IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. JOSEPH B. SALYER Corporal (E-4) United States Marine Corps, Appellant	MOTION ON BEHALF OF NATIONAL INSTITUTE OF MILITARY JUSTICE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* Crim. App. No. 201200145 USCA Dkt No. 13-0186/MC

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

In accordance with Rule 26, Rules of Practice and Procedure, counsel for the National Institute of Military Justice (NIMJ) respectfully requests leave to file an amicus brief in this case, and to file the attached brief.

The NIMJ is a District of Columbia non-profit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ is not a government agency. NIMJ's boards of directors and advisors include law professors, private practitioners, and other experts. No board member is currently an employee of the Department of Defense or other governmental agency.

The issues in this case are at the heart of the reasons for establishment of the Uniform Code of Military Justice – actual

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UNITED STATES, **Appellee** **v.** **JOSEPH B. SALYER** **Corporal (E-4)** **United States Marine Corps,** **Appellant**	**BRIEF ON BEHALF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE*** **Crim. App. No. 201200145** **USCA Dkt No. 13-0186/MC**

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ISSUE PRESENTED

UNDER *UNITED STATES V. LEWIS*, 63 M.J. 405 (C.A.A.F. 2006), A CASE IS DISMISSED WITH PREJUDICE WHEN UNLAWFUL COMMAND INFLUENCE RESULTS IN THE RECUSAL OF A MILITARY JUDGE. HERE, THE MILITARY JUDGE RECUSED HIMSELF BECAUSE HE FOUND THAT THE GOVERNMENT'S ACTIONS MADE IT IMPOSSIBLE FOR HIM TO REMAIN ON THE CASE. THE GOVERNMENT COMPLAINED TO HIS SUPERVISOR ABOUT A RULING, ACCESSED HIS SERVICE RECORD WITHOUT PERMISSION, AND WITH THIS INFORMATION, MOVED FOR HIS RECUSAL. SHOULD THIS CASE BE DISMISSED WITH PREJUDICE?

ARGUMENT

I. INTRODUCTION

From one perspective, if Judge Mori had just done what the government lawyers wanted, none of this would have had to happen.

If Judge Mori had just ruled the way the government lawyers asked, they never would have investigated his wife. If he had just given the instructions that they demanded, they never would have called his boss. If he had just ruled for the prosecution, instead of the defense, the government never would have tried to remove him. And none of the issues facing this Court would have ever arisen. Of course, had Judge Mori done any of those things, he would have violated the basic principle underlying all courts-martial: the necessity of independence. It is a bedrock principle of American military law that courts-martial cannot be subject to outside pressure. Courts-martial must be fair and be seen to be fair. "Command influence is the

mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987) Such influence represents a carcinoma that must be surgically eradicated. *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004). The elimination of outside pressure on courts-martial was a key goal for those promoting adoption of the UCMJ. Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services, 81st Cong., 1st Sess. 647 (1949) [House UCMJ Hearings] (statement by Arthur E. Farmer).

From the earliest days of the Code, practitioners have sought to defend courts-martial against even the appearance of unlawful influence. "This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned." *United States v. Hawthorne*, 7 U.S.C.M.A. 293, 297, 22 C.M.R. 83, 87 (1956). The "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003).

The UCMJ embodies a "clear ... congressional resolve that both actual and perceived unlawful command influence be eliminated from the military justice system." *United States v. Ledbetter*, 2 M.J. 37, 42 (C.M.A. 1976). But Congress understood commanders were not the only persons

who try to subvert the military justice system. House UCMJ Hearings at 756 (1949) (Testimony of Colonel John P. Oliver). Article 37(a) prohibits ***any*** military member outside the court-martial process from seeking to influence the proceedings, not just commanders. 10 U.S.C. 837(a).

Military judges are protected by Article 37(a) because they are "an integral part of the court-martial." *Ledbetter*, 2 M.J. at 42. Judges are the "last sentinel" in the military justice system. *United States v. Harvey*, 64 M.J. 13, 14 (C.A.A.F. 2006). "[S]pecial vigilance" is necessary to ensure judicial independence. *United States v. Campos*, 42 M.J. 253, 260 (C.A.A.F. 1995). This Court has traditionally been recognized as the guarantor of that independence. *See, e.g., Weiss v. United States*, 510 U.S. 163, 181 (1994) (noting this Court's "demonstrated ... vigilance in checking any attempts to exert improper influence over military judges").

