IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Master Sergeant (E-8) **ALLAN L. ARMSTRONG** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 24-0002/AR Crim. App. Dkt. No. 20210644

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UNITED STATES Appellee v. Master Sergeant (E-8) **ALLAN L. ARMSTRONG** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 24-0002/AR Crim. App. Dkt. No. 20210644

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

Granted Issue

WHETHER THE MILITARY JUDGE'S DEPARTURE FROM IMPARTIALITY DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3).

Statement of the Case

On December 9, 2021, a general court-martial composed of members with enlisted representation convicted Master Sergeant (E-8) Allan L. Armstrong,

contrary to his plea, of one specification of sexual assault in violation of Article 120, UCMJ. (JA 3). On December 10, 2021, the panel sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for seven years, and to be discharged from the service with a dishonorable discharge. (JA 92).

On January 21, 2022, the convening authority took no action on the finding but approved and issued the adjudged reprimand, as well as approved Appellant's request to defer both the adjudged reduction in grade and the adjudged forfeitures effective December 24, 2021, both of which terminated upon entry of judgment. (Convening Authority Action and Attachment). The military judge entered judgment on January 26, 2022. (Judgment of the Court). On August 2, 2023, the Army Court summarily affirmed the finding and sentence. *United States v. Armstrong*, ARMY 20210644, 2023 CCA LEXIS 340 (Army Ct. Crim. App. August 2, 2023). Appellant was notified of the Army Court's decision. In accordance with Rule 19 of this Court's Rules of Practice and Procedure, on October 2, 2023, the undersigned appellate defense counsel filed a Petition for Grant of Review. On October 23, 2023, Appellant filed the Supplement to the Petition. On November 13, 2023, this Court granted review.

Summary of Argument

"A necessary component of a fair trial is an impartial judge." *Weiss v. United States*, 510 U.S. 163, 178 (1994) (finding "a number of safeguards in place to ensure impartiality" in military judges). "One of the very objects of the law is the impartiality of its judges in fact and appearance." *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J. concurring). Here, the military judge's departure from impartiality deprived Appellant of his right to a fair trial for two reasons. First, the military judge critiqued, degraded, and mocked defense counsel, in front of the members and outside their presence. Her interference was significant such that members of the public perceived that she was aligned against Appellant. Second, the military judge inappropriately restricted Appellant's case for the military judge's recusal. For these reasons, the finding and sentence must be set aside.

Statement of Facts

A. Military Judge's Interjections

Throughout Appellant's trial, the military judge exhibited open hostility to the defense team, particularly appellant's civilian defense counsel, Mr. Joseph Jordan. (JA 8-30, 32, 47, 86). To at least one observer, the military judge "showed clear bias against the civilian defense attorney" from the start of the trial.

(JA 26). The military judge "consistently interrupted" Mr. Jordan and "would not let him finish his sentences or arguments." (JA 24).

From the beginning, the military judge took defense objections to her rulings personally. The military judge told Mr. Jordan to "spare me the dramatics" during litigation over her Military Rule of Evidence (M.R.E.) 513 ruling. (JA 32). Then, as Mr. Jordan cross-examined Ms. ME, one of the alleged victims, Mr. Jordan elicited an inconsistent statement from Ms. ME. (JA 46). The Government objected under M.R.E. 412. (JA 46-47). The military judge chastised Mr. Jordan, in front of the panel for "exceeding the scope of the direct examination." (R. at 42). However, in the middle of this, the military judge could not remember Mr. Jordan's name. (JA at 46-47). Instead, she called him "Mr. Johnson" in front of the panel and to the witness, and later said she felt as though she "floundered" when she could not remember his name. (JA 13, 17, 20, 44).

But this exchange does not appear in the trial transcript because forty-plus words were omitted from the authenticated record. What happened in court is on the recording marked U.S. v. Armstrong Trial Day 2, Part IV, at approximately 17:20:

> TC: Objection. Your Honor, 412.
>
> MJ: You're exceeding the— that was never *brought out on cross examination, Mr.—I'm sorry. Your name escapes me right now, although I'm looking at you. Mr. Johnson. Joseph. Help me out here.*

> *What is your name? Jordan. Okay. I knew it started with a "J." Um, that was not* brought out on direct examination, Mr. Jordan.
>
> Mr. Jordan: What was brought out was that they had –
>
> MJ: I'm not asking you for a debate. …

(JA 13, 42, missing words in italics).

