

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court Sitting *En Banc*

UNITED STATES, Appellee

v.

**Specialist JORDAN A. WARD
United States Army, Appellant**

ARMY 20240403

Headquarters, Fort Carson
Jacqueline L. Emmanuel, Military Judge (arraignment)
Kenton E. Spiegler, Military Judge (trial)
Lieutenant Colonel John B. Haberland, Special Trial Counsel

For Appellant: Colonel Frank E. Kostik, Jr., JA; Jonathan F. Potter, Esquire;
Lieutenant Colonel Kyle C. Sprague, JA; Major Peter M. Ellis, JA; Captain Andrew
W. Moore, JA (on brief); Jonathan W. Crisp, Esquire (on reply brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Elizabeth G. Van Dyck, JA;
Captain Melissa D. Zigrang, JA (on brief).

8 October 2026

OPINION OF THE COURT

FLOR, Chief Judge:

Is a military judge who presides over a case convened by the headquarters of an installation where he previously served as deputy staff judge advocate (DSJA) and acting staff judge advocate (SJA) required to recuse himself when he might have been briefed on the preliminary facts of the same case? Under the facts of this case, we hold that the military judge was not required to recuse himself.

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of possession of child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (Supp. IV 2016) [UCMJ]. The military judge sentenced appellant to a dishonorable

discharge, four years of confinement, total forfeiture of all pay and allowances, and reduction to the grade of E-1.¹

Appellant raises two assignments of error, only one of which merits discussion: whether the military judge abused his discretion when he failed to recuse² himself. As stated above, under the circumstances of this case, we find no error and therefore affirm.

BACKGROUND

In November 2022, Army Criminal Investigation Division (CID) received a tip from the National Center for Missing and Exploited Children that appellant had uploaded a large amount of child pornography to Google. CID special agents subsequently seized multiple electronic devices from appellant pursuant to a search authorization, including an iPhone.

The Office of Special Trial Counsel (OSTC) preferred charges on 4 March 2024. On 7 April 2024, OSTC referred the charges to a general court-martial convened by the Commanding General of Headquarters, Fort Carson. The detailed military judge had served as DSJA for 4th Infantry Division and Fort Carson from approximately July 2021 until July 2023. He also served as SJA for Fort Carson while the division deployed to Poland for the last several months of his tour. In July 2023, the military judge conducted a permanent change of station (PCS) to become a career manager at the Personnel, Plans, and Training Office (PPTO) in the Pentagon, a position he held until July 2024.³ In July 2024, he PCS'd back to Fort Carson as a

¹ We have given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and determine only one merits discussion or relief: whether the STR is substantially incomplete. The STR has blanks in blocks 14 (fines); 15 (fine penalty); 17 (reprimand); 18 (hard labor); 19 (restriction); 22 (judicially ordered credit); 23 (total days of credit); and 25-28 (suspension recommendations). We address this issue at the end of the opinion.

² At trial, the defense moved to disqualify the military judge and requested his recusal. “The terms ‘disqualification’ and ‘recusal’ are closely related. Whereas disqualification refers to the basis for a judge not to be able to sit on a case, ‘recusal’ refers to the judge’s refusing to sit on grounds of disqualification.” *United States v. Witt*, 75 M.J. 380, 384, n.12 (C.A.A.F. 2016) (citations omitted).

³ PPTO has since disaggregated into multiple entities. The position of career manager is now a talent manager in the Talent Management Office (TMO).

military judge and presided over appellant's trial from 19-21 August 2024 before an enlisted panel.⁴

During an initial Article 39(a) session on the first day of trial, the military judge disclosed on the record that the dates of the offenses overlapped with his time as the DSJA. He added, "I have no recollection of this case at all. I don't believe that I was briefed on it specifically, and I definitely took no action in the case." Appellant's civilian defense counsel (CDC) asked one question to voir dire the military judge, "Did you have interaction with the CID agents involved in this case?" The military judge responded that while he saw CID agents monthly at Sexual Assault Review Board meetings, he did not frequently receive individual case briefs from CID and had no recollection of interacting in an official capacity with the CID agents in this case. The CDC then confirmed he had no challenge.