The amici's interest in this case is based on study of, and experience with, the military justice system. Prosecutors and other personnel rely on the decisions of this Court to guide them and to set boundaries for their conduct. Action is needed not only to preserve this particular Appellant's right to a fair proceeding, free from even the appearance of unlawful influence; but also to preserve the integrity and independence of the military trial judiciary.

II. THE GOVERNMENT ORCHESTRATED REMOVAL OF THE MILITARY JUDGE BECAUSE OF THE JUDGE'S GOVERNMENT-ADVERSE RULINGS

a. The Government's Rocky History With Judge Mori

Lieutenant Colonel Michael D. "Dan" Mori, USMC, was the first military judge detailed to the Appellant's case.[1] He presided at the arraignment and through the beginning of the prosecution's presentation of evidence.

Judge Mori's reputation, deserved or not, was for lenient sentences. Record of Trial (R.) 395. He also had a history of holding government counsel accountable for their miscues. In a prior court-martial at Kaneohe Bay he disqualified the entire prosecution team -- including all the trial counsel and the base military justice officer -- from participation in that trial. JA 156-57. A trial counsel in Appellant's case, Captain Harlye S. Maya, USMC, was one of the trial counsel Judge Mori previously disqualified. JA 157.[2]

b. Judge Mori Rules Against The Government On Multiple Contested Issues At Trial

1. The Government's Efforts to Amend The Charges

The government originally charged the Appellant with distributing child pornography, in a single specification

[1] Three military judges eventually presided over parts of the court-martial: Judge Mori; CAPT J.R. Redford, JAGC, USN; and Colonel Michael B. Richardson, USMC. R. 2, 11, and 389. The government's actions toward, and the rulings of, Judge Mori and Judge Richardson are at issue in this appeal.

[2] The disqualification case was *United States v. Lauer*. *Id.* It is the amici's understanding that case ended in a complete acquittal.

alleging a violation of all three clauses of Article 134, UCMJ. An additional charge of possession was later referred, again in a single specification under all three clauses. Both specifications assimilated various portions of 18 U. S. Code § 2252A. JA at 9-12.

The Appellant was arraigned on 29 July 2011. R. 2, 7-9. There were several Article 39(a) sessions over the next few months as the parties prepared for trial. At one of these sessions, the defense moved for funding for an expert consultant in computer forensics. Trial counsel Captain Jesse P. Schweig, USMC, opposed the motion. R. 74, 77-78. During a hearing on the motion, Capt Schweig revealed that the government did not have -- and in fact, had never found -- the laptop computer on which the Appellant allegedly stored the child pornography. R. 79.

More than three months after arraignment, Judge Mori granted a government motion to except out the assimilated crime under the U. S. Code. The government also excepted, without objection, language describing the Appellant's conduct as prejudicial to good order and discipline. The net effect was to turn specifications alleging offenses under all three clauses of Article 134 into specifications alleging only violations of service discrediting conduct under Clause 2. JA 107-09.

The government also sought to except references to the missing laptop computer. The defense objected, saying they

had prepared the case based on allegations of a laptop laden with child pornography. R. 94-95. Ultimately, Judge Mori denied the amendment. R. 126. His ruling left the government to explain, if it could, what happened to the missing laptop. As it happens, they were able to do that because of the removal of the military judge.

2. The Government Amendments Lead To Further Dispute

Following the government amendments to the specifications, the judge asked the parties their view of the applicable maximum punishment. Citing *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007) and 18 U. S. Code § 2252A(b), the government opined the max included confinement for 30 years. Citing *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011) and the default maximum for Clause 2 offenses, the defense contended the maximum confinement was eight months. JA 14-16. Judge Mori reserved ruling until after findings. JA 112, 125.

