IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	REPLY BRIEF ON BEHALF OF APPELLANT
v.	Crim. App. Dkt. No. 20220225
First Lieutenant (O-2) **ADALBERTO BRINKMAN-CORONEL**, United States Army, Appellant	USCA Dkt. No. 24-0159/AR

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

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ARGUMENT

I.

THE LOWER COURT ERRED IN FINDING THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE FAILED TO RECUSE HIMSELF FROM APPELLANT'S COURT-MARTIAL FOR THE APPEARANCE OF BIAS.

A. The appearance of bias required the military judge's recusal.

The government asserts that there was no appearance of bias because the military judge was "sectioned off" from investigations when law enforcement discovered that appellant may have possessed images and videos of suspected child pornography (Appellee Br. at 9), the military judge stated that he did not work on appellant's case (Appellee Br. at 9), and because the military judge's previous professional interactions with trial and defense counsel were neither unusual or improper (Appellee Br. at 10-11). If appellant had alleged that there was actual bias in this case, then those would be valid points, however, appellant asserts only that there was an appearance of bias. (App. Br. at 17).

Next, the government focuses most of its argument on the military judge's prior professional interactions with trial and defense counsel. (Appellee Br. at 10-11). This focus, rather than on the military judge's role as the "subject matter expert for all of Hawaii" immediately preceding his assignment as the military judge and his familiarity with the undercover operation, is misplaced, especially

considering that appellant's discussion of the military judge's mentorship of the prosecutors is limited to one clause of one sentence in the analysis of the issue. (App. Br. at 20).

Ultimately, the government fails to confront the gravamen of the appearance of bias: the military judge was the self-professed "subject matter expert for all of Hawaii" not just for sexual assault crimes in general, but for the specific crimes in a specific undercover operation that appellant was accused of committing and the military judge served as the most experienced and highest-ranking prosecutor for those crimes in Hawaii immediately before taking the bench. The government fails to confront the fact that the military judge knew details about the undercover operation which were not, and could not be, known by anyone unfamiliar with the operation. Many of these facts were disputed in the motion to suppress at trial and on appeal. A reasonable person knowing all the circumstances, including these undisputed facts, would conclude that the military judge's impartiality might reasonably be questioned, even though there is no actual bias. *See United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001).

B. Reversal is warranted under all three factors of *Liljeberg v. Health Servs. Acquisition Corp.*[1]

[1] 486 U.S. 847, 864 (1988).

Under the first *Liljeberg* factor, appellant asserts that the risk of injustice to him is high because the military judge issued rulings on the motion to suppress and on the motion to admit evidence pursuant to Mil. R. Evid. 404(b), both of which required the military judge to make discretionary rulings. (App. Br. at 21-22). The government cites *United States v. Uribe*[2] for the proposition that adverse rulings do not necessarily demonstrate the risk of prejudice and *Quintanilla*[3] for the proposition that "remarks, comments, or rulings . . . do not constitute bias or partiality, unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." (Appellee Br. at 12-13).

The government misconstrues appellant's argument. The issue is that the risk of injustice is greater when a judge who has an apparent partiality toward the government renders discretionary rulings. *See Uribe*, 80 M.J. at 455 (Stucky, C.J., dissenting). This is especially true because the military judge had knowledge of and had worked on cases involving Operation Keiki Shield and he knew details about the undercover operation that would be known only by the "subject matter expert for all of Hawaii," many of which were disputed by the parties during the motion to suppress and during the government's case-in-chief. If there were issues in appellant's trial that did not require discretionary rulings, such as the imposition

[2] 80 M.J. 442, 449 (C.A.A.F. 2021).
[3] 56 M.J. at 44.

of a mandatory minimum punitive discharge for a sexual assault conviction,[4] then the risk of injustice to appellant would be low even if the military judge had an apparent partiality toward the government. Here, however, the military judge issued rulings which required him to exercise discretion, such that the risk of injustice was greater. Moreover, the government does not confront appellant's argument regarding the language of the military judge's ruling on the motion to suppress. *See* App. Br. at 22-23. Ultimately, it is entirely possible that the military judge's rulings were the product of his considered and unbiased judgment, unmotivated by any improper considerations, but that is beside the point: appearance may be all there is, but that is enough. *In re Al-Nashiri*, 921 F.3d 224, 237 (D.C. Cir. 2019) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001).