Much later in the trial, one of the CID agents testified about the difficulties in accessing appellant's iPhone. These difficulties required them to send the device to the United States Army Criminal Investigation Laboratory (USACIL) and wait for new software to access the iPhone. This testimony caused the military judge to call for an Article 39(a) session outside the presence of the members. He then disclosed on the record:

As I was saying I noticed - so when anybody states whether they know anything that is a reason to disqualify or challenge them, at the time I had given some indicia that I was the Deputy Staff Judge Advocate for 4th Infantry Division of Fort Carson at the time of the alleged offenses. I had no memory of this case, I still have very little. But as I heard some of the discussion about the process of sending to USACIL, and then the delay, and then an update and technology, it rang a bell for me. I do believe that I heard that line somewhere. I still would have left prior to any meaningful discussions. I am confident that I gave no advice or direction, or took any action in this case, but I want my own statements to be accurate. So as I previously said that I didn't have any recollection of this case, I believe that I did hear a minimal amount about this case when I was in the 4th Infantry Division in Fort Carson, [Office of the Staff Judge Advocate (OSJA)]. So with that, and you're welcome to do so after the break if you want some time, does either party wish to challenge me?

⁴ A different military judge arraigned appellant on 23 April 2024, during which appellant made his forum selection of enlisted panel.

The trial counsel had no challenge. The CDC asked when the military judge departed the position. The military judge confirmed he left in late June 2023.

Based on this response, the CDC moved for a mistrial and asked the military judge to recuse himself from appellant's case. The CDC stated the disclosure of possible awareness of the facts in this case was not previously mentioned by the military judge, and the new disclosure created an objective and subjective apparent conflict of interest. The military judge took a recess, after which he added:

Going back up from the top here, so I put on the record that I may have a memory of something similar to this case. I don't know if it was this case or not, but it was a similar fact pattern that I at least was told once that a phone was with CID, with USACIL, and that people were working through whether or not it could be unlocked.

The CDC then further articulated his motion for disqualification under R.C.M. 902. First, he cited to the R.C.M. 902(a) objective test that the military judge's impartiality might reasonably be questioned. Second, he cited R.C.M. 902(b)(2) that the military judge shall disqualify himself where he had previously acted as the SJA. The CDC did not further mention his motion for a mistrial.

The military judge then added additional clarification:

[D]uring the last several months of [my time at Fort Carson] I was actually the acting staff judge advocate for the installation, for Fort Carson, as the flag was split. So the division was forward. My boss . . . was the staff judge advocate for the division, and I was entrusted with duties as the acting staff judge advocate for the installation. So I was acting as a staff judge advocate during the last several months, including the time period where this was under investigation. During my time in that capacity . . . I received regular briefings from each division in the Office of the Staff Judge Advocate. Most of the divisions briefed me every other week, the military justice division included.

During the meetings, the military justice division, specifically trial counsel, would select cases to highlight. Now, I honestly don't know the inner workings of how those were picked between the chief of justice, special victim prosecutor, or trial counsel During those meetings there were times that I provided advice or direction on cases, and I well remember the types of

scenarios, as well as most of the specific cases in which I did so. So typically, when it was further along in a case, sometimes a charging decision, sometimes a question as to a referral decision, or trial strategy afterwards, sometimes discussion of experts after referral; and certainly things came up in matters that would come before a staff judge advocate, which is where the Court would say that Rule 902, mentioning a Staff Judge Advocate, where it pertains there are some things that are clear, like Article 34 advice. There are other things where it's a role advising a general court-martial convening authority where it's clear you're acting as a staff judge advocate. There are times that I saw people's work in cases generally at those times. And I will add to the list that I started plea agreements, alternate dispositions. I recall one case and only one case, where very early in an investigation I gave an opinion because there was a lot of conversation about witness availability and whether to prefer charges at all.

The military judge expressed further confidence that he had not taken such action in appellant's case because charges were preferred more than eight months after he departed. The military judge denied the motion for a mistrial under R.C.M. 915.

Trial proceeded for the remainder of the day. The next day, the military judge held an Article 39(a) session and clarified his previous ruling. He applied the objective standard from R.C.M. 902(a) regarding the appearance of bias standard—whether a reasonable person, knowing all the circumstances, would conclude that his impartiality might reasonably be questioned. The military judge found no such appearance of bias, reiterated his ruling, and resumed trial. Prior to findings, the military judge *sua sponte* found appellant not guilty of two specifications of viewing child pornography in violation of Article 134, pursuant to R.C.M. 917. The panel convicted appellant of the remaining two specifications of possessing child pornography. After findings, appellant elected to be sentenced by the military judge. During sentencing proceedings, the military judge merged appellant's two convictions into a single specification of possession of child pornography as multiplicitous, citing *United States v. Mobley*, 77 M.J. 749 (Army Ct. Crim. App. 2018).