Judge Mori also asked for input on how to define child pornography under the amended specs. The parties agreed on most definitions, taking them from Title 18 of the U.S. Code; but disagreed on the definition of "minor." Relying on the definition from 18 U. S. Code § 2256(1), the government argued that a minor is a person under the age of 18. Citing the UCMJ, the defense argued a minor is a person under age 16. JA 120.

The trial counsel, Capt Maya, argued the judge should "just stick with the statute" -- apparently meaning Title 18. Judge Mori responded "But you didn't charge him with violating the statute," an observation with which the trial counsel agreed. JA 121. Reserving his ruling for later, the judge turned to other matters. *Id.*

3. Judge Mori Rules Against The Government On Admissibility Of Evidence

The defense objected to two items of evidence: (1) an FBI subpoena and records obtained in response to the subpoena from a local internet service provider (ISP)(collectively marked as Prosecution Exhibit 5 for Identification (PE5); and (2) testimony from the Appellant's former wife, DS, regarding a statement made by the Appellant prior to their divorce about the missing laptop: according to DS, the Appellant told her that the laptop broke while he was deployed, and so he replaced it. R. 587. The defense objected to PE5 as hearsay in violation of the Appellant's confrontation rights, U.S. CONST. AMEND. VI; the defense also objected to the testimony of DS, claiming it was within the spousal privilege of Mil.R.Evid. 504.

Judge Mori sustained the objection to PE5 and reserved ruling on testimony from DS. JA 123-24, 126. He advised the parties that he would take up the undecided issues "probably" the next day. R. 269. When the court-martial

reconvened the following morning, the government asked Judge Mori to reconsider the exclusion of PE5. After hearing further argument, the judge again sustained the defense objection. JA 127-29.

After argument about DS's testimony, Judge Mori found "that there was a confidential communication made" -- the threshold determination under Rule 504. He ruled that that admissibility of DS' testimony would therefore turn on the question of waiver, an issue he reserved for later. JA 135. Judge Mori placed the burden on the waiver issue on the government. R. 283.

4. Judge Mori Rules Against The Government On The Definition of "Minor"

After deliberating overnight, Judge Mori returned to the definition of "minor." Drawing on the UCMJ rather than Title 18, he ruled that because the offenses were charged only under Clause 2, the definition would be "any real person under the age of 16 years." JA 140. Capt Maya objected to the ruling, but conceded that the judge had explained the rationale behind it. *Id.; see also* JA 141. Neither party raised any further issues based on the ruling, and the parties proceeded with opening statements.

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5. Opening Statements: The Defense Commits To A Theory Of The Case And The Trial Counsel Cites Excluded Evidence And Draws A Potential Mistrial

The defense theory of the case relied in large part on the government's failure to find a laptop containing in child pornography. R. 94-95, 98. In opening statement, trial defense counsel placed that strategy on full display for the members, focusing on the missing laptop and the government's failure to ask "basic investigatory questions" that could have cleared the Appellant. JA 146; R. 320-23.

In the government's opening, Capt Maya referred to PE5, the FBI subpoena and ISP records excluded by Judge Mori. JA 144. Even though the judge had ruled twice on the issue -- excluding the records on the original defense objection and again on the government motion for reconsideration -- Capt Maya suggested her reference to PE5 was a deliberate decision based on her belief the exhibit could somehow be admitted for its "effect on the listener." JA 148. Judge Mori then warned her the government might face "a mistrial if you don't get it in somewhere else." JA 149.[3]

Trial on the merits then began with the government's first witness, after which the court-martial broke for lunch.

[3] PE5 apparently was never admitted.

c. After Losing Critical Rulings, The Government Faces Multiple Dilemmas

Significant problems now confronted the government. They had: (1) lost a ruling on the definition of "minor," a key element of the offenses; (2) lost a ruling with regard to the ISP records; and (3) referred to those records in front of the members, raising the possibility of a mistrial -- declared by a judge with a prior history of taking them to task.

In addition, the government had: (4) lost a bid to amend the charges to omit reference to a laptop which the government knew it could not produce at trial; and (5) suffered an adverse finding on spousal privilege that might prevent the Appellant's ex-wife from explaining what happened to that laptop.