Next, appellant has articulated a risk of a specific injustice: because of the military judge's self-professed expertise while serving as the Special Victims Prosecutor immediately preceding his assignment as the military judge, his familiarity with the undercover operation in appellant's court-martial, and his tone in the ruling on the motion to suppress, there was a risk of injustice to appellant if the military judge did not disqualify himself. *Cf. Uribe*, 80 M.J. at 449 (reversal not warranted where the appellant did not identify any specific injustice he

[4] Article 56(b), Uniform Code of Military Justice, 10 U.S.C. § 856(b).

suffered at the hands of the military judge). Of note, *Liljeberg* requires only the "risk of injustice" and not an actual injustice. 486 U.S. at 864. *See*, *e.g.*, *Buck v. Davis*, 580 U.S. 100, 103 (2017); *United States v. Pandey*, 1992 U.S. App. LEXIS 30766, *13-14 (1st. Cir. 1992); *Exxonmobil Oil Corp. v. TIG Ins. Co.*, 44 F.4th 163, 172-73 (2d. Cir. 2022); *Adams v. Roman Cath. Church of the Archdiocese of New Orleans (In re Roman Cath. Church of the Archdiocese of New Orleans)*, 101 F.4th 400, 407 (5th Cir. 2024); *United States v. Orr*, 969 F.3d 732, 741 (7th Cir. 2020).

Regarding the second *Liljeberg* factor, the government erroneously focuses on appellant's prompt challenge of the military judge (Appellee Br. at 13) rather than on the risk that the denial of relief in appellant's case will produce injustice in *other* cases. *See* 486 U.S. at 868.

Regarding the third *Liljeberg* factor, the government asserts that there is no risk of undermining the public's confidence in the military justice system largely because appellant's case "did not 'involve intimate personal relationships, extensive interaction, conduct bearing on the merits of the proceed[ings], or other factors that could undermine the basic fairness of the judicial process.'" (Appellee Br. at 14) (quoting *United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001)). The government answers the argument it wishes appellant made, rather than the argument appellant actually made: that the military judge's self-professed

expertise as the most experienced and highest-ranking prosecutor in Hawaii for a narrow set of crimes for which appellant was prosecuted and his familiarity with the undercover operation immediately preceding his assignment as the military judge gave the appearance of partiality for the government. *See* App. Br. at 23-24. Under these circumstances, a reasonable observer would question whether the military judge was an impartial arbiter and would lose confidence in the military justice system.

Finally, the government fails to acknowledge that the military judge did not apply Rule for Courts-Martial 902(a) and relevant caselaw and did not place his findings and analysis on the record.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE MOTION TO SUPPRESS EVIDENCE DISCOVERED FROM APPELLANT'S "VACUUM PHONE."

A. This Court should refer to the evidence adduced at trial and not to the government's proffer.

The government suggests that this Court can rely on the government's recitation of the chronology in its response to the motion to suppress. (Appellee Br. at 16, n.3). The chronology in the government response is an offer of proof and not evidence. *See United States v. Thompson*, 29 C.M.R. 68, 71 (C.M.A. 1960) ("The information submitted by the defense in its proffer is not evidence,

nor does an offer of proof establish the truth of facts related therein.").

Accordingly, appellant urges this Court to consider the testimony admitted during litigation of the motion to suppress and during the merits phase of the court-martial and not the government's proffer.

B. Appellant unequivocally withdrew consent from his husband.

The government argues that appellant "placed no restrictions on the use of his shared apartment with DBC or the vacuum phone." (Appellee Br. at 28). This assertion is incorrect and ignores the same facts that the military judge ignored. Appellant explicitly told his husband to "disregard" his previous entreaties to come to Hawaii, locate appellant's car, retrieve the vacuum phone, enter the password to watch the videos, and grab the valet key on the little table next to appellant's wallet. (JA 393). The government, like the military judge, asserts that appellant's "disregard" message "was not a 'disallow' message." (Appellee Br. at 32) (citing JA 573). Even though the government agrees with appellant that "magic words" are not required to effectuate the withdrawal of consent, the government nonetheless insists that appellant's instruction to his husband to "disregard" the previous messages did not withdraw consent. (Appellee Br. at 32). Essentially, the government ignores appellant's explicit withdrawal of consent and requires him to use specific talismanic language – "magic words" – to revoke consent. Appellant unequivocally withdrew consent. DBC understood that appellant

withdrew consent, and CID knew that appellant had withdrawn consent because they knew about the "disregard" message. Moreover, DBC did not know about the vacuum phone until he read the Facebook messages from appellant. He could not have common authority over an object that he did not know existed.