LAW AND DISCUSSION

A. Law

We review a military judge's disqualification decision under an abuse of discretion standard. *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021)

(citation omitted). “A military judge’s ruling constitutes an abuse of discretion if it is arbitrary, fanciful, clearly unreasonable or clearly erroneous.” *United States v. Brinkman-Coronel*, 85 M.J. 431, 436 (C.A.A.F. 2025) (citations omitted). We “cannot find an abuse of discretion if [we] merely would reach a different conclusion.” *Id.* (citations omitted).

“An accused has a constitutional right to an impartial judge.” *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001) (citation omitted). “There is a strong presumption that a military judge is impartial in the conduct of judicial proceedings.” *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007) (citation omitted).⁵ There are “two bases for disqualification of a military judge” under R.C.M. 902. *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011). The first basis is a military judge’s duty to “disqualify himself or herself in any proceeding in which that military judge’s impartiality might reasonably be questioned.” R.C.M. 902(a). The second basis involves specific enumerated circumstances requiring disqualification under R.C.M. 902(b).

Our superior court has held that the second basis should be decided first – “whether disqualification is required under the specific circumstances [of actual bias] listed in R.C.M. 902(b).” *Quintanilla*, 56 M.J. at 45. If these specific circumstances of actual bias do not apply, “the second step asks whether the circumstances nonetheless warrant disqualification based upon a reasonable

⁵ The Code of Conduct for United States Judges (CCUSJ) provides, “A judge should hear and decide matters assigned, unless disqualified.” Canon 3(A)(2). Although by its own terms, the CCUSJ does not apply to military courts, our superior court has adopted it. *Butcher*, 56 M.J. at 91; *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001).

The version of the Code of Judicial Conduct for Army Trial and Appellate Judges in effect at the time of this trial, dated 16 May 2008, states in Rule 2.11, Disqualification: “Army judges shall disqualify themselves from a proceeding when required by R.C.M. 902 or other provision of law.” The comment includes, “the Court of Appeals for the Armed Forces has held that 28 U.S.C. § 455, which governs disqualification of federal judges, applies to judges of the Courts of Criminal Appeals. *See United States v. Lynn*, 54 M.J. 202, 205 (C.A.A.F. 2000).”

The recently updated Code of Judicial Conduct for United States Army Trial and Appellate Judges, dated 17 March 2026, repeats the same Rule 2.11, Disqualification. It also adds a new provision specifically adopting CCUSJ Canon 3(A)(2) in Canon 3.A.(2)., “A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.”

appearance of bias [under R.C.M.902(a)].” *United States v. Tapp*, 85 M.J. 19, 27 (C.A.A.F. 2024) (alteration in original).

Rule for Courts-Martial 902(b) provides five specific grounds when a military judge should disqualify himself or herself. This includes: “Where the military judge has acted as counsel, preliminary hearing officer, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.” R.C.M. 902(b)(2).⁶

Rule for Courts-Martial 902(a) requires military judges to “disqualify himself or herself in any proceeding in which that military judge’s impartiality might reasonably be questioned.” This appearance of bias standard is an objective one, viewed from the lens of “whether a reasonable person knowing all the circumstances would conclude that the military judge’s impartiality might reasonably be questioned.” *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015) (citation omitted).

Our superior court has held that because

R.C.M. 902(a) is silent on remedies that are available when this Court determines that a military judge failed to recuse himself or herself even though recusal was required because

⁶ Rule for Courts-Martial 902(b)(2) ends with the phrase “as to any offense charged or in the same case generally.” While we are certain of the meaning of this rule regarding the offenses charged, the phrase “in the same case generally” has received limited commentary in the drafters’ analysis. In the 2016 *Manual for Courts-Martial [MCM]*, explanation of the R.C.M., Apdx. 21-50, R.C.M. 902(b)(2) is derived from three locations: 1) 28 USC § 455(b)(2); 2) *United States v. Goodman*, 3 M.J. 1 (C.M.A. 1977); and, 3) the 1969 *MCM* paras. 62f(5), (6), and (11). None of these sources include further guidance on the phrase, “in the same case generally,” although we note the standard is rooted in Article 26(d), UCMJ. *See e.g., United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001) (identifying Article 26(d), UCMJ, as the statutory basis of specific disqualifying circumstances codified in R.C.M. 902(b)). We need not define the outer boundaries of this phrase today. However, one reasonable interpretation of the language “in the same case generally” would be to disqualify a military judge who previously acted in an official capacity regarding the same general transactions, victims, and underlying course of conduct, regardless of whether the involvement pertained to the precise specification currently referred. *See e.g., United States v. Moorefield*, 66 M.J. 170, 171 (C.A.A.F. 2008) (finding SJA was not disqualified to advise the convening authority under R.C.M. 1106 although he served as a military judge in appellant’s earlier, unrelated court-martial that occurred several years earlier and involved different victims and evidence).

of an appearance of bias . . . [we] appl[y] the three-part test outlined in *Liljeberg*⁷ to determine whether “reversal of a decision should be granted as a remedy” when “the judge’s impartiality might reasonable be questioned.”

