IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Respondent v. Major (O-4) **DAVID J. RUDOMETKIN** United States Army Petitioner	**BRIEF IN SUPPORT OF PETITION FOR A NEW TRIAL** Docket No. ARMY 20180058 Tried at Redstone Arsenal, Alabama, on 8 November and 20 December 2016; 3 February, 31 May, 10 August, and 15 September 2017; and 29–31 January, 1–2 February, 12 March, 22 June, and 6 September 2018; before a general court-martial appointed by the Commander, U.S. Army Aviation and Missile Command, Lieutenant Colonel Richard Henry, Colonel Jeffrey R. Nance, and Colonel Douglas K. Watkins, military judges, presiding.

TO THE HONORABLE THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Statement of the Case

On 1 November 2022, petitioner, Major (MAJ) David J. Rudometkin, through appellate defense counsel, petitioned the Judge Advocate General, United States Army for a new trial based on newly discovered evidence and fraud on the court under Article 73, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 873 (2016), Rule for Courts-Martial (R.C.M.) 1210, and Army Regulation (AR) 27-10, Military

Justice, para. 5–63 (20 November 2020). The Judge Advocate General referred this petition to this court. This brief supports the petition.[1]

Relief Sought

The petitioner asks the Court to grant a new trial on the charges of which he was convicted because of newly discovered evidence and fraud on the court.

Statement of the Case

On 2 February 2018, a military judge sitting as a general court-martial convicted petitioner, contrary to his pleas, of three specifications of rape, two specifications of aggravated sexual assault, one specification of assault consummated by a battery, and three specifications of conduct unbecoming an officer and a gentleman, in violation of Articles 120, 128, and 133, UCMJ.

The military judge sentenced the petitioner to a dismissal and twenty-five-years confinement. On 12 March 2018, at a post-trial proceeding, the military judge dismissed two specifications of rape and resentenced the petitioner to dismissal and confinement for seventeen years. On 17 January 2019, the convening authority approved the sentence.

[1] Petitioner personally submits his brief in support of the petition for new trial in Appendix B.

On 4 February 2020, this court set aside the convening authority action and directed a new convening authority action. On 2 November 2020, the convening authority completed a new action, approving the sentence.

On 9 November 2021, this court set aside the findings and sentence. On 15 August 2022, the Court of Appeals for the Armed Forces (CAAF) reversed this court's decision and remanded the case for further review under Article 66, UCMJ.

Petitioner's case is also currently before this court under Article 66, UCMJ, pending petitioner's submission of a brief on remand from the CAAF.

Statement of Newly Discovered Evidence and Fraud on the Court; Affidavits

Petitioner submits the newly discovered evidence included in Appendix A.[2] This evidence consists of public record of marriage for Lieutenant Colonel (LTC) [redacted] and [redacted] [Mrs. [redacted]] on 4 September 2021 in Fayetteville Washington County, Arkansas. Petitioner also incorporates and requests this court consider the record of trial in resolving this petition.

Standard of Review

"The determination of sufficient grounds for granting a petition for new trial in the military rests within the sound discretion of the authority considering that

[2] Petitioner's personal submission of newly discovered evidence and affidavits are included with petitioner's matters contained within Appendix B.

petition. . . . These courts are free to exercise their fact finding powers." *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982) (cleaned up).

Law and Argument

In his personal submission, Petitioner makes allegations of judicial and prosecutorial misconduct (fraud on the court and subornation of perjury) in (a) prior pleadings and decisions of this Court and the Court of Appeals for the Armed Forces and (b) by Declarations with exhibits attached: (1) Declaration: Fraud on the Court by Suborning Perjury Charge I, Specification 3, (2) Declaration: Suborning Perjury Part II LTC [redacted]., (3) Declaration: Records Concealed by LTC [redacted]. Municipal Court Madison, AL, (4) Declaration: Part II Records Concealed by [redacted]. Municipal Court Madison AL, (5) Declaration: Arrest Record Concealed by LTC [redacted]., (6) Declaration: Part III: Prosecutorial Misconduct by Concealing Disciplinary Records & Fraud on the Court by LTC [redacted].[3]

Post-trial Declarations may be used to support a petition for a new trial. *See, e.g., United States v. Cade*, 75 M.J. 923 (Army Ct. Crim. App. 2016) pet. denied 76 M.J. 133 (C.A.A.F. 2017). In many cases, a Declaration with supporting documents is the only way a petitioner can bring such allegations before the court.