B. Military Judge Told Defense Counsel to "Shut up"

The military judge excused the panel, and then litigation resumed on the government's objection. (JA 42-43). Mr. Jordan told the military judge that he was not trying to elicit statements prohibited by the military judge's M.R.E. 412 ruling. (JA 43.) For no clear reason, the military judge responded to his position on the objection by bringing up the time she forgot Mr. Jordan's name: "Mr. Jordan, thanks for allowing me to flounder when I couldn't remember your name." (JA 44).

Mr. Jordan tried to proffer the line of questions he wished to ask Ms. ME, but the military judge would not let him finish and cut him off twice. (JA 45-46). After Mr. Jordan pointed out that he had to "make a record" without interruption if the military judge was going to overrule his objections, the military judge chastised Mr. Jordan by telling him to shut up:

> MJ: Keep your voice down. Don't talk over me talking. When I'm talking you shut up.
>
> Mr. Jordan: And you remember my name, Your Honor.

> MJ: You are trying my patience right now. I didn't forget your name on purpose. I wasn't trying to be disrespectful to you, as you are currently trying to be to me. And I'm not going to tolerate it. That was an honest mistake on my part, forgetting your name. But you are the Defense Counsel and I'm the judge and I make the rulings. When I'm speaking, you shut your mouth. And do not, do you hear me, do not attempt to disrespect me that way again. Are we clear?

(JA 46-47).

C. Appellant Requested Recusal

After the military judge told Mr. Jordan to shut up, the court recessed. When it reconvened, the defense moved to recuse the military judge under Rule for Courts-Martial (R.C.M.) 902a for "actual and implied bias against the defense team." (JA 48-49).

In support of the motion, the defense called Ms. Veronica Langley to the stand. (JA 48). But the military judge refused to allow Ms. Langley to testify. At the time of the trial, Ms. Langley was the Director of Forensic Psychiatry and a civilian assistant to the defense expert witness. (JA 29-31). Ms. Langley had attended roughly twenty courts-martial in her capacity as the Director of Forensic Psychiatry. (JA 29-31). She was in the courtroom throughout the trial, to include when the military judge chided Mr. Jordan. (JA 29-31, 49).

Ms. Langley observed the military judge "frequently [] exhibited a disrespectful tone when directing" Mr. Jordan and she believed "Judge Emanuel

presented her bias not only to the panel, but to the entire courtroom and even witnesses on the stand." (JA 29-31).

D. Military Judge Refused to Hear from Ms. Langley

Even though Ms. Langley witnessed the events in the courtroom, the military judge refused to hear from Ms. Langley. The military judge said Ms. Langley did "not qualify as someone who [was] unconnected with the case." (JA 49). She cited no rule or caselaw to support her denial of this defense witness. (JA 49). The defense argued that the standard for implied bias is "what a reasonable person would think." (JA 49). But the military judge simply responded, "I don't want to hear from Ms. Langley." (JA 49).

The defense argued the military judge demonstrated actual bias when she told Mr. Jordan to "shut your mouth, shut up, those words." (JA 49). The military judge responded, "I'm not recusing myself because I'm not actually biased against Mr. Jordan or the defense team." (JA 49). The defense argued a reasonable person would think the military judge was biased by the military judge's demonstrated animus toward Mr. Jordan. (JA 50).

The military judge interrupted:

> Actually, I'm going to stop you, Captain Creighton, because you present, [sic] no context for this. As far as when I told Mr. Jordan to stop talking and to shut his mouth and without that context, taken out of context, [sic] I don't think you are reasonably conveying what occurred. I do not believe that I am impliedly bias [sic] nor do I think a reasonable person who is unfamiliar with the case observing the proceedings would come to that conclusion. I'm not going to recuse myself."

(JA 50-51).

When the defense asked to call a witness to testify, the military judge denied the request, saying, "No, I was here. I was present." (JA 51). The military counsel asked for a moment, but the military judge responded, "No. Are we ready to proceed, I've made my ruling on the defense motion to recuse." (JA 49).

At that point, Mr. Jordan again raised the Appellant's right to preserve the record. He cited to caselaw and reiterated the request to call a witness. (JA 51). But the military judge would only hear from a witness not "connected with the defense team." (JA 52).