Tapp, 75 M.J. at 27 (citation omitted). The three-part test from *Liljeberg* includes: (1) “the risk of injustice to the parties in the particular case”; (2) “the risk that the denial of the relief will produce injustice in other cases”; and (3) “the risk of undermining the public’s confidence in the judicial process.” *Liljeberg*, 486 U.S. at 864.

B. Discussion

We find the military judge acted within his discretion in not recusing himself in appellant’s case.

1. Actual Bias Under R.C.M. 902(b)

We find the military judge was not disqualified under R.C.M. 902(b)(2). While the parties and the military judge himself describe his role as “Acting SJA,” we find that he was, in fact, the SJA for Fort Carson while the division was forward. Just as assumption of command orders while a commander is absent place the subordinate temporarily in command, when an SJA is absent, the Acting SJA is the SJA. While the military judge served as SJA while appellant’s case was investigated, we do not find his mere status rises to the level of “acted as . . . staff judge advocate” within the meaning of R.C.M. 902(b)(2).

First, there is no indication that the military judge took action as an SJA in the present case. Black’s Law Dictionary defines “act” in relevant part as “the process of doing or performing.” *Black’s Law Dictionary* (12th Ed. 2025). Read in conjunction with the phrase, “as to any offense charged or in the same case generally,” the words “acted as” in R.C.M. 902(b)(2) must mean something other than simply occupying the role of SJA. We find no support that R.C.M. 902(b)(2) is purely status-based. We instead read “acted as” to be based on *actions* taken by an SJA in a particular case. We find additional support for the meaning of “acted as” in R.C.M. 902(b)(2) from *United States v. Stefan*, 69 M.J. 256, 258 (C.A.A.F. 2010). In that case, while interpreting a similar disqualification under Article 6(c), UCMJ—which provides that no individual “who has acted” as a trial counsel “in any case may later act as a staff judge advocate”—the court rejected a narrow reading of the statute that the prohibition only applied to persons formally detailed as trial counsel.

⁷ *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988).

Rather, the court held that disqualification requires “only that the person act as such.” *Id.* We find the court’s reasoning analogous here. The determinative factor is whether the individual participated in the case in some official capacity. Under Article 6, UCMJ, that entails either formal detailing to that particular case or functionally performing prosecutorial duties. Under R.C.M. 902(b)(2), it requires action in the particular case as an SJA. Merely holding an official title or organizational billet alone is not enough to constitute “acting as” under R.C.M. 902(b)(2).

The CAAF’s opinion in *Stefan* adds that when analyzing whether a person has “performed the duties of a disqualifying position, some relevant considerations include the action taken, the position of the person that would normally take that action, and the capacity in which the action is claimed to have been taken.” *Id.*⁸

Staff judge advocates take a wide variety of influential actions in courts-martial. Some of these actions include referral advice under Article 34, UCMJ (*see also* R.C.M. 406(a)); panel advice on a specific case under Article 25, UCMJ; advice on immunity decisions under R.C.M. 704; and expert witness funding advice to the

⁸ The Supreme Court has applied the standard of “critical decisions” in analogous cases where former prosecutors in the civilian sector then become judges. We find this term enlightening when comparing what actions an SJA might take before they become a military judge.

A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion.

Williams v. Pennsylvania, 579 U.S. 1, 10-11 (2016).

convening authority.⁹ In the record before us, there is no evidence the military judge performed any of the traditional SJA actions before departing Fort Carson. According to his disclosures on the record, the military judge was not even certain he was briefed on appellant's case. At most, he remembered being briefed on CID difficulties in accessing iPhones,¹⁰ an altogether unremarkable memory because it was a common issue.¹¹

We also find the military judge was not required to disqualify himself under R.C.M. 902(b)(2) for "acting as counsel." Supervisory attorneys act "as counsel" if their actions take a more active role in deciding how to bring cases to court-martial. This court has analyzed the "acted as counsel" provision of R.C.M. 902(b)(2) in a series of cases challenging the same military judge who presided over the cases that had been previously under investigation while he had served as a Chief of Justice for III Corps at Fort Hood, Texas.