[3] While it may seem so, petitioner is not relitigating his recusal claims already litigated through the Court of Appeals for the Armed Forces. Petitioner takes the position that fraud on the court is a separate stand-alone basis for a new trial regardless of how an appeal under Article 66(c), UCMJ, 10 U.S.C. § 866(c) may have addressed the issue.

A petition for new trial may be granted on the grounds of newly discovered evidence and fraud on the court-martial. R.C.M. 1210(f). A petition may be granted for newly discovered evidence where:

> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (C) The newly discovered evidence, if considered by the court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2).

A new trial may be authorized when there is "fraud on the court." Article 73, UCMJ, 10 U.S.C. § 873; R.C.M. 1210(f)(3). The rules Discussion cites, as an example, "willful concealment of a material ground for challenge of the military judge . . . , when the basis for challenge or disqualification was not known to the defense at the time of trial." Without cavil, the record shows a failure to disclose a disqualifying circumstance and a lack of knowledge by the defense. A knowing failure to disclose may be considered a willful act. A judicial officer can commit fraud on the court. *See, e.g., Bulloch v. United States*, 763 F.2d 1115 (10th Cir. 1985).

1. Judge [redacted].

The marriage of Judge [redacted] and Mrs. [redacted] occurred on 4 September 2021, approximately ten months after the convening authority took action. (Appendix A). Accordingly, it was both discovered after trial and could not be discovered by petitioner at the time of trial in the exercise of due diligence. This evidence establishes the relationship between Judge [redacted] and Mrs. [redacted] was of a romantic nature that precipitated into marriage. This true nature of the relationship was unknown to petitioner at the time of trial, but had it been known, petitioner would have moved for the disqualification of Judge [redacted] under R.C.M. 902(a), and petitioner would probably have prevailed, resulting in a substantially more favorable result. *See* R.C.M. 903(d), Discussion ("The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily.").

Moreover, the newly discovered evidence establishes fraud on the court-martial through willful concealment by Judge Henry about his relationship with Mrs. [redacted]. In *Albaaj*, the CAAF set aside the findings and sentence pursuant to a petition for new trial where a panel member failed to disclose the circumstances of his relationship with [redacted] brother, a defense witness. *United States v. Albaaj*, 65 M.J. 167, 168 (C.A.A.F. 2007). "Where a potential member is not forthcoming . . . the process may well be burdened intolerably." *Id*. (citing *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994)). The CAAF's analysis examined the right of the accused

to receive a fair trial by an impartial *trier of fact*, ultimately concluding the failure to disclose "injured the perception of fairness in the military justice system." *Albaaj*, 65 M.J. at 171.

Petitioner's case similarly presents willful concealment by the trier of fact, although here by the military judge, because petitioner elected trial by Judge [redacted] since the nature of Judge [redacted] improper relationship was unknown to him at the time. The CAAF has incorporated a two-prong test to determine whether a new trial is warranted by the failure of a trier of fact to disclose honest information: "[A] party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Mack*, 41 M.J. at 55 (citing *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (1984)).

On 8 November 2016, at petitioner's initial hearing, Judge [redacted] informed the parties he was "not aware of any matter that might be a ground for challenge against" him." (R. at 5). On 30 January 2018, petitioner elected to be tried by Judge Henry. (R. at 379). At no time prior to findings did Judge [redacted] reveal the nature of his relationship with Mrs. [redacted] to the parties. As found in the post-trial hearing, Judge [redacted] and Mrs. [redacted] engaged in an improper relationship while petitioner's court-martial was still pending. Accordingly, Judge [redacted] willful concealment of his romantic relationship with Mrs. [redacted] satisfies the first prong.