Finally, the government (6) faced an uncertain ruling on the maximum punishment, from a military judge with a reputation for leniency, which might well result in a significantly lower maximum confinement.

d. The Government Targets Judge Mori

Rather than simply wait for these issues to be resolved, the prosecution now took affirmative steps to have Judge Mori removed.

/ / /

1. The Prosecutors Invade The Military Judge's Personnel Records

Judge Mori's reasoning for his definition of "minor" was stark and simple: "you didn't charge him with violating the statute." JA 121. The ruling flowed from the government's charging decision and the judge placed the onus for it on the prosecution. The government had already acknowledged, prior to opening statement, that Judge Mori explained his rationale; the trial counsel did not ask for reconsideration or for further clarification before proceeding with instructions to the members. JA 121.

Judge Mori's rationale was simple and straightforward -- but not acceptable to the prosecution.[4] Capt Schweig, the trial counsel earlier in the Appellant's case (R. 74, 77-78), testified that after the judge gave his instructions:

> … ***the government was looking for some reason*** why [Judge] Mori had decided to instruct the members … that the definition of a minor … was going to be a person under the age of 16.

JA 208 (emphasis added). He offered no explanation why "the government" did not accept the judge's stated reason: whether they believed, for example, that there was an ulterior motive, or whether they believed the judge was

[4] Judge Mori's successor characterized the definition of age as a close call -- "a flip of the coin" -- without speculating how he would have ruled. JA 194. The issue remains unsettled; this Court has granted review of the issue in *United States v. Jasper*, No. 13-0013/AR, __ M.J. ___ (C.A.A.F. February 5, 2013).

being dishonest. Capt Schweig likewise did not specify which members of "the government" wanted to find a reason different from the one given by the Judge Mori.

Capt Schweig did, however, testify that several people -- including Capt Maya -- told him that Judge Mori "may have had a young wife." JA 210. Based on these rumors, Capt Schweig decided to go through the judge's government personnel records. JA 208. Based on his examination of the records, Capt Schweig concluded Mrs. Mori "was most likely 17 years old or maybe a little bit more at the time they were married" roughly a decade before the Appellant's trial began. *Id.*

Capt Schweig later explained that the information was something "that ***anyone with access*** to [the records] could easily discover." JA 210 (emphasis added). He admitted, however, that the information "[a]bsolutely" was "very personal." JA 212. After looking through the judge's personnel files, Capt Schweig delivered the very personal information about Mrs. Mori and the marriage to the base Staff Judge Advocate, Lt Col John Andrew Mannle, USMC. JA 175.

The opinion of the court below emphasizes that Lt Col Mannle "was ***not*** acting as the SJA" in the events at issue in this case. *United States v. Salyer*, 2012 WL 5208620 at * 6 (N-M Ct. Crim. App., Oct. 23, 2012) (emphasis in original). Assuming this is true, he would have been

acting in his other role, law center director … where his duties were, *inter alia*, "to supervise the prosecution function." JA 177.[5]

2. The Top Prosecutor Calls Judge Mori's Boss

Lt Col Mannle then called the judge's rater and supervisor, Navy Captain (CAPT) Berger.[6] Lt Col Mannle described beginning the call by telling CAPT Berger he "would understand if he wanted me to stop talking at any time." JA 189. He then told CAPT Berger about Judge Mori's ruling on the definition of "minor," and claimed to be "unsure" why the judge used the UCMJ definition rather than the one preferred by the prosecution team. JA 179. This was clearly discussing the nature of a ruling in an ongoing case, and it can not be described as a purely administrative scheduling matter.

Lt Col Mannle also gratuitously shared the data about Mrs. Mori that Capt Schweig had obtained (using his access to government files). *Id.* He gave CAPT Berger his unsolicited views on what he thought would be the "likely" outcome of a government *voir dire* and motion to recuse based on the information about Mrs. Mori. JA 176.

[5] As director, Lt Col Mannle was present at the Appellant's court-martial for opening statements and "some of" the Article 39(a) session in which Judge Mori warned the government they might face a mistrial. JA 174.
[6] CAPT Berger was at the time the circuit military judge "in charge of" cases in the Pacific region, including Hawaii, Okinawa, and mainland Japan. JA 174.

