UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, BURTON, and WALKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Major DAVID J. RUDOMETKIN
United States Army, Appellant

ARMY 20180058

Headquarters, U.S. Army Aviation and Missile Command
Richard J. Henry, Jeffrey R. Nance, and Douglas K. Watkins, Military Judges
Lieutenant Colonel Anthony C. Adolph, Staff Judge Advocate (pretrial)
Lieutenant Colonel Daniel D. Derner, Staff Judge Advocate (new review)

For Appellant: Captain Nandor F.R. Kiss, JA; Philip D. Cave, Esquire (on brief).

For Appellee: Lieutenant Colonel Wayne H. Williams, JA; Major Brett Cramer, JA; Major Jonathan S. Reiner, JA; Captain R. Tristan C. De Vega, JA (on brief).

9 November 2021

MEMORANDUM OPINION ON FURTHER REVIEW

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WALKER, Judge:

At the time of appellant's court-martial, the presiding military judge engaged in an inappropriate relationship with the wife of a prosecutor in his jurisdiction to such an extent that the wife's husband believed the military judge and the wife were engaged in an extra-marital affair. This inappropriate relationship created the appearance that the military judge lacked impartiality in appellant's court-martial. Furthermore, after applying the test laid out in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862-64 (1988), we find that the military judge's involvement in appellant's case risks undermining the public's confidence in the

judicial process. Under the circumstances of this case, we are compelled to set aside the findings of guilty and sentence and authorize a rehearing.[1]

I. BACKGROUND

A. Appellant's Offenses

Appellant's offenses occurred during the course of two marriages and two short-lived intimate relationships that span a period of fifteen years. He was charged with rape, sexual assault, and assault consummated by a battery of his first wife and aggravated sexual assault of his second wife. He was also charged with assault consummated by a battery, during sexual intercourse, of a female with whom he had an intimate relationship. Lastly, appellant was charged with three specifications of conduct unbecoming an officer for engaging in extra-marital sexual relationships with three women, one of whom was his ex-wife, while still married to his second wife.[2] Appellant's second wife left their marital home in August 2011 but the two of them remained married until they divorced in June 2016. During the time that appellant remained married to his second wife, he engaged in sexual relationships with his ex-wife and two other females spanning a time frame from February 2013 until November 2015.

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[1] Appellant raises five assignments of error, having withdrawn one. We have also given full and fair consideration of the other assignments of error and the matters appellant personally submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). None of these issues warrant discussion or relief. Specifically, we have carefully considered appellant's assertions that his trial defense counsel were ineffective for multiple reasons. We disagree with appellant's assertion. We do not find that appellant has established either deficient performance or prejudice. *See United States v. Akbar*, 74 M.J. 364, 371 (C.A.A.F. 2015) (citing *Strickland v, Washington*, 466 U.S. 668, 694 (1984)). We have also considered whether to compel affidavits from defense counsel, but we do not find that the "allegations[s] and the record contain evidence which, if unrebutted, would overcome the presumption of competence." *United States v. Melson*, 66 M.J. 346, 347 (C.A.A.F. 2008) (quoting *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995)); *see also United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997) (noting the five factors for when affidavits are not required).

[2] Our discussion of the facts and circumstances surrounding appellant's convictions is limited to those facts and circumstances necessary to resolve the issue addressed herein.

On 2 February 2018, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of rape occurring prior to 1 October 2007, two specifications of aggravated sexual assault occurring between 1 October 2007 and 27 June 2012, one specification of assault consummated by a battery, and three specifications of conduct unbecoming an officer and gentlemen, in violation of Articles 120, 128, and 133, Uniform Code of Military Justice [UCMJ], 10 U.S.S. §§920, 928, and 933. The military judge sentenced appellant to a dismissal and confinement for twenty-five years.

Prior to the convening authority taking action, the Court of Appeals for the Armed Forces (CAAF) decided *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), overruled by *United States v. Briggs*, 141 S. Ct. 467 (2020). On 12 March 2018, the military judge held a post-trial Article 39(a), UCMJ, session, at appellant's request, based upon CAAF's *Mangahas* decision and its potential impact on rape offenses for which appellant was convicted. Based upon the *Mangahas* decision, the military judge dismissed two specifications of rape of which appellant had been convicted, occurring in 1999 and 2000, since the the statute of limitations expired prior to those offenses being charged.[3] The military judge then denied appellant's request for a mistrial as to sentencing and reconsidered appellant's sentence without affording appellant a sentence rehearing.[4] After hearing only additional sentencing argument, the military judge resentenced appellant to a dismissal and confinement for seventeen years. The convening authority approved the revised sentence.

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[3] The military judge dismissed Specifications 1 and 2 of Charge I.