E. Military Judge Allowed Testimony from Bailiff

Given this limitation, the defense called the court bailiff, a First Lieutenant. (JA 52). On the stand, it was obvious to at least one witness that the bailiff was nervous and intimidated. (JA 27). The bailiff never previously participated in any way or indeed had even seen another court-martial. (JA 29, 54). He testified the military judge forgot Mr. Jordan's name, both the military judge and Mr. Jordan

talked over one another, and the military judge told Mr. Jordan to "shut up." (JA 54). The bailiff gave confused answers to questions about the exchange between counsel and the military judge. For example:

> CPT Creighton: I see what you're saying. Does it appear as though Mr. Jordan is being disrespectful to the judge?
>
> Bailiff: I don't know, because sometimes -- you know, sometimes attorney can be a crazy I don't -- I don't -- I cannot because I have never seen -- this my first time -- so I don't know if that's something that happens all the time or it's just [sic]...

(JA 55).

F. Government Never Opposed Motion

The Government did not oppose the motion for the military judge's recusal. (JA 48-56). The Government presented no evidence and the military judge never asked whether the Government had evidence to present or a position on the motion. (JA 48-56).

G. Military Judge Denied Recusal Motion

The military judge immediately denied the defense motion to recuse, providing no findings of fact or conclusions of law. (JA 56). The military judge also did not address appellant's implied bias claim, aside from her own assertion that a reasonable person of the public "unfamiliar with the case" would not conclude that she was biased. (JA 51).

H. Military Judge Elicits Laughter During Rebuke

Soon after the military judge denied the motion to recuse, she recalled the members of the panel and instructed them to "disregard any comment or statement or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty." (JA 62). However, within minutes, the military judge made a comment, at Mr. Jordan's expense, which made the panel laugh (or chuckle) at him. (JA 18, 27, 29, 86). This occurred when, during a back-and-forth, Ms. ME became uncooperative:

> Mr. Jordan: Well, that's your testimony, right?
>
> Ms. ME: You asked me what happened and I'm answering what happened.
>
> Mr. Jordan: Right, well –
>
> Ms. ME: So, if you have a question about something other than that, then you can ask that.
>
> MJ: Thank you for doing my job for me, Ms. E. Mr. Jordan. I'm sorry, I almost blanked again. If you would confine your cross-examination to questions of the witness rather than testifying yourself and engaging in argument.

(JA 86).

The panel, the military judge, and the witness laughed at the military judge's quip about Ms. ME behaving as a judge while she was testifying. (JA 18, 27, 29, 86). Upon hearing the laughter, Mr. Jordan was certain he had lost credibility before the panel. (JA 18).

Granted Issue

WHETHER THE MILITARY JUDGE'S DEPARTURE FROM IMPARTIALITY DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

Standard of Review

Whether a military judge erred in not recusing herself is reviewed for an abuse of discretion. *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001). In conducting this analysis, the appellate courts consider the facts and circumstances under an objective standard. *Id*. at 91.

Law and Argument

"An accused has a constitutional right to an impartial judge." *United States v. McIlwain*, 66 M.J. 312, 313 (C.A.A.F. 2008), citing *United States v. Wright,* 52 M.J. 136, 140 (C.A.A.F. 1999), and *Ward v. Village of Monroeville,* 409 U.S. 57 (1972). A reasonable person knowing all the circumstances in this case would question the military judge's impartiality. Therefore, relief is warranted because all three *Liljeberg* factors are met.

A. The Military Judge was Disqualified Under R.C.M. 902(a) Because Her Impartiality Might Reasonably Be Questioned

The military judge abused her discretion in a ruling that was nothing more than a short declaration: "I do not believe that I am impliedly bias nor do I think a reasonable person who is unfamiliar with the case observing the proceedings would come to that conclusion." (JA 47). First, this is the wrong standard. The

objective standard does not begin with someone "unfamiliar with the case observing the proceedings" as the military judge stated above. The correct standard is "[a]ny conduct that would lead a reasonable man *knowing all the circumstances* to the conclusion that the judge's 'impartiality might reasonably be questioned'" as a basis for the judge's disqualification. *See United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982) (emphasis added). Second, the military judge's subjective beliefs concerning the conclusions of the public are irrelevant absent any development of the facts on the record, and even so, only relevant to the issue of actual bias. *See Wright*, 52 M.J. at 141.

