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10/27/2026
CLERK OF THE COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private First Class (E-3) **JAMES A. GILLESPIE** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20250350 USCA Dkt. No. _____/AR

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Issue Presented

WHETHER APPELLANT IS ENTITLED TO RELIEF UNDER ARTICLE 6(C), UCMJ, WHEN THE POST-TRIAL LEGAL ADVISOR TO THE CONVENING AUTHORITY PREVIOUSLY SERVED AS THE SENIOR DEFENSE COUNSEL WHO DETAILED COUNSEL TO REPRESENT APPELLANT AND SUPERVISED THEM DURING APPELLANT'S 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 [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 and Relevant Facts

On July 9, 2025, Appellant entered a plea of guilty to two specifications of domestic violence in violation of Article 128b, UCMJ, and one specification of violating a lawful order in violation of Article 92, UCMJ. (R. at 129; STR). That same day, the military judge found appellant guilty of the three specifications and sentenced him to eight months of confinement and a bad-conduct discharge. (R. at 228; STR).

On July 22, 2025, Appellant submitted post-trial matters pursuant to R.C.M. 1106. (Post-Trial Matters). Appellant requested the Convening Authority (CA) to defer automatic forfeitures until entry of judgment and waive automatic forfeitures

for six months. (Post-Trial Matters). On September 17, 2025, the Deputy Staff Judge Advocate for 2d Infantry Division signed the clemency matters in the Staff Judge Advocate (SJA) or legal advisor block. (SJA Clemency Advice). That same day, the CA took no action on the findings and adjudged sentence, disapproved Appellant's requests for deferment of reduction in grade and forfeitures, and disapproved appellant's request for waiver of automatic forfeitures. (Convening Authority Action). But the legal advisor that advised the CA (SJA Clemency Advice) was also the Senior Defense Counsel that detailed defense counsel to and was supervisory counsel in Appellant's case. (R. at 6).

On September 24, 2025, the military judge entered Judgment. (Judgment). On August 31, 2026, the Army Court affirmed the findings and sentence as entered in the Judgment. (Appendix A).

Reasons to Grant the Petition

Can a staff judge advocate switch sides during a case? This case presents this Court the opportunity to address whether a judge advocate can serve as a supervisory defense counsel who detailed defense counsel to Appellant's case and then advise the convening authority to deny Appellant requested relief. This Court has addressed cases where judge advocates have moved positions within a government role, not switching from a defense role to a government role.

Addressing this side-switching issue will allow for the Court to look at whether this creates a prima facie appearance of prejudice to Appellant.

Standard of Review

Whether a staff judge advocate or legal advisor is disqualified from participating in the post-trial review is a question of law that is reviewed *de novo*. *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010); *United States v. Taylor*, 60 M.J. 190, 194 (C.A.A.F. 2004).

Law and Argument

Article 6(c)(1), Uniform Code of Military Justice [UCMJ], states,

> No person who, with respect to a case, serves in a capacity specified in paragraph (2) may later serve as a staff judge advocate or legal officer to any reviewing or convening authority upon the same case. . . . (2) The capacities referred to in paragraph (1) are, with respect to the case involved, any of the following: (A) Preliminary hearing officer, court member, military judge, military magistrate, or appellate judge. (B) Counsel who have acted in the same case or appeared in any proceeding before a military judge, military magistrate, preliminary hearing officer, or appellate court.

Here, the acting SJA, the legal advisor giving clemency advice to the Convening Authority on appellant's case, was disqualified due to his prior role as the Senior Defense Counsel (SDC) on the case.[1] While the former-SDC did not appear in any proceeding, he was the supervisory attorney and detailing authority

[1] The former-SDC should have determined he had a conflict because he previously served as supervisory counsel and thus was part of the defense team, determined he was indeed conflicted, and recused himself from further involvement in the accused's case, including advising on the post-trial action.

for defense counsel for this case. Thus, he had previous and significant involvement in the same case. He is referenced twice in Appellant's record. (Article 32 Appointment Memorandum dated 4 February 2025; R. at 6). As the supervisory attorney, he had the "responsibility for the direction, coordination, evaluation, or assignment of responsibilities and work of subordinate lawyers . . . ." Army Reg. 27-26, Rules of Professional Conduct for Lawyers, Rule 1.0 (26 Mar. 2025). The definition of supervisory attorney demonstrates a level of involvement in the appellant's case as to be disqualifying to act as an advisor on post-trial matters.