In *United States v. Slack*, ARMY 20150352, 2017 CCA LEXIS 142 (Army Ct. Crim. App. 13 Mar. 2017), a panel of this court held the military judge had not acted as counsel within the meaning of R.C.M. 902(b)(2) and (3) because he was not "actively involved in the preferral and referral process . . . [or] appeared to have made recommendations on the charging decisions" because the preferral and referral occurred "over a year" after he became a military judge. *Id.*, at *9. The court came to the same conclusion in *United States v. Inman*, ARMY 20150042, 2017 CCA

⁹ We note that this case was a covered offense and ultimately an OSTC preferred and referred case. See Uniform Code of Military Justice, 10 U.S.C. § 801(17) (Supp. III 2021); R.C.M. 401A; R.C.M. 406(b). We need not further address whether or how the establishment of OSTC would limit the ability of an SJA to act in a certain case. OSTC did not become fully operational until 28 December 2023, several months after the military judge departed Fort Carson. See Uniform Code of Military Justice art. 24a(d)(1)(A), 10 U.S.C. § 824a (Supp. V 2023) ("A special trial counsel may, at the sole and exclusive direction of the special trial counsel, exercise authority over . . . child pornography [offenses] punishable under section 934 (article 134) . . ."). We leave for another day what effect the establishment of OSTC has on the assessment of potential SJA actions regarding covered offenses in the future.

¹⁰ Given the military judge's lack of memory and the substance of what he did remember, which was not a disputed evidentiary fact, we also find no basis for recusal under R.C.M. 902(b)(1), "personal knowledge of disputed evidentiary facts concerning the proceeding."

¹¹ We find that the military judge was forthright with the parties. As soon as he recalled a fact that might have involved this case, he put extensive explanation on the record.

LEXIS 339 (Army Ct. Crim. App. 17 May 2017), where the record did not reflect the military judge “was actively or affirmatively involved in appellant’s case during any stage of the prosecution.” *Id.*, at *15.¹²

Conversely, in *United States v. Schaefer*, ARMY 20140245, 2016 CCA LEXIS 429, *3 (Army Ct. Crim. App. 28 Jun. 2016), a panel of this court held the opposite. The court concluded the military judge was disqualified for previously acting as counsel, where he “briefed the [SJA] on appellant’s case and made recommendations as to what a proper disposition of the charges would be” and charges were referred while he was still assigned as the Chief of Justice.¹³

Applying these cases to the military judge’s possible prior involvement in appellant’s case, we find no basis to conclude that he had acted as counsel. There is no evidence that the military judge was active in the preferral or referral process, made recommendations as to the charging decisions, briefed a decision-making authority about appellant’s case, or made recommendations on proper disposition. The record fails to show that the military judge was actively or affirmatively involved in appellant’s case during any stage of the prosecution. Rather, the record reflects only that, at most, the military judge may have passively received an update

¹² In *Inman*, a panel of this court did not apply the “vertical imputation standard.” The vertical imputation standard, “under which the knowledge and actions of subordinates are attributed to the superior,” has been applied by some federal circuits. *Id.* at *13. Our superior court also did not apply this standard when deciding a Navy case where its Chief of Government Appellate Division (GAD) later served as a CCA judge where the only actions taken in the case while he served as Chief of GAD were filing oppositions to enlargements of time. “In view of the perfunctory nature [of filing oppositions to enlargements of time], we conclude that it is appropriate to apply the actual prior involvement standard to this case, rather than the vertical imputation standard. Accordingly, the fact that [the CCA judge] did not recuse himself *sua sponte* did not amount to plain error.” *United States v. Jones*, 55 M.J. 317, 320 (C.A.A.F. 2001). While the CAAF did not apply the vertical imputation standard in *Jones*, the court “reserve[d] judgment as to which standard [actual prior involvement or vertical imputation] should be applied in other circumstances.” *Id.* at 321. Given the limited record before us, we find no reason to apply the vertical imputation standard in appellant’s case.

¹³ In another case involving the same military judge, a panel of this court held that the military judge was disqualified under R.C.M. 902(a) for an appearance of bias when a trial counsel he supervised as Chief of Justice opined probable cause existed in that case. *United States v. Keen*, ARMY 20150168, 2016 CCA LEXIS 616 (Army Ct. Crim. App. 20 Oct. 2016),

about CID’s inability to access an iPhone, which was not particularly noteworthy or unusual—and involved no exercise of prosecutorial judgment, direction, or advice.