3. Judge Mori's Boss Relates Concerns Based On The Prosecution's Call

Shortly after the call from Lt Col Mannle, CAPT Berger spoke with Judge Mori. CAPT Berger told him that Lt Col Mannle "was not happy" with his ruling and that the government planned to seek Judge Mori's recusal from the case. JA 154. When asked to describe whether CAPT Berger ever voiced "displeasure" with these events, Judge Mori answered he "would say I interpreted his questioning of me to raise concern with my performance." JA 156.

4. The Government Moves To "Disqualify" Judge Mori

When the court-martial resumed, Capt Maya asked Judge Mori how old his wife was at the time of their marriage. He answered that she was seventeen. JA 151.

The trial counsel did not ask Judge Mori any reasonable follow-up questions about his personal which might expose an actual or implied bias: for example, Judge Mori's opinions on sex offenses in general, offenses involving minors (under either definition), or about how his life experiences might affect his judicial rulings. Even though the differing definitions of "minor" under Title 18 and the UCMJ had been discussed at some length in *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010), the government did not ask about the impact of that decision. Capt Maya did, however, ask Judge Mori about the *Lauer* case, the prior case in which he disqualified her as trial

counsel. Curiously, she did not make any effort to link that case to the Appellant's, nor did she make any comment about it -- beyond reminding the judge that ***he*** had once thrown ***her*** off a case, too. JA 156-57.

On hearing Judge Mori tell them his wife was seventeen when they married, the government immediately moved to recuse him:[7]

> Specifically ***the reason is because the military judge instructed the court over a government objection*** that the definition of a minor is any individual under the age of 16. This is in direct conflict with the plain language of the United States Code Statute [*sic*] that is most closely analogous under *United States v. Leonard*. ***Consequently, the government questions the military judge's impartiality to make rulings on this instruction.***

JA 152 (emphasis added). The trial counsel went on to opine that a reasonable member of the public "would also question the impartiality of the tribunal in this case." *Id.*

5. The Government Rids Itself Of The Military Judge

Judge Mori declined to recuse himself based on his ruling, his wife's age, any other personal information, or any other identified information that might show actual or implied bias. R., Appellate Exhibit (AE) LX. Rather, he found that the government's actions had made it impossible to continue as military judge. *Id.*

[7] Perhaps recalling the incident in which Judge Mori removed her from the *Lauer* case, Capt Maya used the term "disqualify" rather than the correct term. JA 152. The parties, however, subsequently treated the motion as a motion to recuse.

Judge Mori concluded that the government's conduct placed him in the same quandary faced by the military judge in *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). Rulings for the prosecution might now be questioned as efforts to protect his career and forestall further focus on his family. Rulings for the defense could be construed as payback. JA 164. Like the judge in *Lewis*, he determined that he had no choice but to step down. *Id.*

III. THE GOVERNMENT CAMPAIGN AGAINST JUDGE MORI VIOLATED ARTICLE 37(a)

Judge Mori's departure was not happenstance or coincidence. It followed a concerted prosecution effort to oust him from his judicial role in the Appellant's court-martial. That effort was set against the backdrop of a number of rulings which disappointed (and in some instances, were not obeyed by) the government, triggered by a definitional ruling with which the government vehemently disagreed, and likely impacted by his prior rulings in *Lauer*.

The government effort to rid itself of this difficult judge began with a member of the prosecution team searching Judge Mori's personnel files without his knowledge or consent. There is no evidence that the government took any measures to limit the amount of other personal data exposed through this fishing expedition. It featured a call from the prosecutors' boss to Judge Mori's rating official,

offering unsolicited views on the judge's ruling, disclosing personal information about the judge's wife, and sharing opinions about whether the judge would have to recuse himself from the case. The entirely-foreseeable result[8] of the government campaign was a call from Judge Mori's boss -- a call Judge Mori felt raised concerns about his performance.