While the former-SDC did not appear in court in appellant's case, Article 6(c) "does not support such a narrow reading of the statute" to avoid disqualification. *Stefan*, 69 M.J. at 258. He merely needed to act as supervisory counsel. *Id.* As the supervisory defense counsel in appellant's case, the former-SDC was disqualified from acting as the SJA and legal advisor and should not have advised the Convening Authority on clemency.

In *Stefan*, this Court held the chief of military justice was disqualified from preparing an addendum to the staff judge advocate's recommendation as she caused the charges to be served on the appellant and acknowledged acting as trial counsel. 69 M.J. at 259. In *Stefan*, the disqualified actor served as a subsequent

government actor. *Id.* In Appellant's case, the former-SDC flipped from the defense to the government—the opposing side of Appellant's interests.

Taylor emphasized the importance of the legal advisor being, and appearing to be, objective and neutral. 60 M.J. at 193. In Appellant's case, the former-SDC became a government actor, which removed any appearance he was objective or neutral. The former-SDC should have recused himself from this case due to his prior involvement as the supervisory attorney. In *Taylor* and *Stefan*, the judge advocates were both government actors going to a subsequent government role. The court found, in both cases, the SJAs were disqualified from acting on post-trial actions. *Id.* at 196; *Stefan*, 69 M.J. at 259.

Unlike in *Stefan*, the Appellant was materially prejudiced, as the former-SDC has effectively altered his posture in the matter and now appears aligned in a manner adverse to Appellant's interests. Such a shift calls into question the integrity of the military justice system and warrants careful judicial scrutiny. In *Stefan*, this Court found the SJA had minimal involvement as she did not actively prosecute the case or take a firm stance on sentencing and thus had not materially prejudiced Stefan. *Stefan*, 69 M.J. 256, 259.

Here, the former-SDC had more than minimal involvement as he was initially on the opposite side and was the supervisory and detailing attorney for now-opposing counsel. Because the record contains no documentation of the

SJA's recommendation, it is impossible to determine what advice the SJA provided to the Convening Authority. Prior involvement where the now-SJA was on the opposite side creates a prima facie appearance of material prejudice.

As in *Taylor*, "appellant is entitled to a post-trial action by a convening authority who ha[s] been advised by a properly qualified staff judge advocate." *Taylor*, 60 M.J. at 195, *United States v. Lee*, 66 M.J. 387 (C.A.A.F. 2008), and *United States v. Lynch*, 39 M.J. 223 (C.M.A. 1994). An objective outside viewer would not find this to be fair to the appellant and would taint the objective viewer's opinion of the Military Justice System. The remedy for the disqualification of the SJA in *Taylor* was a new post-trial review, which included a recommendation by a staff judge advocate who was not disqualified. *Id.* at 196. The same should occur here.

Conclusion

Appellant respectfully requests this Court grant his petition for review, find that the SJA was disqualified from advising the Convening Authority, and order a new post-trial Action.

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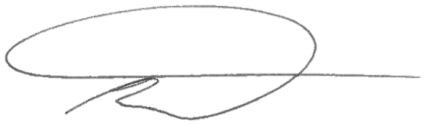

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Certificate of Compliance with Rules 24(c) and 37

1. This Supplement to the Petition complies with the type-volume limitation of Rule 24(c) because it contains 1,287 words.