Ultimately, our conclusion that the military judge was not disqualified under R.C.M. 902(b)(2) rests on the record developed at trial. As the moving party, defense counsel carried the burden of proof and persuasion under R.C.M. 905(c) to establish the factual basis for disqualification, but here, the military judge developed the record. “There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle.” *Quintanilla*, 56 M.J. at 44.¹⁴ The defense presented no evidence, called no witnesses, sought no continuance to further investigate, and did not ask the military judge any questions beyond: (1) Did you have interaction with the CID agents involved in this case?; and (2) What date did you depart from that position? Instead, the defense counsel moved for a mistrial and for the military judge to recuse himself based on the military judge’s own disclosures on the record.¹⁵

2. Appearance of Bias Under R.C.M. 902(a)

Turning to the second asserted basis for disqualification, we likewise conclude the military judge did not abuse his discretion in declining to recuse himself for an appearance of bias under R.C.M. 902(a). A reasonable person, knowing all the circumstances of this case, would not conclude the military judge’s impartiality might reasonably be questioned. At most, the record supports the conclusion that the military judge received an update that CID could not access the contents of appellant’s iPhone with then current technology. This status update, if it even occurred in this specific case, occurred at least eight months before charges

¹⁴ See also *United States v. Allen*, 31 M.J. 572, 601 (N. M. Ct. Crim. App. 1990), *aff’d*, 33 M.J. 209 (C.M.A. 1991) (“A judge is presumed to be qualified and so the burden placed upon the party seeking disqualification is substantial in proving otherwise.”).

¹⁵ In describing both the burden of proof and the methods for meeting that burden, our sister court has held:

[T]he moving party in the military justice system bears the burden of proving disqualification, and can do so, for example, by filing affidavits, entering into stipulations of fact or expected testimony, or calling witnesses to establish the facts and reasons in support of the party’s belief that the military judge has a personal vice a judicial bias or prejudice against the party or in favor of the adverse party.

Allen, 31 M.J. at 607.

were preferred. Just as our superior court held in a recent case, we also find “there is insufficient evidence in the record that would serve to rebut this presumption” of judicial impartiality. *United States v. Davis*, 85 M.J. 295, 303-304 (C.A.A.F. 2025).

Our sister court held in *United States v. Hoffman*, No. 201400067, 2018 CCA LEXIS 326 (N.M. Ct. Crim. App. 9 Jul. 2018) that the military judge in that case who had previously served “as the Officer-in-Charge (OIC) of the [Legal Services Support Section (LSSS)] during the investigation stage of appellant’s first court-martial” was not required to recuse himself. *Id.*, at *28. More specifically, the military judge had “absolutely no recollection of participating in any aspect of the investigation, pre-preferral process, or referral of the charges in this case.” *Id.* at *29-30. We note that our sister court resolved this under R.C.M. 902(a), and we find its rationale persuasive. In appellant’s case, we also find no appearance of bias given that the military judge was “firm but fair to both sides. The full record discloses that he applied the law correctly and even-handedly.” *Id.* at *31-32.

Because of our finding that the military judge’s impartiality cannot be reasonably questioned, we do not believe we need to apply the three *Liljeberg* factors to determine remedies for the military judge’s failure to recuse himself. Assuming arguendo, even had we applied the *Liljeberg* factors, we would reach the same conclusion that no remedies are needed in this case:

(1) Risk of injustice to appellant: Low. First, appellant selected an enlisted panel as the factfinder. Second, the military judge made no motion rulings regarding CID’s search of appellant’s phone. Third, the military judge, as previously discussed, granted a *sua sponte* R.C.M. 917 motion, finding appellant not guilty of two of the four specifications. Later, the military judge merged the two remaining specifications on his own motion during sentencing. These two actions reduced appellant’s punitive exposure from forty years to ten. Finally, appellant selected military judge alone sentencing, despite the option to select panel sentencing in this case.