1. R.C.M. 902(a)

Rule for Courts-Martial 902(a) directs that a military judge "shall" be disqualified if her "impartiality might reasonably be questioned." As this Court has noted, under subsection (a), disqualification is required "in any proceeding in which [the] military judge's impartiality might reasonably be questioned," even though the evidence does not establish actual bias. The appearance standard is designed to enhance public confidence in the integrity of the judicial system. *United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001), quoting *Liljeberg*, 486 U.S. at 860. "Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification." *United States v.*

Kincheloe, 14 M.J. 40, 50 (CMA 1982). The standard does not differ between judge-alone trial and trial by members. *United States v. Sherrod*, 26 M.J. 30, 33 (C.M.A. 1988) *see also McIlwain* 66 M.J. at 312.

"In the military context, the appearance of bias principle is derived from R.C.M. 902(a) . . . ." *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012). "[A] military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). The test for identifying an appearance of bias is "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021).[1] *Litekey* stands for the proposition that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current

[1] The military judge decides whether she should disqualify herself. *See* R.C.M. 902(a); *see also Uribe*, 80 M.J. at 450 (The military judge must have discretion in making this decision because in many situations, fair-minded observers might differ in their assessment of whether a military judge's impartiality "might reasonably be questioned.") (Maggs, J. concurring). However, whether the military judge should disqualify herself is viewed *objectively* and is not assessed in the mind of the military judge herself, but rather in the "mind of a reasonable man who has knowledge of all the facts." *Wright*, 52 M.J. at 141 (citation and quotation marks omitted). In this case, very little deference should be given to the military judge's decision, because she provided no analysis to support her determination not to recuse herself. *United States v. Hollings*, 65 M.J. 116, 119 (C.A.A.F. 2007). As to the standard, this Court has previously found that issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo. *See United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." 510 at 555. The record and the declarations support that the military judge's actions portend of such deep-seated antagonism.

2. Application of R.C.M. 902(a)

In this case, the military judge abused her discretion because a reasonable person, knowing all the circumstances would conclude that the military judge's impartiality had evaporated. In the twenty or so courts-martial Ms. Langley had observed across the services, she had never seen a military judge behave in such a way towards counsel. (JA 29-31). She noted that Judge Emanuel's tone towards Mr. Jordan was "unprofessional, demeaning, degrading and quite simply rude." (JA 29-31). She believed the military judge's behavior affected the panel members and witnesses, and degraded Mr. Jordan. (JA 29-31).

Additionally, CPT Creighton has "practiced in front of many judges as a civilian prosecutor and as a military justice practitioner, and I have never seen the lack of decorum shown by a judge than during *U.S. v. Armstrong*." (JA 20). Captain Creighton said that "numerous people [came] up to [him], both during and after the trial, to tell [him] how uncomfortable it was given how COL Emanuel was treating counsel and the proceedings." (JA 20). The military judge repeatedly

interrupted defense counsel, frequently in front of the panel, to prevent them from giving an explanation or making a record of what they wanted to say. (JA 35, 36, 42-43, 45-47, 50-51, 57, 86). A reasonable person knowing all circumstances would conclude that the military judge's impartiality would be questioned, because as demonstrated above, reasonable people came to such a conclusion and shared their concerns with the attorneys representing MSG Armstrong, with the Army Court and again with this Court.

"A trial judge must exhibit neutrality in [her] language and in the conduct of a trial before a jury and should avoid any possibility of prejudicing the jury through [her] criticism of or hostility toward defense counsel." *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977). As the audio, the transcript, and the declarations establish, the military judge indicated through speech and behavior that the defense counsel's presentation was fundamentally flawed and thus unworthy of being heard. (JA 8-30, 32, 47, 86). Because of the military judge's behavior, Appellant's court-martial's "legality, fairness, and impartiality were put into doubt." *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000).

B. The Military Judge's Bias Resulted in an Unfair Trial

The military judge's interference and her diminishment of defense counsel in front of the panel with disparaging remarks prejudiced Appellant's right to a fair

trial. In *United States v. Spears*, the 7th Circuit Court of Appeals reversed a guilty conviction where the trial judge "lost his cool" and departed from the "equanimity of spirit required of him" to the serious prejudice of the appellant. *United States v. Spears*, 558 F.2d 1296, 1298 (7th Cir. 1977). In that case, the court of appeals determined that "there is a point at which unfairness in the trial requires reversal." *Id*. The facts of this case have also gone beyond that point.