2. This Supplement to the Petition 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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Appendix A: Army Court Decision

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOPER, WILLIAMS, and SCHLACK
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E2 JAMES A. GILLESPIE
United States Army, Appellant

ARMY 20250350

Headquarters, 2d Infantry Division
Mitchell D. Herniak, Military Judge
Lieutenant Colonel Stacee B. Cain, Special Trial Counsel
Lieutenant Colonel Patrick R. Sandys, Acting Staff Judge Advocate (post-trial)

For Appellant: Lieutenant Colonel Kyle C. Sprague, JA; Major Beau O. Watkins, JA (on brief); Lieutenant Colonel Kyle C. Sprague, JA; Major Nicole K. Ulrich, JA (on specified brief).

For Appellee: Pursuant to A.C.C.A. Rule 17.4, no response filed; Colonel Richard E. Gorini, JA; Lieutenant Colonel Kyle V. Burgamy, JA; Major Isaac J. Dickson, JA; Captain Clare M. Murphy, JA (on reply specified brief).

31 August 2026

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

COOPER, Senior Judge:

An appellant is entitled to have his request for clemency accompanied by legal advice from a qualified judge advocate. Consequently, it is error for a judge advocate who previously acted as counsel to subsequently advise the convening authority on the post-trial for the same case. However, to warrant relief, the appellant must demonstrate the error resulted in material prejudice to a substantial right.

A military judge, sitting as a general court-martial, convicted appellant, pursuant to his pleas, of one specification of failing to obey a written lawful order, one specification of assault consummated by battery, and one specification of aggravated assault, in violation Articles 92 and 128, Uniform Code of Military

Justice, 10 U.S.C. §§ 892, 928 [UCMJ]. The military judge sentenced appellant to a bad-conduct discharge and to be confined for eight months.

Our review of this case is conducted pursuant to Article 66, UCMJ (Sup. III 2021).*

BACKGROUND

Following acceptance of appellant's guilty plea and his sentencing, appellant requested the convening authority "exercise [his] authority under [R.C.M.] 1103(b) and 1103(h) and defer automatic forfeitures until entry of judgment and subsequently waive automatic forfeitures for six months." The convening authority denied appellant's requests.

The legal advisor who completed the Staff Judge Advocate (SJA) "Clemency Advice" in appellant's case had previously served as the senior defense counsel (SDC) for the region and had detailed appellant's defense counsel to the case.

Appellant submitted the case for our review on its merits. This court then specified whether appellant was entitled to relief under Article 6(c), UCMJ, when the post-trial legal advisor to the convening authority previously served as the SDC who supervised and detailed appellant's defense counsel.

LAW AND DISCUSSION

We review whether a staff judge advocate or legal advisor is disqualified from participating in post-trial review de novo. *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010) (citation omitted).

In pertinent part, Article 6(c), UCMJ, states: "No person who, with respect to a case, serves as [counsel who have acted in the same case] may later serve as a staff judge advocate or legal officer to any reviewing or convening authority upon the

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*Notwithstanding appellant's submission in his Rule for Courts-Martial [R.C.M.] 1106 matters that "the record contains no errors warranting appellate relief," and his request that "the convening authority affirm the findings and sentence to ensure the plea's integrity on appeal, avoiding unnecessary disruption to the judicial process," and "the Army Court of Criminal Appeals (ACCA) uphold the guilty plea and adjudged sentence as provident, voluntary, and fair," appellant still submitted his case to this court on its merits for review. Appellant's R.C.M. 1106 matters were not sufficient to waive or withdraw from appellate review, as they did not meet the criteria as laid out in Article 61, UCMJ, or R.C.M. 1115. Thus, pursuant to our Article 66 authority, we have carefully reviewed the providence of appellant's guilty plea and find it to be without error. We will therefore affirm the findings and sentence in our decretal paragraph.

same case." The statute requires "only that the person act" as counsel to be disqualified. *Stefan*, 69 M.J. at 258.

Here, the legal advisor who advised the convening authority on appellant's post-trial matters was the SDC who had supervised and detailed appellant's trial defense counsel. Accordingly, the legal advisor had acted as counsel in the case. Therefore, we agree with appellant that the legal advisor was disqualified under Article 6(c), UCMJ, from advising the convening authority on appellant's clemency request because he had "acted in the same case."

