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	REPLY 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

Argument

The Government's arguments in support of the military judge's conduct fail for four reasons. First, the military judge's departure from appropriate decorum is captured by the courtroom recordings. Second, the trial defense team did not violate R.C.M. 902(d)(2). Third, the military judge abused her discretion by applying an incorrect legal standard regarding recusal. Fourth, reversal is warranted under *Liljeberg*.

1. The Audio Makes Clear the Only Departure from Appropriate Decorum in the Court Room was from the Military Judge

As a preliminary matter, this Court ordered the parties to brief "whether the military judge's departure from impartiality deprived Appellant of his right to a fair trial." (JA 1). Instead of answering this question, the Government devotes much of its brief to fighting the Court's granted issue, and arguing the military judge was only attempting to control her courtroom. (Appellee's Br. at 10-11, 16-19).

The Government suggests that Mr. Jordan "appeared to raise his voice" and that the military judge needed to "exercise control over her courtroom." (Appellee's Br. at 16). An examination of the audio establishes that no one, least of all Mr. Jordan, raised their voice at the time the military judge told Mr. Jordan to "shut up". (*Armstrong*, Day IV, at 19:30). Indeed, when the military judge first chided Mr. Jordan to "keep his voice down, slightly," Mr. Jordan replied, "Say again?" (*Id.*). He is perhaps perplexed because, as the audio demonstrates, he had not raised his voice in the first place.

The Government also argues that "1LT EK's testimony did not support the defense counsel's allegation of bias." (Appellee's Br. at 18). The Government's use of 1LT EK's testimony in an attempt to justify the military judge's behavior is unpersuasive for several reasons. First, 1LT EK's testimony was weak. He was observing his first court-martial. (JA 54). His only source of knowledge of impartiality and appropriate decorum in the courtroom came to him from television.

(*Id*.). Second, when 1LT EK was not confused and scattered, his testimony was entirely obsequious and reverent of the military judge. When asked if the exchange "surprised [him] a little bit," 1LT EK deferred entirely to the military judge, referring to her as the "final decision maker." (JA 290). To the bailiff, a witness most certainly not "unconnected to the case," and most certainly not an objective outside observer fully informed of all circumstances, she was the final decision maker. Thus, his testimony should be given minimal weight.

Finally, after the military judge attempted to give a curative instruction to the panel, the military judge still could not refrain from making a joke at Mr. Jordan's expense. (JA 86). The military judge interrupted Mr. Jordan's cross-examination of Ms. ME again and rebuked him for testifying rather than cross-examining. (*Id*.). But the record clearly establishes that the witness was refusing to answer Mr. Jordan's question regarding Appellant's prosthetic leg, and instead of instructing the uncooperative witness to answer his question, the military judge mocked Mr. Jordan in front of the panel, eliciting audible laughter from the members. (*Id*.).

2. R.C.M. 902(d)(2)

The Government also wields the Discussion for R.C.M. 902(d)(2) as a shield, arguing the rule permits a military judge to restrict testimony. (Appellee's Br. at 21). It is true R.C.M. 902(d)(2) permits "reasonably limiting the presentation of evidence, the scope of questioning, and argument on the subject so as to ensure that

only matters material to the central issue of the military judge's possible disqualification are considered, thereby, preventing the proceedings from becoming a forum for unfounded opinion, speculation, or innuendo."

But the military judge never cited R.C.M. 902(d)(2) when she refused to hear from Ms. Langley. (JA 49). Furthermore, the Government failed to establish that Ms. Langley's testimony would have been unreasonable and irrelevant to the central issue of the military judge's disqualification. Without question, Ms. Langley was present each time the military judge cut off Mr. Jordan, refused to allow him to speak, and was witness to her departure from impartiality in the proceedings. (JA 29-31). The trial defense team did not attempt to parade witnesses to present unfounded opinion, speculation, or inuendo. The defense sought the testimony of one witness who had personally observed nearly twenty courts-martial and could testify to the military judge's conduct in the courtroom on that day.