(2) Risk that the denial of the relief will produce injustice in other cases: Low. This factor “requires this Court to consider whether granting relief is necessary in order to compel a judge or litigant to more closely examine possible grounds for disqualification and to handle such matters promptly and properly.” *Tapp*, 85 M.J. at 30. The military judge closely examined the possible grounds for disqualification promptly and properly, to include disclosing what he knew on the record, subjecting himself to voir dire, and being forthright and honest. He was mindful of his obligations under R.C.M. 902. Thus, relief is not necessary to ensure “other military judges exercise the appropriate degree of discretion in the future.” *Id.*

(3) Risk of undermining public confidence in the judicial process: Low. This factor does not limit “our review to facts relevant to recusal, but rather review the entire proceedings.” *United States v. Martinez*, 70 M.J. 154, 160 (C.A.A.F. 2011). This *Liljeberg* factor employs “a totality of the circumstances approach and requires the application of an ‘objective standard’ to determine ‘whether denying a remedy . . . under the circumstances of [a] case will risk undermining the public’s confidence in the military justice system.’” *Tapp*, 85 M.J. at 30. The record does not support, based on the facts presented by the military judge, that there would be reason for the public’s confidence in the judicial process to wane due to the military judge’s limited prior knowledge, if any, of the facts of this case while under investigation. As previously discussed, the “military judge’s rulings were within the range of reasonable options available to him,” and even favorable to appellant. *Id.* at 31. We are convinced that, viewing the entire proceedings, the public’s confidence in the military justice system would not be undermined.

CONCLUSION

On consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.^{16 17}

Senior Judge POND, Senior Judge COOPER, Judge JUETTEN, Judge BURGESS, Judge WILLIAMS, and Judge STEELE concur.

SCHLACK, Judge, with whom Senior Judge MORRIS joins, concurring in the result:

I concur in the court’s judgment affirming the findings and sentence. I also agree appellant is not entitled to relief under R.C.M. 902. I write separately because I would resolve this case more narrowly than the court does.

This was a serious recusal issue. The military judge previously served in a senior legal position in the same jurisdiction in which appellant’s case was investigated. At trial, the military judge initially stated he had no recollection of the case. Later, after hearing testimony from a Criminal Investigation Division agent, he stated the testimony “rang a bell” and that he may have heard something about

¹⁶ We order the Statement of Trial Results corrected to reflect the following: blocks 14 and 17-19 will state “None”; blocks 22-23 will state “0”; block 25 will state “No”; blocks 15 and 26-28 will state “N/A.”

¹⁷ The Judgment of the Court is corrected to reflect the date the Statement of Trial Results (STR) was signed as 22 August 2024.

the matter before departing Fort Carson. He nonetheless remained confident he gave no advice or direction and took no action in the case and “would have left prior to any meaningful discussions.”

I agree with the court’s statement of the governing framework under R.C.M. 902 and do not repeat it here. My disagreement is not with the framework. It is with how much the court says this record *proves*. In my view, this case turns on a simpler point: appellant did not develop facts sufficient to establish disqualification under any part of the rule, be it acting as a staff judge advocate, acting as supervisory counsel, or for an appearance of bias. *United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001).

A. Acting as a staff judge advocate

I agree appellant did not establish disqualification under R.C.M. 902(b)(2). But I would stop there—appellant failed to carry his burden as the movant for disqualification. *E.g.*, *United States v. Soriano*, 20 M.J. 337, 340 (C.M.A. 1985) (citations omitted). This record does not show the military judge provided legal advice on appellant’s case, directed investigative activity, recommended disposition, influenced charging decisions, or otherwise exercised case-specific SJA authority. At most, the record suggests the military judge may have received a limited status update about difficulty accessing appellant’s phone. That warranted scrutiny. It did not, without more, establish that the military judge had acted as an SJA in this case. R.C.M. 902(b)(2).

The record before us is what the record is—thin. That point should do most of the work. Prior service as a DSJA or acting SJA in the same jurisdiction while a case is under investigation is not meaningless. However, it is also not automatically disqualifying. Sometimes it will matter a great deal. Sometimes it will not. The problem here is that the defense never developed the facts necessary to tell the difference.¹⁸

The majority recognizes the limits of the record. I would place even greater emphasis on them. Once the military judge disclosed that the testimony had refreshed a possible recollection, defense counsel had reason and the right to press the issue. *See* R.C.M. 902(d)(2) (“Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for

¹⁸ For example, while the OSTC handled the trial phase of appellant’s court-martial, the misconduct occurred on or about 10 November 2022, which predated the implementation of OSTC and its plenary authority over covered offenses. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531(a), 539C, 135 Stat. 1541, 1692, 1699 (2021) (imposing an effective date of 27 December 2023 for the newly created OSTC authorities under UCMJ art. 24a).