Litekey advises that "impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." 510 U.S. 540, at 555-56. Appellant does not argue that military judges are forbidden to be stern, or interrupt counsel, or run a highly controlled courtroom. However, it is impermissible for a military judge to unduly restrict counsel in their endeavors to represent clients. *United States v. Cole*, 491 F.2d 1276, 1278 (4th Cir. 1974). That is what happened here. (JA 49-50).

In *United States v. McIlwain*, this Court determined that the disqualification of the military judge required reversal. 66 M.J. 312 (C.A.A.F. 2008). This case is stronger than *McIlwain* because there the defense did not even argue that the military judge's decisions throughout the trial were tainted. *McIlwain*, at 6. However, in this case, both the trial and outcome were tainted by the military judge's refusal to recuse herself and by the interjection that came during the cross-

examination of Ms. ME. (JA 8-30, 32, 46-56 86). Appellant was acquitted of all offenses *except those pertaining to Ms. ME.* The same is true for the military judge's frequent interruptions and refusal to permit defense counsel, both Mr. Jordan and CPT Creighton, to make arguments during their objections throughout the trial. (JA 46 and 51-52, 56).

C. Reversal under *Liljeberg* is Necessary

As this Court has done in *Butcher*, *McIlwain*, and *Uribe*, this Court should apply the *Liljeberg* factors to determine prejudice under a violation of R.C.M. 902(a). *See* 56 M.J. at 92; 66 M.J. at 315; 80 M.J. at 449. Here, the military judge's departure from impartiality was of a nature to undermine public confidence in the military justice system, therefore application of the *Liljeberg* test requires reversal.

Whether a military judge's failure to recuse herself constitutes reversible error depends on "[1] the risk of injustice to the parties in the particular case, [2] the risk that denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988); *Quintanilla*, 56 M.J. at 45.

1. Injustice to the Parties in the Particular Case

The first factor of the *Liljeberg* test supports reversal in this case. The military judge's conduct demeaned Appellant's trial defense counsel in front of

witnesses and panel members. This conduct materially prejudiced a substantial right of constitutional dimension and resulted in injustice to Appellant.

When the defense attempted to call Ms. Langley to establish the military judge's bias, the military judge refused to hear from her. (JA 49). Ms. Langley was qualified to testify to what she observed in the court-room—furthermore, she observed approximately twenty courts-martial and had the ability to articulate her observations with clarity and precision and could draw comparisons to the conduct of other military judges. (JA 29-31). Instead, the defense resorted to calling the bailiff, which resulted in his confused testimony. (JA 287). This was the direct result of an injustice and improper conduct of the military judge.

2. Undermining the Public's Confidence in the Judicial Process

Finally, the third prong of the *Liljeberg* test also requires reversal.[2] Failure to reverse in this case would "undermine the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864. Failure to reverse would strike at the core of what R.C.M. 902(a) was designed to protect: a fair trial by a fair panel with a fair judge.

This is confirmed by the declarations of the witnesses to the military judge's conduct that are before this Court. (JA 8-30). In this case, where observers of the trial averred the military judge's departure from impartiality impacted their faith in the military justice system, public confidence in the military justice system will be degraded if this conviction and sentence are allowed to stand.

[2] Appellant does not concede the second prong of *Liljeberg*. Unlike in *Uribe*, this Court can be sure that without action on Appellant's case, the military judge will continue to produce injustice in other cases, because it has already happened in other cases. On September 1, 2022, a little under a year after Appellant's trial concluded, the same military judge degraded and mocked other defense counsel in that case. *See United States v. Locke*, A.C.C.A. 20220447, Brief on Behalf of Appellant. In *Locke,* just as in the Appellant's case, the same military judge interrupted the defense counsel during his argument and mocked the attorney's southern accent. *Id*. The expert in that case found "COL Emanuel [] the least competent, most combative, and most disrespectful judge I have ever witnessed. Her conduct makes me seriously question the legitimacy of the military justice system." (*Id.*). For that reason, the second factor weighs in favor of reversal. This court can take judicial notice under Rule 30A of the briefs filed in *United States v. Locke*, currently under review at the Army Court of Criminal Appeals.