The government also argues that "Appellant did nothing to interfere with, limit, or otherwise cabin his husband's usage or control over the vacuum phone," such that appellant "never acted to withdraw consent from his husband's subsequent disclosure of it to law enforcement." (Appellee Br. at 34). Contrary to the government's assertion, appellant needed only to make his intent clear through some unequivocal act *or* statement. *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018). The instruction to "disregard" constituted an unequivocal statement. Accordingly, DBC's consent to CID was invalid.

C. CID exceeded the scope of DBC's limited consent.

DBC authorized CID to do what was necessary "to find my husband" because CID convinced him that exigent circumstances existed. Although several CID agents testified that DBC limited his authorization for this discrete purpose (JA 087, 088, 095, 102), the government insists that DBC gave broad consent to CID. (Appellee Br. at 27, 30, 34, 35). The government fails to recognize the parameters of DBC's authorization as a limit on the scope of the consent.

The government also insists that "CID had broad apparent authority to search the vacuum phone. . . ." and it relies on *United States v. Jackson* for the proposition that the proper point of view is of "what the typical reasonable person would have understood by the exchange between the law enforcement agent and the person who gives consent." (Appellee Br. at 35-36) (quoting 598 F.3d 340, 348 (7th Cir. 2010)). This argument deliberately ignores the fact that law enforcement agents convinced DBC that exigent circumstances existed to obtain his "broad" consent. Several CID agents, and Special Agent [SA] KJ in particular, used the vague, ambiguous, and ominous term "signs of life" multiple times with DBC to press him for consent. The government and the lower court's majority opinion fail to recognize that the purported emergency search and DBC's consent were inextricably intertwined. It is no stretch to posit that DBC would not have consented to the search but for CID's insistence that exigent circumstances existed.

D. DBC did not have apparent authority over the vacuum phone.

The government contends that it appeared to CID that DBC had apparent authority over the phone because he had the passcode to it, he and appellant were married, and he "broadly instructed them to act as needed to find appellant." Appellant has already addressed the limited nature of DBC's consent *supra*. *See* App. Br. at 39-41). Without citing any authority, the government seems to rely on some sort of common law idea that spouses share all property communally, which

amounts to a *per se* rule that the fact that two people are married always bestows apparent authority on one of the spouses. Such a principle ignores the evidence that DBC and appellant did not share all property communally. For example, they did not share bank accounts or a cell phone plan. (JA 079, 081-082). Additionally, DBC did not know about the existence of the vacuum phone. *Cf. United States v. Rader*, 65 M.J. 30, 31, 34 (C.A.A.F. 2007) (not only did the appellant's roommate know about the appellant's computer but he also used it on more than one occasion).

As for the passcode, DBC provided it because he believed the vacuum phone was appellant's everyday phone. Appellant's commander and CID knew that the vacuum phone was not appellant's everyday phone, but no one told DBC that CID had seized the everyday phone, nor did they tell him that the phone they sought was not appellant's everyday phone. Because of CID's subterfuge (at best) or deceit (at worst), it cannot be said that CID reasonably believed that DBC had apparent authority over the vacuum phone.

E. CID failed to conduct an emergency search in a good faith effort to respond to the purported emergency.

The government concludes that the purported emergency search was conducted in good faith, pursuant to Mil. R. Evid. 314(i). (Appellee Br. at 42). In doing so, it ignores several facts: CID deactivated the vacuum phone, thereby preventing any outgoing or incoming calls or data that could have provided clues

to locating appellant; SA DS sent the phone to CID for digital forensic examination to search it in the most "forensically sound" manner as opposed to searching it immediately for clues as to appellant's whereabouts; and took an overnight break from searching the phone – after finding an image of suspected child pornography – while appellant was still missing. If circumstances were so exigent, then CID would not have wasted time transporting the vacuum phone to CID offices for a digital forensic extraction later that day and certainly would not have taken an overnight break from examining the phone. Finally, if circumstances were as exigent as CID insisted they were, then they would not have needed DBC's consent.

PRAYER FOR RELIEF

WHEREFORE, appellant respectfully requests that this Honorable Court set aside and dismiss the findings and sentence.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(c) AND 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains approximately 2,441 words.

2. This brief 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. Brinkman-Coronel, Crim. App. Dkt. No. 20220225, USCA Dkt. No. 24-0159/AR was electronically filed with the Court and Government Appellate Division on November 25, 2024.

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