On the one hand, the Government endorses the military judge's refusal to hear from Ms. Langley directly. (Appellee's Br. at 20). On the other, the Government warns this Court, in a footnote, to give no weight to the affidavits provided from appellant's trial defense team because, wait for it, the defense failed to adequately develop the record on the points made within the affidavits. (Appellee's. Br. at 20 n.5).

The Government approves of the military judge's requirement that the defense provide a witness "unconnected to the case." (App. Br. at 15). But the bailiff certainly fails the test of someone who is "unconnected" to the trial because he is literally under the military judge's authority. Not only does the military judge significantly outrank the bailiff, he reports to the military judge. For Appellant's court-martial, 1LT EK was the military judge's judicial officer whose primary responsibility was to do her bidding: call the court to order, tell the panel to retreat to the deliberation room, retrieve the panel from the deliberation room, close the courtroom, reopen the courtroom, attend to the jury during deliberations, etc. (R. at 71, 103, 130, 161, 164, 189, 213, 338, 362, 420, 425, 444, 445, 487, 496, 509, 536, 538, 549, 564, 573, 575, 579, 580). If any rule required a witness to be "unconnected" to the case to testify in a motion for recusal under 902(d)(2), surely 1LT EK's testimony violated that rule.

3. Abuse of Discretion

Pressing ahead, the Government asserts Appellant has failed to show the military judge's decision to recuse herself was based on an erroneous view of the law. (Appellee's Br. at 16). On the contrary, Appellant cited to the correct legal test for identifying an appearance of bias, which 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) (emphasis added) (quoting *United States v. Sullivan*, 74 M.J. 448 (C.A.A.F. 2015)). The military judge, however, applied an incorrect standard. (JA 50-51). The standard she applied, adopted now by the Government, is "whether a reasonable person who was unfamiliar with the case observing the proceedings would come to that conclusion." (JA 51). But the Government can cite to nothing to support its assertion that the military judge was correct in applying this contortion of the objective standard laid out in *Uribe*. By applying her "unfamiliar with the case" standard, the military judge misapprehended and misapplied the test at the heart of R.C.M. 902(a). (JA 50-51).

The Government also claims the military judge made no findings of fact that were clearly erroneous, suggesting "the military judge did not dispute any facts beyond stating that defense presented 'no context' to the military judge telling defense counsel to stop talking." (Appellee's Br. at 13). This is perhaps accurate, but for a different reason than advanced by the Government. The military judge *made no findings of fact*, and therefore, minimal deference should be afforded the military judge's conclusion that she was not biased. To the extent Appellant did not challenge the military judge's findings of fact, it is because the military judge simply did not make any findings of fact.

4. Reversal is Warranted

a. Specific Injustice

The Government claims Appellant failed to identify any specific injustice he suffered at the hands of the military judge. (Appellee's Br. at 20). But the Government ignores the military judge's rebuke at Mr. Jordan's expense—in front of the panel—during the cross-examination of the very witness upon whose testimony Appellant was later convicted. (JA 86).

The specific injustice is not just that the military judge refused to allow the defense to present its case for her recusal, but it is also the failure of the military judge to exhibit neutrality in her language and her conduct. *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977). Appellant did not get a fair trial because the military judge interfered with the cross-examination of the complaining witness to the Government's benefit, and demeaned Appellant's trial defense counsel in the process. (JA 86). The military judge also foiled trial defense from addressing the Government's objections (JA 46-47), prevented the defense from creating a record (JA 54-46), and refused to allow them to support their motion for recusal with evidence, except for the evidence that (as the Government admits) was favorable to the military judge. (JA 49). A reasonable observer would conclude that this behavior exposed a "deep-seated antagonism" that would make fair judgment impossible. *Liteky v. United States*, 510 U.S. 540, 541 (1994).

The Government never seriously contends with *Liteky*, *Spears*, or *Candelaria-Gonzalez*. Instead, the Government cites to inapplicable cases that can be easily distinguished. In *Marcavage*, the Third Circuit determined a district court judge need not recuse herself because of a membership in a barrister's association and the position the lead defense counsel held in that association. *Marcavage v. Bd. of Trs. of Temple Univ. of the Commonwealth Sys. of Higher Educ*., 232 F. App'x 79, 82 (3d Cir. 2007). Appellant's case presents a different kind of conflict between defense counsel and the judge—a conflict that led the judge to abandon her judicial temperament. Moreover, the judge in *Marcavage* did not prevent counsel from presenting supporting evidence to support the motion to recuse. 232 F. App'x at 83. Nor did that judge decide the motion for recusal without even consulting the Government, as the military judge in the instant case did.