[4] Appellant raised, *inter* alia, the following assignment of error:

> WHETHER THE MILITARY JUDGE COULD, AS A MATTER OF LAW, REASSESS APPELLANT'S SENTENCE AFTER DISMISSING TWO SPECIFICATIONS IN A POST-TRIAL ARTICLE 39(a) SESSION. IF NOT, AND ONLY THE CONVENING AUTHORITY COULD REDUCE APPELLANT'S SENTENCE OR AUTHORIZE A SENTENCING REHEARING, WAS THE MILITARY JUDGE'S SENTENCE REASSESSMENT VOID?

Given the relief we provide in our decretal paragraph, we need not address this issue.

B. The Military Judge

Appellant was arraigned on 8 November 2016 and tried 1-2 February 2018 at Redstone Arsenal, Alabama. During the course of appellant's court-martial, eight pre-trial Article 39(a), UCMJ, sessions were conducted from December 2016 through 31 January 2018 for purposes of litigating motions and addressing other pre-trial matters. Lieutenant Colonel (LTC) Richard Henry was the military judge at all proceedings in appellant's case to include a post-trial Article 39(a) session on 12 March 2018. At an Article 39(a), UCMJ, session prior to trial, LTC Henry stated on the record that he was not aware of any matter that might be a ground for challenging him as the presiding judge. Neither the prosecution nor the defense challenged or conducted voir dire of LTC Henry.

The Judge Advocate General of the Army designated LTC Henry as a military judge in April 2015. In the summer of 2016, LTC Henry was stationed at Fort Benning, Georgia, where he served as a military judge. As part of his duties, LTC Henry was detailed to courts-martial at Redstone Arsenal, Alabama. Lieutenant Colonel Henry served as a military judge until his removal in April 2018, a few months after appellant's court-martial. Lieutenant Colonel Henry was married at all times relevant to this case.[5]

In the summer of 2016, CPT AC served as a trial counsel in the Fort Benning Office of the Staff Judge Advocate (OSJA). In this capacity, he practiced as a prosecutor in front of LTC Henry. At all times relevant to this case, CPT AC was married to Mrs. KC. Captain AC did not serve as a trial counsel on appellant's court-martial.

Mrs. KC, a special education teacher, first met LTC Henry in October 2016 at a Halloween party hosted by the OSJA. As the party was crowded, Mrs. KC, LTC Henry, and LTC Henry's wife spent most of the evening talking in a bedroom. After the party, LTC Henry sent Mrs. KC a message via Facebook messenger thanking her for hanging out in "the introvert room." Thus, began a frequent exchange of messages between Mrs. KC and LTC Henry, to whom she referred to as "RJ." In their messages, they discussed personal issues such as children, family, work, and marriage, as well as "non[-]personal issues."

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[5] The facts related to LTC Henry's relationship with Mrs. KC are derived from three items contained within the record of trial: (1) App. Ex. LXXIX (military judge's findings of fact and conclusions of law concerning LTC Henry's inappropriate relationship); (2) transcript pages 1403-1541 (Article 39(a), UCMJ, post-trial hearing related to LTC Henry's relationship with Mrs. KC); and (3) Def. App. C., (Army administrative investigation into LTC Henry's relationship with Mrs. KC).

Over time, Mrs. KC's relationship with LTC Henry grew steadily closer. At the Fort Benning staff judge advocate's farewell party in "the summer of 2017," LTC Henry's wife introduced CPT AC as her "husband's best friend's husband." At the time, CPT AC was not aware that his wife was that close with LTC Henry. Later in the summer, Mrs. KC invited LTC Henry and his wife to dinner at her house. Captain AC elected not to attend after consulting with the Fort Benning chief of justice about concerns over attending such a dinner. Lieutenant Colonel Henry, his wife, and their daughter eventually went to dinner at Mrs. KC's house in November 2017, while CPT AC was away on temporary duty (TDY).

By December 2017, CPT AC became increasingly suspicious that the relationship between LTC Henry and his wife was inappropriate. CPT AC noticed the frequency of the texting between LTC Henry and Mrs. KC increased. Further, texting would occur at all hours, to include well into the night after their respective spouses retired to bed. When CPT AC inquired about the texting, Mrs. KC told CPT AC the messages were private and that "she had promised LTC Henry that she wouldn't reveal what he told her." Mrs. KC also related to CPT AC that LTC Henry's messages were supposed to be secret from both CPT AC and LTC Henry's wife. Of the few messages CPT AC did observe, LTC Henry stated "I'm glad I finally found somebody I can talk to" and "goodnight my bestie." Mrs. KC eventually admitted that she shared things with LTC Henry that she only shared with another longtime friend.

From December 2017 through March 2018, CPT AC's concerns about the relationship between LTC Henry and Mrs. KC continued to grow. During this period of time, LTC Henry and Mrs. KC frequently attended yoga classes, ate lunches and dinners together, and Mrs. KC even spent time in LTC Henry's chambers during an unrelated trial. Lieutenant Colonel Henry also allowed Mrs. KC to use the courtroom to study for classes she was taking in furtherance of her master's degree. On several occasions, LTC Henry took food to Mrs. KC at her classroom, and assisted her in preparing lessons and materials for her students. Upon LTC Henry's request, Mrs. KC sometimes kept her meetings with LTC Henry a secret from her husband.

