IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20220276
Staff Sergeant (E-6) **KYLE W. BURRESON** United States Army, Appellant	Tried at Fort Bliss, Texas on 1 November 2021, 25 March 2022, and 21 May 2022 before a general court-martial convened by Commander, Headquarters, 1st Armored Division, Colonel Robert Shuck, Military Judge, presiding.

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

Assignment of Error

WHETHER THE MILITARY JUDGE VIOLATED ARTICLE 53a, UNIFORM CODE OF MILITARY JUSTICE, CAUSING MATERIAL PREJUDICE TO THE SUBSTANTIAL RIGHTS OF APPELLANT?

Argument

The government contends that the issue of whether the military judge impermissibly participated in plea negotiations was waived, or alternatively, that the participation was neither error nor prejudicial. The government's argument fails on all three counts.

Panel No. 3

A. The issue was not waived.

The government specifically claims the issue of whether the military judge impermissibly participated in plea negotiations is waived because appellant affirmed that he did not object to the agreement, that he entered into the agreement because it was in his best interest, and that no one coerced him to enter into the agreement. (Gov't Br. at 11).

The government's waiver argument is easily disposed of. For one, federal courts have declined to find waiver for violations of Federal Rule of Criminal Procedure [Fed. R. Crim. P.] 11(c)(1)—the federal analog to Article 53a, Uniform Code of Military Justice [UCMJ]—under circumstances similar to here. *See e.g.*, *United States v. Myers*, 804 F.3d 1246, 1255-56 (9th Cir. 2015) (declining to find waiver where accused invited the judge's participation for tactical advantage); *United States v. Ushery*, 785 F.3d 210, 221 (6th Cir. 2015) (reviewing a judge's participation for plain error where accused swore under oath that his plea had not been coerced, admitted to the offense, and received a favorable deal); *United States v. Castro*, 736 F.3d 1308, 1313-14 (11th Cir. 2013) (reviewing a judge's participation for plain error where accused had signed an agreement that he had not been pressured to plead guilty, verified during the plea colloquy that his plea had not been coerced, and was advised he was entitled to "persist in the plea" of not guilty).

Moreover, while codified in Article 53a, the military's prohibition on judicial participation is also incorporated in Rule for Courts-Martial [R.C.M.] 910, *see* R.C.M. 910(f), *Discussion*, and military courts have been reluctant to apply plain error—let alone waiver—for other violations of Rule 910. *See e.g.*, *United States v. Hansen*, 59 M.J. 410, 415 (C.A.A.F. 2004) (Crawford, J., dissenting).[1]

For these reasons, the government's contention on waiver fails.

B. The error was plain and obvious.

The government claims the military judge's participation in the plea negotiations was not error, (Gov't Br. at 17-19), but its analysis conveniently omits the critical fact that the advice communicated to the convening authority on the referral of the Article 134, UCMJ, came from the military judge. After the military judge indicated his intent to reject appellant's plea to the Article 107, UCMJ,

[1] In *Hansen*, the Court of Appeals for the Armed Forces reviewed an error arising from the military judge's failure to advise on certain rights per R.C.M. 910(c), despite that Hansen admitted that his counsel explained the effect of his guilty pleas, assured the court his plea was voluntary, and failed to object to the military judge's summation of his rights advisement. *Hansen*, 59 M.J. at 414-15 (Crawford, J. dissenting). Though the government claims *Hansen* is factually distinguishable, (Gov't Br. at 9, n. 6), the prohibition on judicial participation is part of R.C.M. 910, and it would be inconsistent to find certain R.C.M. 910 violations reviewable in one instance and not in another where both records contained similar assurances of voluntariness. *See United States v. Davila*, 569 U.S. 597, 610 (2013) (treating the review of different violations of Fed. R. Crim. P. 11 similarly because "neither Rule 11 nor the Advisory Committee's commentary singles out any [provision] as more basic than others.").

offense, he discussed the "possible courses of action" with the parties (R. at. 83); trial counsel then "briefed the [staff judge advocate] *on everything the military judge said* about . . . the Article 134 offense" (R. at 108); and the convening authority referred the Article 134 offense "in accordance with" the military judge's "discussion." (R. at 106-07). This far exceeds mere "less-careful language." (Gov't Br. at 17). The military judge, in fact, facilitated the agreement with respect to the Article 134 offense, which was obvious error.

While the government relies on appellant's concurrence in "each step of the process," this ignores the "absolute" nature of the prohibition. *See United States v. Corbitt*, 996 F.2d 1132, 1134 (11th Cir. 1993). Participation is prohibited "under *any* circumstances" with "no exceptions," *United States v. Bruce*, 976 F.2d 552, 555 (9th Cir. 1992) (citing *United States v. Adams*, 634 F.2d 830, 839 (5th Cir. 1981)) (emphasis in original), to include even upon an accused's request. *Myers*, 804 F.3d at 1256. Thus, any "concurrence" is immaterial to whether there is error.