"It is well-settled in military law that the military judge is more than a mere referee." *McIlwain*, 66 M.J at 314. This Court has noted that the "influence of the trial judge on the jury is necessarily and properly of great weight," and "jurors are ever watchful of the words from the military judge." *Id*.

In this case, the military judge interjected and degraded Appellant's trial defense counsel to Appellant's detriment. Mr. Jordan was not free to make arguments on the record. (JA 46, 47). When the military judge, in her frustration, could not remember Mr. Jordan's name, the military judge later blamed Mr. Jordan for not supplying his name fast enough, in the form of facetiously thanking him. (JA 44). This interaction is puzzling because the military judge brought it up in the middle of the litigation over the government's M.R.E. 412 objection, apropos of nothing. (JA 44). She refused to let Mr. Jordan explain his client's legal position, interrupting him mid-sentence. (JA 46-47). Then the military judge refused to recuse herself based on actual bias, and when the detailed military counsel began to argue a theory of implied bias, the military judge would not let him finish. (JA 50). And she refused to explain why she did not do so. (JA 56). Later, the military judge demeaned him in front of the panel members, who openly laughed in direct response to the military judge's rebuke at Mr. Jordan's expense. (JA 86).

Here, the military judge acted as a judge and a witness where her own conduct was at issue and provided nothing to the parties or on the record to support

her ruling. (JA 56). The refusal to recuse was self-serving because the military judge's professionalism and demeanor were in question. (JA 47, 56). For the above reasons, the public's confidence in the conduct of the military judge as not only an impartial member of the court, but also as a reflection of the military justice system will be seriously degraded if reversal is not ordered.

This case is distinguishable from prior cases where this Court has held that the conduct of the military judge did not rise to the level of a fundamentally unfair trial. In *Uribe*, this Court found that although the military judge's relationship with trial counsel was inappropriate, reversal under the *Liljeberg* factors would not be appropriate. 80 M.J. at 442. Appellant's case is very different. The conduct of the military judge towards defense counsel here denied Appellant a fair trial. For example, in *Uribe*, the military judge submitted to an extensive interview by the defense about his relationship with the trial counsel. 80 M.J. at 445. Here, the military judge would not even allow the defense to call a witness, Ms. Langley, to testify about her observations. Instead, the defense called the bailiff, who was supervised by the military judge, and who had never even attended a court-martial before Appellant's. (JA 54). Then, the military judge made not a single finding of fact, other than the self-serving determination that she was not biased. (JA 46).

Second, in *Uribe*, the appellant in that case did not identify any specific injustice he suffered at the hands of the military judge. 80 M.J. at 449. Here,

several are identified. Mr. Jordan was clearly distracted and hindered by his conflict with the military judge. (JA 8-30, 58). The frequent spats between the military judge and Mr. Jordan caused other people in the courtroom to call into question the military judge's impartiality. (JA 20, 29-31). Moreover, her demeanor also had a chilling effect on Appellant's counsel. Mr. Jordan remarked that he was so affected he had to leave the courtroom and consult with other people to calm down and return to the task of preparing a defense for MSG Armstrong. (JA 16).

Third, unlike in *Uribe*, the military judge here did not make thorough findings of fact and/or conclusions of law to support her ruling. (JA 54). The military judge in *Uribe* adopted the facts stated in Uribe's motion. (80 M.J. at 450). Here, the military judge went out of her way to control what facts were included on the record by improperly limiting the presentation of relevant evidence that might support the defense motion for recusal. (JA 50, 29-31).

Conclusion

Appellant respectfully requests that this Honorable Court set aside the finding and sentence.

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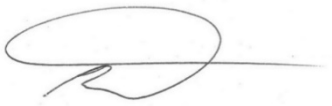

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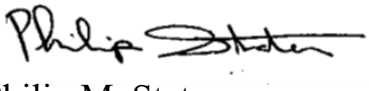

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 5,749 words.

2. This Brief on Behalf of Appellee complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Armstrong, Crim. App. Dkt. No. 20210644, USCA Dkt. No. 24-0002/AR was electronically filed with the Court and Government Appellate Division on January 12, 2024

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