Having found error, we now test for material prejudice to the substantial rights of the accused. *Id.* at 259. To warrant relief, an appellant bears the burden of demonstrating "some colorable showing of possible prejudice." *Id.* (citation omitted).

Appellant argues, because the legal advisor transitioned directly from SDC to a government advisory role, this "side-switching" creates a prima facie appearance of prejudice that inherently calls into question the integrity of the post-trial process. We find this argument unpersuasive. Although the legal advisor should have been more cognizant of his possible conflicts, the fact that he occupied roles as a defense counsel, then subsequently government counsel, does not automatically establish prejudice. As such, we must determine whether his doing so prejudiced a substantial right of appellant. *See* UCMJ art. 59(a).

To determine whether a disqualified advisor materially prejudiced an appellant, we must examine the nature and extent of the advisor's prior involvement and their subsequent post-trial conduct. As the Court of Appeals for the Armed Forces noted in *Stefan*, "[w]hile minimal conduct can contravene Article 6(c), it is obvious that when the conduct is relatively minimal, the likelihood of actual prejudice is substantially diminished." 69 M.J. at 259. Conversely, courts have found prejudice when the disqualified officer's actions demonstrated active hostility, the misuse of confidential information, or aggressive advocacy against the accused. *See, e.g.*, *United States v. Johnson-Saunders*, 48 M.J. 74, 74–75 (C.A.A.F. 1998) (finding prejudice when the acting SJA had been detailed as the assistant trial counsel, had actively prosecuted the case, and had requested a harsher sentence than adjudged in post-trial recommendations); *United States v. Coulter*, 3 C.M.A. 657, 658–61, 14 C.M.R. 75, 76–79 (1954) (finding prejudice when the SJA had been previously detailed as trial counsel, actively prosecuted the case, and injected bias by calling the accused a "worthless individual" in a report to the convening authority).

Here, there is no evidence suggesting the legal advisor's actions prejudiced appellant. While his role as the supervisory and detailing attorney for appellant's defense counsel was sufficient to trigger a statutory disqualification under Article 6(c), UCMJ, there is only evidence that he detailed a counsel to appellant's case and generally supervised the counsel. Nothing in the record indicates the legal advisor

directly supervised counsel on matters pertinent to appellant's court-martial. These actions have not been found to be prejudicial without more. *Stefan*, 69 M.J. at 259 (finding no prejudice where the SJA advice was from a former trial counsel who had signed the charge sheet but did not actively prosecute the case nor take a firm stance on sentencing).

Applying this framework to the record before us, appellant failed to demonstrate any prejudice. In his R.C.M. 1106 matters, appellant requested deferment of forfeitures until Entry of Judgment and waiver thereafter. However, as noted by the government, appellant neither identified a dependent nor submitted the paperwork to execute a pay transfer to a dependent. Accordingly, the convening authority had insufficient information to approve his waiver request. *See* UCMJ art. 58b(b) (authorizing waiver of adjudged forfeitures for "an accused who has dependents"). Further, because he did not identify a dependent, appellant would directly be enriched by an approved deferment. As such, it is doubtful any similarly situated appellant would have received clemency.

Like our higher court's finding in *Stefan*, under these circumstances, considering appellant's offenses, we find no basis to believe that a different legal advisor's advice would have resulted in a different action by the convening authority. 69 M.J. at 259 (finding no prejudice where "there [wa]s nothing that would suggest that another SJA would have made a different recommendation on Appellant's clemency request" to the convening authority). Accordingly, we find no material prejudice to a substantial right of the appellant.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judge WILLIAMS and Judge SCHLACK concur.

FOR THE COURT:

James W. Herring, Jr.

JAMES W. HERRING, JR.
Clerk of Court

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Gillespie, Crim. App. Dkt. No. 20250350, USCA Dkt. No. _____/AR was electronically filed with the Court and Government Appellate Division on October 27, 2026.

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