C. The error was prejudicial.

The test for prejudice in federal courts for the error here is whether there is a "reasonable probability that, but for error, [an accused] would not have entered the plea." *United States v. Davila*, 569 U.S. 597, 608, 612 (2013). Critically, the Supreme Court has been careful to make clear that this standard does *not* require an accused to prove that it was likely he would not have pled not guilty; rather he

must only show that "the probability of a different result is sufficient to undermine the confidence in the outcome." *United States v. Dominquez*, 542 U.S. 74, 82, n. 9 (2004).

That test is met here. The military judge's inherently coercive intervention communicated his desire for a plea, and the immediate timing between the participation and the plea alone establishes prejudice. *Davila*, 569 U.S. at 612. Moreover, the immediate timing is compounded by the military judge's receipt of appellant's plea without a full advisement of appellant's rights as to the new charge. *See e.g.*, Article 32, UCMJ, 10 U.S.C. § 832; Article 35, UCMJ, 10 U.S.C. § 835. Additionally, the likelihood the government would have never pursued the charge absent the military judge's intervention—an argument the government does not contest—separately establishes a probability of a different outcome sufficient to undermine confidence in the outcome.[2]

[2] The Supreme Court clarified the test for prejudice for prohibited judicial participation in *Davila*, and appellant's brief assessed prejudice under this test. However, there is an open question as to whether this test is the appropriate test in military courts. In short, *Davila* applied the same test for prejudice as for other violations of Rule 11, *Davila*, 569 U.S. at 609-10, but military courts have not applied this test for R.C.M. 910 violations. Instead, military courts have asked whether there is a "substantial basis in law and fact for questioning the guilty plea." *See United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008). Applying *Davila*'s same logic, there is a question as to whether the "substantial basis" test is the more appropriate test here. *See e.g.*, *United States v. Miller*, 63 M.J. 452, 456-57 (C.A.A.F. 2006) (applying the "substantial basis" test to appellant's claim that

The government fails to address any of these points and relies instead on *United States v. Ushery* to claim there is no prejudice. (Gov't Br. at 21-22). In *Ushery*, the Sixth Circuit looked at five factors to determine prejudice: (1) whether the accused admitted to the offense, (2) whether the accused moved to withdraw his plea, (3) whether the accused received a favorable deal, (4) the time between the participation and the plea, and (5) whether the military judge who participated in the plea negotiations was the same judge who received the plea. *Ushery*, 785 F.3d at 221. The court determined that only the last two factors weighed in favor of Ushery and ultimately found no prejudice. *Id*. Comparing this case to *Ushery*, the government contends that the result should be the same. (Gov't Br. at 21-22).

Ushery, however, is readily distinguishable. The government overlooks that the Sixth Circuit found the factors weighing in Ushery's favor were "neutralized." *Id*. at 222. Specifically, while Ushery's plea had been received immediately after the trial court's participation in the plea negotiations, the sentencing phase did not occur for four months, during which time Ushery never attempted to withdraw his plea. *Id*. at 222. By contrast, the sentencing phase here—and the final opportunity for appellant to withdraw his plea—came immediately after receipt of the plea. Furthermore, while in *Ushery* the same judge who participated in the plea

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his plea was involuntary); *United States v. Goodell*, 79 M.J. 825, 830 (C.G. Ct. Crim. App. 2020) (same).

negotiations received Ushery's plea, the Sixth Circuit did not even go so far as to find error with the judge's "participation," which were comments to the effect of Ushery not needing to waive his appellate rights and a concern he raised about the return of Ushery's baseball cards. *Id*. at 220, 222. Here, the military judge crossed a clear line by participating in discussions as to the proper offense to charge, and unlike in *Ushery*, his participation was to appellant's detriment.[3]

Ushery is further distinguishable because there appeared to be no question as the court's exact comments. Here, however, much of the participation occurred "off-record," and while the on-the-record summations alone demonstrate plain error, the complete extent of the error is unable to be gauged from the record. *See United States v. Frank*, 36 F.3d 898, 903 (9th Cir. 1994) ("[m]any judges generally refrain from any in-chambers discussion of a proposed change of plea in a criminal case, lest they overstep [Fed. R. Crim. P. 11(c)(1)]"). This cuts in favor of a finding of prejudice. *See United States v. Garcia*, 24 M.J. 518, 520-21 (A.F.C.M.R. 1987).

For these reasons, there was prejudice from this error.

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[3] Given that the military justice system does not accept *Alford* pleas, the first factor in *Ushery*—the admission of the offense—is not applicable in military cases. If a military accused does not admit his offense, his plea will never be accepted. In other words, on review of an error for judge's prohibited participation in plea negotiations, an analysis of the first factor would *always* cut against a military appellant.

WHERREFORE, appellate defense counsel respectfully request that this court set aside the Article 134 offense and its sentence.

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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 25 October 2023.

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