If Judge [redacted] disclosed that he was engaging in such a relationship with Mrs. [redacted], it would have provided a valid basis to challenge him for cause. When evaluating a challenge under R.C.M. 902(a), a basis for disqualification of the military judge includes "any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned." *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982).

Petitioner was tried and convicted by Judge [redacted], *inter alia*, for conduct unbecoming an officer for engaging in a sexual relationship with a woman not his wife. (R. at 1229). Judge [redacted], a married man, was engaging in a relationship, that culminated in marriage to Mrs. [redacted], a married woman. Even absent an explicit finding of sexual acts between Judge [redacted] and Mrs. [redacted], the appearance alone is sufficient for a successful challenge.[4] *See United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021).

Judge [redacted], as the trier of fact, willfully concealed a material ground for disqualification. Accordingly, this court should grant the petition for a new trial in

[4] To the extent this court requires additional facts concerning Judge [redacted] relationship and his failures to disclose, petitioner requests this court order a *Dubay* hearing so that petitioner can examine Judge [redacted] and Mrs. [redacted] under oath. *See Mack*, 41 M.J. at 55 ("where a party asserts juror nondisclosure during voir dire as a ground for a new trial, the normal procedure is to remand the issue to the trial court for resolution, because appellate tribunals are a poor substitute for trial courts in developing a record or for resolving factual controversies."); *United States v. Sonego*, 61 M.J. 1, 4 (C.A.A.F. 2005) (requiring petitioner only show a "colorable claim" to trigger an evidentiary hearing).

order to vindicate the harm to petitioner and the injury to the integrity of the military justice system.

2. Prosecutorial misconduct—fraud and subornation of perjury.

The Discussion to Rule 1210(f)(3) examples include:

> [C]onfessed or proved perjury in testimony or forgery of documentary evidence which clearly had a substantial contributing effect on a finding of guilty and without which there probably would not have been a finding of guilty of the offense; willful concealment by the prosecution from the defense of evidence favorable to the defense which, if presented to the court-martial, would probably have resulted in a finding of not guilty[.]

If true, as petitioner argues in his Declarations, the factual declarations may give rise to a colorable claim of fraud on the court through prosecutorial misconduct, which are grounds for a new trial. See, e.g., *United States v. Whitley*, 18 U.S.C.M.A. 20, 23, 39 C.M.R. 20 (1968) (citing *United States v Rogers*, 14 U.S.C.M.A. 570, 34 C.M.R. 350 (1964)). *Alcorta v. Texas*, 355 U.S. 28 (1957), is one of the cases indicating a new trial can be appropriate where a critical witness lies, the prosecutor knows it, and it appears the prosecution made some effort to conceal information. The factfinder was given a false impression of the facts with the aid of the prosecutor, who elicited the false facts during testimony. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court reaffirmed that using false evidence, known to be such by "representatives of the State," is a constitutional error. *Id*. at 269. The court further said that:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Id. In *United States v. Rutkin*, 212 F.2d 641, 644-45 (3rd Cir. 1954), the court remanded the case for a hearing to develop further facts about an alleged conspiracy involving the prosecutor to suppress favorable evidence as part of a new trial request. *See also United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989); *United States v. Brooks*, 49 M.J. 64 (C.A.A.F. 1998).

Petitioner himself also asks that if the court finds the record inadequate, it should seek an affidavit from trial counsel. Then, if that affidavit fails to resolve any factual conflicts or needs, petitioner asks the court to order a *Dubay* hearing. This procedure is how the court considers claims of ineffective assistance of counsel. *See United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997); *see also United States v. Cuento*, 60 M.J. 106 (C.A.A.F. 2004). In *Cuento*, the court again noted that when it is the prosecutrix who is the alleged perjurer, then the court is "'disinclined' to burden an Appellant with mechanical application of a rigorous standard" when determining if a new trial is warranted. *Id*. at 113.

Conclusion

WHEREFORE, petitioner respectfully requests this court set aside the findings and the sentence, and grant a new trial.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 1 December 2022.

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