Neither party to a court-martial has the power to select, or to unseat, a military judge. *Lewis*, 63 M.J. at 414. Yet that is precisely what happened here. When the new military judge took over the case, he found that "***the government's actions*** here essentially resulted in [Judge] Mori finding himself in a position where ***[he] had no choice*** but to recuse himself." JA 214 (emphasis added).[9]

The government's actions were driven by its dissatisfaction with Judge Mori's ruling. The government's unhappiness with that ruling, and its refusal to accept the judge's reason for it, led Capt Schweig to use his access to military records to investigate Mrs. Mori. It led Lt Col Mannle to not only warn CAPT Berger about a possible need for a new judge, but also to share the "very personal" information about Mrs. Mori with CAPT Berger, and to offer his views on the recusal motion and the ruling that

[8] R., AE LXXXIV, p. 9.

[9] So focused was the government in its campaign against Judge Mori that his successor can be forgiven for mistakenly referring to him, in subsequent written findings, as "the accused." R., LXXXIV, p. 6 at ¶14.

prompted it. Lt Col Mannle's own introductory remarks show he had some personal concerns about the call -- he "would understand" if CAPT Berger wanted him to stop talking. JA 189.

Attempts to manipulate the result of the trial by influencing the detail of the military judge are unlawful. *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991); Article 37, UCMJ. "Calculated carping" to the military judge's supervising judge "cannot [be] countenance[d]." *Campos*, 42 M.J. at 260. Relaying complaints from the field can create at least an appearance of unlawful influence which cannot be permitted and must be cured. *United States v. Mabe*, 30 M.J. 1254, 1266 (N.M.C.M.R. 1990). Even when there is no actual unlawful influence, government actions may still place an "intolerable strain" on the public perception of fairness in the military justice system. *Lewis*, 63 M.J. at 415.

When Capt Maya moved to "disqualify" Judge Mori, she said the government's reason was his ruling on the disputed definition. JA 152. The government made no effort to tie the personal information about Mrs. Mori to any of the judge's thought processes in arriving at that definition. They did not try to link his ruling to his opinions or outlook or his philosophy of military justice. Moreover, they made no effort to ask the next military judge about

his family -- apparently, because that military judge had not vexed them with any adverse rulings.

As in *Lewis*, the prosecutors wanted to make sure that a given military judge, properly detailed and qualified, would not sit. As in *Lewis*, they got their way. 63 M.J. at 416. The government conceded at trial that its actions leading to the recusal raised the issue of unlawful command influence. JA 172. The new military judge agreed, finding the government's conduct had "the undeniable appearance of influencing the court proceedings." R., AE LXXXIV, p. 10. Thus, the burden shifted to the government to show beyond a reasonable doubt that the taint from that influence could, and would, be cured. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).

IV. THE ACTIONS OF THE NEW MILITARY JUDGE FAILED TO CURE THE TAINT OF THE GOVERNMENT CAMPAIGN

Judge Richardson was detailed to finish the trial. The government questioned him about his views on Judge Mori, but remarkably -- given the apparently all-consuming importance of spousal information when Judge Mori was on the bench -- did not ask him anything about his wife's age, or even if he was married. R. 393-95. The trial counsel did, however, ask Judge Richardson to reconsider and reverse Judge Mori's ruling on the definition of "minor." JA 85-92.

The defense moved for dismissal with prejudice based on the actions of the government that caused the removal of Judge Mori. JA 72-84. The prosecution initially denied that the issue of unlawful command influence was even raised, but quickly reversed course and conceded that it was. JA 161, 172. The government argued, however, that there was no actual influence, and that in any event, the change in judges would in no way be detrimental to the Appellant. JA 161, 172, 193.

After hearing this argument, Judge Richardson took the trial counsel to task, observing sharply

> And yet out of the other side of your mouth, you file a motion with your co-counsel there asking that I turn around and reconsider motions already made, which were contrary to the government.

JA 193. He pointed out, correctly, that changing ***any*** "defense-favorable" rulings would mean "you now have prejudice." *Id.* After further colloquy on that point, in which he opined that the government was about to "sort of shoot [itself] in the foot there" and that requesting reconsideration was "unwise," the government withdrew its motion to reconsider. JA 193-94.