Nor does *Selkridge* apply here. In *Selkridge*, another Third Circuit case, the court found the trial judge should have recused himself, but nonetheless found the judge's conflict did not change the result in the case. *Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 171 (3d Cir. 2004). The court decided *Selkridge* under a harmless error analysis and determined that remand would have the consequence of "unnecessary, additional litigation." *Id*. Here, the Government has not established harmless error. The military judge departed from the "equanimity of spirit" required of her in front of the panel and such conduct had a spoiling effect to

the point at which unfairness in the trial required reversal. *United States v. Spears*, 558 F.2d 1296, 1298 (7th Cir. 1977). A new trial is not unnecessary litigation. It is required in the interest of justice.

b. Deterrence

The Government argues that this Court should not take judicial notice of the facts of *United States v. Locke*, Army Crim. App. Dkt. 20220447, which involves the same military judge. There, she allegedly mocked the accent of the military defense counsel and was openly hostile to the civilian defense counsel. The briefs in *Locke* are accessible at this location.

The Government cites to *United States v. Jessie*, 79 M.J. 437, 441 (C.A.A.F. 2020) to support its argument that this Court should ignore the military judge's conduct in other cases. *Jessie*, however, is about attaching extraneous material to the record. It is silent on judicial notice. *See United States v. Rodriguez*, 2023 CCA LEXIS 125, at 12 (A.F. Ct. Crim. App. Mar. 9, 2023) ("We find nothing in *Jessie* that purports to overrule the CAAF's prior recognition that a CCA may take judicial notice of undisputed facts or matters of domestic law that are 'important to the resolution of an appellate issue.'").

Accordingly, this Court should take judicial notice of the factual allegations raised in *Locke*—not for the truth of the matters alleged, but only for the circumstances surrounding this military judge who, subsequent to this case, found herself at the center of another impartiality dispute concerning whether she mocked and demeaned defense counsel in a very similar situation. For the reasons stated, it is necessary to reverse the results of Appellant's trial to ensure the appropriate degree of discretion in the future.

c. Public Confidence

The third *Liljeberg* prong requires reversal. The Government argues that Appellant's acquittal of two specifications would assuage an objective observer's confidence in the military justice system, citing to *Uribe*. (Appellee's Br. at 24). When Appellant's acquittals are examined, the true concern for public confidence in the military justice system is amplified, not mitigated, as the Government suggests.

Unlike in *Uribe*, this case deals with two alleged victims. (JA 3). Appellant was only acquitted of the specifications relating to Ms. KZ. (Statement of Trial Results). Appellant was convicted of the offense relating to Ms. ME. (Statement of Trial Results). The military judge's departure from impartiality occurred, and tainted, the presentation of evidence pertaining to the Government's case against Appellant relating to Ms. ME. Thus, the public cannot have confidence in a justice

system in which the military judge placed her thumb on the scale during the presentation of evidence pertaining to the complaining witness—and the accused was convicted of offenses only as pertaining to that witness.

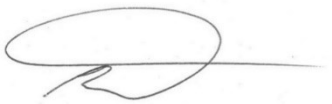
Given these specific injustices, the need for deterrence, and the potential erosion of the public's confidence in the military justice system, this case calls for reversal.

Conclusion

For the reasons stated, Appellant respectfully requests this Honorable Court set aside the finding and sentence.

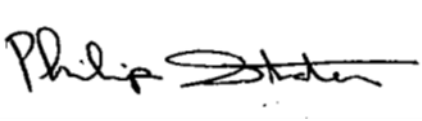
Rachel M. Rose
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 69-0087
USCAAF Bar No. 37719

Robert W. Rodriguez
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 37706



Jonathan F. Potter
Senior Capital Defense Counsel
Defense Appellate Division
USCAAF Bar No. 26450

Autumn R. Porter
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 37938



Philip M. Staten
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 33796

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 February 22, 2024

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736