adultery or "improper relationship," which he found "pervasive, personal, secretive, and intimate" against Appellee's alleged offenses. Yet, for the Army Court, the nature and similarity of the allegations is a core reason they correctly decided to set aside the convictions.

Second, Judge Watkins did not consider the number and breadth of cases over which LTC Henry presided—the "small body of case[s.]."

As previously discussed, the context requires heightened attention to the likelihood of prejudice. The Army Court, from its perch overseeing Army Justice, surely had a different—and broader—view of LTC Henry's conduct, and its impact on the perception of the public in Appellee's case, than that possessed by Judge Watkins. Applying that broader perspective—indeed broader responsibility—the Army Court found a rehearing was necessary in this case. In other words, the government is seeking to substitute Judge Watkins's decision for that of a court of criminal appeals exercising its awesome power under UCMJ art. 66, 10 U.S.C. § 866.

C. Contrary to the government's argument, LTC Henry could not pick and choose those matters over which he was disqualified. He was disqualified for some, so he was disqualified for all.

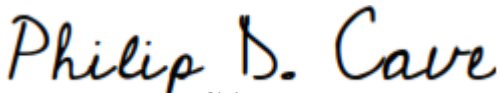
The Government's argument suggests that LTC Henry should have recused himself from deciding the adultery charges at trial—at least that is an import of their argument. It may seem glib, but the suggestion does not account for a principle that a judge recused for some is recused for all. *See e.g., United States v. Witt*, 75 M.J. 380, 384 (C.A.A.F. 2016) citing *United States v. Roach*, 61 M.J. 17 (C.A.A.F. 2010); *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988). The government also fails to explain

how this could possibly work in practice. Would the military judge inform the accused and the government he could not try the accused because the military judge also engaged in adulterous behavior, but he could handle the rest of the trial because he was not suspected of any of the other offenses?

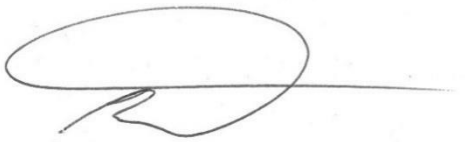
And this is the first time the Government has asked for this remedy. Accordingly, the Court should reject this belated appeal. The Government did not make this partial recusal suggestion to Judge Watkins at the post-trial hearing, nor suggest partial relief in its Answer to the Appellant's initial assignment of error at the Army Court. It did not make the argument to the Army Court in its motion for reconsideration. *See United States v. Muwwakkil*, 74 M.J. 187, 192 (C.A.A.F. 2015) citing to *Dep't of Revenue v. Ranch*, 511 U.S. 767, 772 n.9 (1994) ("The issue was not raised below, so we do not address it."); *Giordenello v. United States*, 357 U.S. 480, 488 (1958) (refusing to entertain government's belated contentions not raised below).

WHEREFORE, Appellee respectfully asks this Court to affirm the decision of the Army Court.

Respectfully submitted,



PHILIP D. CAVE
U.S.C.A.A.F. Bar No. 22647
Counsel for Appellee
1318 Princess St,
Alexandria, VA 22314
703-298-9562
mljucmj@court-martial.com

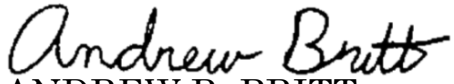


JONATHAN F. POTTER
U.S.C.A.A.F. Bar No. 26450
Senior Capital Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-693-1140

ANDREW R. BRITT
U.S.C.A.A.F. Bar No. 37398
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-693-0682

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Rudometkin, Crim. App. Dkt. No. 20180058, USCA Dkt. No. 22-0105/AR was electronically filed with the Court and Government Appellate Division on April 6, 2022.



ANDREW R. BRITT
U.S.C.A.A.F. Bar No. 37398
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-693-0682