disqualification before the military judge decides the matter.”). That right is not an empty one. When a possible basis for disqualification emerges, counsel are expected to use it. The rule permits questioning the military judge and presenting evidence for a reason: to develop the facts necessary to test the issue in a meaningful way. Counsel must do the job the rule assigns. Counsel could have conducted more searching voir dire. Counsel could have requested a continuance. Counsel could have sought emails, trackers, or briefing materials relevant to the military judge’s prior involvement. Counsel could have interviewed, or called as witnesses, trial counsel and the chief of military justice at the relevant time. Defense counsel did none of those things and, absent a strategic reason to forgo them, should have done so if they wanted a fuller record for appellate review. Instead, the defense asked only limited questions of the military judge—who already acknowledged a general lack of memory on the subject—and moved directly for recusal and mistrial. Said plainly, appellate courts should not be asked to infer disqualifying facts from a record that trial defense counsel declined to build. R.C.M. 905(c); *Quintanilla*, 56 M.J. at 44.

This is why I find this case closer to *United States v. Inman*, ARMY 20150042, 2017 CCA LEXIS 339 (Army Ct. Crim. App. 17 May 2017) (mem. op.), than to cases involving demonstrated prior participation. In *Inman*, the military judge’s prior supervisory role overlapped with the investigation, and there, too, the record reflected passive exposure to case-related information. *Id.*, at *15-18. Still, the court concluded the record did not show the military judge was actively or affirmatively involved in the prosecution. *Id.* at *15. That is the narrower point I would rely on here.

B. Prior personal knowledge of disputed evidentiary facts

I also part company with the majority’s treatment of R.C.M. 902(b)(1). The majority briefly touches the issue. In my view, it deserves fuller treatment. Once the military judge stated the testimony refreshed a possible memory from his prior assignment, the inquiry was not limited to whether he had acted as an SJA in the case. The court also should have addressed more directly whether he had personal knowledge of disputed evidentiary facts. R.C.M. 902(b)(1).

Even so, I agree appellant did not carry his burden under R.C.M. 902(b)(1). The military judge described his recollection as tentative, minimal, and, at the very least, *uncertain*. He did not indicate that he remembered a disputed factual issue about appellant’s guilt, the contents of the phone, the legality of a search, or the credibility of any witness. Rather, the recollection, as described, concerned a possible briefing about difficulty accessing a phone. On this record, that is not enough to establish personal knowledge of a disputed evidentiary fact within the meaning of the rule. But that conclusion follows from the thinness of the record, not from the insignificance of the issue.

C. Appearance of partiality

I also agree appellant did not establish disqualification under R.C.M. 902(a). But I would say so more carefully than the court. A reasonable observer could regard prior service as DSJA or acting SJA in the same jurisdiction during the life of the investigation as a circumstance requiring close scrutiny. In my view, the military judge's later disclosure only heightens that concern. Still, the military judge disclosed the matter when it came to mind, denied having given advice or direction, and was not shown on this record to have possessed material information beyond possible status-level awareness. In the absence of a fuller factual showing, appellant did not overcome the presumption of judicial impartiality. R.C.M. 902(a); *Quintanilla*, 56 M.J. at 44-45; *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007).

I also would not place significant weight on the military judge's later rulings favorable to the defense. The court notes the military judge granted relief under R.C.M. 917 on two specifications and later merged the remaining specifications for sentencing. Those rulings may bear on prejudice or remedy. They do not answer whether disqualification existed *when the issue arose*. A recusal analysis should not be retroactively validated by subsequent rulings, however favorable. To reason otherwise would risk replacing an objective recusal inquiry with a hindsight assessment of judicial performance, contrary to the principle that justice must satisfy the appearance of justice. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988).

Finally, I note a structural difficulty that should make courts cautious about saying too much in cases such as this one. Under the present rule, the challenged judge ordinarily decides the disqualification question in the first instance.¹⁹ That is the framework we must apply. As such, this internal analysis places particular weight on not only full disclosure by the judge but also meaningful, factual development by counsel. Where the issue is close, confidence in the outcome—and, more importantly, trust in the fairness of the military justice system—depends less on doctrinal neatness than on a complete record. For that reason, I would not minimize the significance of the circumstances presented here, even though I agree appellant failed to develop them into proof. R.C.M. 902(d).

¹⁹ I acknowledge that, in some instances, a military judge might recuse himself and allow another to handle the disqualification issue. *E.g.*, *United States v. Tapp*, 85 M.J. 19, 25 (C.A.A.F. 2024). This practice, however, is simply not required by the current rule.

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For these reasons, I concur in the result.

FOR THE COURT:

A solid black rectangular box used to redact the signature of James W. Herring, Jr.

JAMES W. HERRING, JR.
Clerk of Court