Judge Richardson denied the defense motion to dismiss because he felt he could purge any taint arising from the government's actions by refusing to "reconsider any of [Judge] Mori's decision which were … 'defense-friendly." JA 214-15. However, his proposal did not address the

pending rulings that would also be critical to the parties, such as the maximum punishment.

Judge Richardson sought to ensure that the government understood and complied with these ground rules:

> MJ: … I can ensure that, as a result of what's happened here, that the accused is not placed in ***any worse position than he possibly could have been*** had [Judge] Mori continued with this trial.
> Do you understand that?
>
> TC: Yes, sir.
>
> MJ: So that's the starting point of my analysis.
>
> TC: Yes, sir.

JA 217-218 (emphasis added).

To save the government from the consequence of its own improper actions, the record must show that all the curative measures imposed by the military judge were fully implemented. *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010). If the record does not show full implementation, the presumption of prejudice flowing from the government's conduct is not overcome. *Id.*, 68 M.J. at 357.

The record fails to show that Judge Richardson's fix was implemented in full; it actually shows that it was not. ***Immediately*** after saying she understood the rules, Capt Maya asked the new judge to return to the question of spousal privilege and the testimony of the Appellant's ex-wife, DS. JA 218. This issue had been left partially open

by Judge Mori, who found that there was a confidential communication but reserved final ruling on admissibility pending an attempt by the government to prove waiver. JA 135.

Judge Richardson opined to government counsel that waiver "would be a tough, hard hurdle for you to get over." JA 221. Defense counsel agreed, arguing that the Appellant "did not waive that [spousal] privilege in any manner." JA 222.

The court-martial took testimony from DS in an Article 39(a) session the next day. When asked if she believed her discussion with the Appellant concerning the laptop was confidential, DS answered "Yes, I believed it was just between us." R. 574-75. When asked whether she believed the conversation was "intended not to be shared," she responded "Yes, sir." R. 575. She testified that she did not believe the information needed to be kept "secret," and did not believe at the time that it was especially important. *Id.* About the communication line she used to talk to her husband, she said "they say it's secure, but it's probably not the most secure." R. 576. Following her testimony, Judge Richardson concluded that the marital communications between the Appellant and DS concerning the laptop were "never intended to be confidential" (JA 226) -- reversing Judge Mori's finding on that point *sub silentio*.

This change effectively decided the privilege issue. As a matter of law, there can be no privilege without a confidential communication. Mil.R.Evid. 504. The prosecutors never had to prove -- the judge did not find -- waiver, because there was no privilege to be waived. Accordingly, Judge Richardson denied the defense claim of privilege. JA 226-27.

Because of this change in fortune, the prosecutors were free to call DS to explain the missing laptop -- and they did. R. 584-88. Her testimony undermined the Appellant's defense strategy of focusing on the missing laptop, a plan discussed from the early days of the case and relied upon in the defense's opening statement. JA 107, 146; R. 320-23. DS was the government's next-to-last witness (R. 589, 591, 635, 638); and the late change by Judge Richardson altered the landscape of the case to the Appellant's decided detriment.

Trial counsel pressed their newly-won advantage in full, citing DS' testimony multiple times in argument on findings. R. 750-52, 766. The members then convicted the Appellant of possessing the missing laptop and the child pornography that had been contained within it. JA at 7.

As in *Lewis*, the decision to get rid of Judge Mori had no downside. Lt Col Mannle, the base SJA and supervisor of the prosecutors, was excluded from the trial -- but because he was a percipient witness, not as a curative measure to

protect the Appellant or the integrity of the court-martial. JA 189.[10] As in *Lewis*, his "instrument in the courtroom," Capt Maya, "remained an active member of the prosecution despite participating fully" in the government scheme, 63 M.J. at 414, and Capt Schweig remained free to do his bidding in the personnel records room and beyond.

The other outstanding issues: the possibility of a mistrial resulting from Capt Maya's decision to reference PE5, and the question of the maximum sentence -- likewise resolved for the government. The mistrial went nowhere, even though that excluded exhibit apparently never did find its way into evidence. On the maximum sentence, Judge Richardson took his cues from the Title 18 statute -- just as the government wanted. JA 230-31. "To this point, from an objective standpoint, the government has accomplished its desired end and suffered no detriment or sanction for its actions." *Lewis*, 63 M.J. at 416.

V. DISMISSAL BY THIS COURT IS NECESSARY

An outside observer of the Appellant's court-martial would have seen a trial presided over by a properly detailed and certified military judge whom the government

[10] The service court opinion suggests that Lt Col Mannle was also "barred … from any further participation in the case." 2012 WL 5208620 at * 7. The record does not show that this is true. Moreover, it is unclear what "further involvement" the service court is referring to; its opinion notes that Lt Col Mannle "was not acting as the SJA for the convening authority in [this] case." *Id.* at * 6.

did not like and wanted to be rid of. The first military judge was one who

(1) had a reputation for lenience;

(2) had been at odds with the trial counsel before;

(3) denied a government effort to amend the charges to accommodate a government proof problem;

(4) made an initial ruling adverse to the government on the definition of one of the elements of the offense -- a ruling which was a close call, according to the subsequent judge, and which still has not been resolved by this Court;

(5) stated as his reason for the adverse ruling the government's charging decision;

(6) reserved ruling on the maximum sentence, based on the same charging decision;

(7) made a preliminary finding on spousal privilege which was adverse to the government;

(8) excluded PE5; and

(9) warned the government that they faced a mistrial when the trial counsel nonetheless brought up PE5 in her opening statement.

The same outside observer would see that the government responded by

(10) invading the judge's personnel records without his knowledge or consent;

(11) obtaining "very personal" information about the military judge's spouse;

(12) sharing the information about the military judge's wife with the military judge's supervisor and rater;

(13) opining that the military judge ruled incorrectly and would likely have to recuse himself;

(14) provoking a call from the rater to the military judge, to the effect that the government was "not happy" with the ruling, and apparently questioning his performance; and

(15) launching a highly unusual *voir dire* and challenge of the military judge.

All of those, from the objective observer's standpoint, resulted in

(16) the government getting rid of the first military judge;

(17) the government seeking reconsideration of the adverse ruling on the definition -- a motion withdrawn only when they were informed pursuing it might hurt their case;

(18) the government next seeking ***and obtaining*** a favorable ruling on spousal privilege which reversed the findings of the prior judge;

(19) the government seeking ***and obtaining*** a favorable ruling on sentence maximum, which the prior judge had reserved; and

(20) no detriment, sanction, or adverse action against the government for anything that went on before.

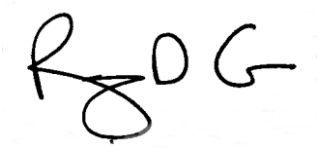
The government in this case got their win. They got it after openly manipulating the assignment of the military judge and placing an "intolerable strain on the public perception of the military justice system." *Lewis*, 63 M.J. at 415 (internal quotations and citations omitted). Approving the government's behavior in this case will not only allow it to profit from its actions; it will give this

Court's judicial *imprimatur* to further abusive campaigns against military judges who do not toe the government line.

This case cannot be returned to the *status quo* that existed before the government invaded Judge Mori's personnel files and set in motion his recusal. As in *Lewis*, this Court cannot order a rehearing before the original judge given the government's conduct. A hearing before any other judge would mean that the government still got what it wanted: a trial without Judge Mori. There is, regrettably, no way to unring the bell. Only dismissal with prejudice can undo the damage the government has done.

WHEREFORE, this court should set aside the findings and the sentence, and dismiss the charges.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 5911 words. And this brief is typed in courier-new 12-point type, so it complies with the typeface and type style requirements of Rule 37. This brief has been prepared in a monospaced typeface using Microsoft Word Version 2007.

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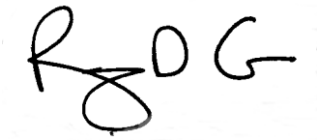
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to LT Samuel Moore, JAGC, USN, counsel for Appellee, Appellate Government Division, LT David Dziengowski, JAGC, USN, counsel for Appellant, and this court, on 28 February 2013.



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[11] By motion submitted to this court on 14 February 2013.