After switching jobs to become a defense counsel at Fort Benning, CPT AC had ethical concerns about practicing in front of LTC Henry based upon his suspicions that Mrs. KC was having an affair with LTC Henry given the level of his wife's secrecy and deception concerning her relationship with LTC Henry. He expressed those concerns to his superiors in the U.S. Army Trial Defense Service, who in turn contacted LTC Henry's supervising judge. This led to LTC Henry's removal from the bench on 8 April 2018. A senior military judge was then appointed to conduct an investigation into LTC Henry's relationship with Mrs. KC. The investigation concluded that LTC Henry was "involved in a personal and

emotionally intimate relationship with Mrs. [KC] between December 2017 – April 2018," and that "the relationship created [an] appearance of impropriety."

On 8 September 2018, at a post-trial Article 39(a), UCMJ, session appellant requested a mistrial, asserting that LTC Henry should have recused himself from appellant's court-martial given the similarity between LTC Henry's misconduct and the conduct unbecoming offenses for adultery of which appellant was convicted. At that hearing, CPT AC testified that he and Mrs. KC were attempting marital reconciliation but revealed "it's not going well." The new military judge detailed to appellant's case denied appellant's motion for a mistrial.

II. LAW AND DISCUSSION

"When an appellant, as in this case, does not raise the issue of disqualification until appeal, we examine the claim under the plain error standard of review." *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (citing *United States v. Jones*, 55 M.J. 317, 320 (C.A.A.F. 2001)). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Id.* (citing *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)).[6]

"An accused has a constitutional right to an impartial judge." *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001) (citations and internal quotation marks omitted). "An impartial and disinterested trial judge is the foundation on which the military justice system rests, and avoiding the appearance of impropriety is as important as avoiding impropriety itself." *United States v. Berman*, 28 M.J. 615, 616 (A.F. Ct. Crim. App. 1989). To ensure every military accused receives an impartial judge, the President promulgated Rule for Courts-Martial (R.C.M.) 902, which provides the framework for when a military judge must be disqualified from participating in a court-martial. Rule for Courts-Martial 902(a)-(b) establishes grounds for disqualification when a military judge is either actually biased or conflicted based on some specific grounds, or when the military judge appears to lack impartiality under all the facts and circumstances. *See also Martinez*, 70 M.J. at 157. Here, we focus on the military judge's appearance of impartiality.

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[6] We considered whether this issue should be reviewed under an abuse of discretion standard given that appellant filed a post-trial motion for mistrial asserting that the nature of LTC Henry's relationship with Mrs. KC would lead a reasonable member of the public to question his impartiality which was considered and denied by another military judge. *See Butcher*, 56 M.J. at 90-91. However, because appellant did not challenge LTC Henry until after his trial, we will apply the same standard of review as if appellant first raised this issue on appeal. Even reviewing this case under an abuse of discretion standard, we would come to the same result.

"[A] military judge *shall* disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a) (emphasis added). In some cases, a military judge may accept a waiver as to his disqualification only if there is a "full disclosure on the record of the basis for disqualification." R.C.M. 902(e). Here, however, no waiver exists because LTC Henry never disclosed his relationship with Mrs. KC as a basis for disqualification.

To determine if a military judge should disqualify himself, "the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt" by the military judge's actions. *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000) (cleaned up). When conducting this test, we apply an objective standard of "[a]ny conduct that would lead a reasonable [person] 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) (cleaned up).

If we determine the military judge should have disqualified himself, we then analyze the facts to determine if the error was harmless. "In a plain error context we look to see if the error materially prejudiced the substantial rights of the appellant" pursuant to Article 59(a), UCMJ. *Martinez*, 70 M.J. at 159.

Even absent material prejudice to a substantial right pursuant to Article 59(a), UCMJ, a judge's failure to disqualify himself may still require a remedy after applying the test laid out in *Liljeberg*, 486 U.S. at 862-64. *Id.* In *Liljeberg*, the Supreme Court considered three factors in determining "whether a judgment should be vacated" based on a judge's appearance of partiality: "[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864. The Court of Appeals for the Armed Forces (CAAF) applies the same three-part test in analyzing cases involving a military judge's appearance of partiality pursuant to R.C.M. 902(a). *See United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001).

The analysis for the third *Liljeberg* factor is "similar to the standard applied in the initial R.C.M. 902(a) analysis" in that we apply an objective standard and view the issue of disqualification through the eyes of a reasonable member of the public. *Martinez*, 70 M.J. at 159-60. However, the analysis of the third *Liljeberg* factor is much broader than the initial R.C.M. 902(a) analysis because "we do not limit our review to facts relevant to recusal, but rather review the entire proceedings, to include any post-trial proceeding, the convening authority action, [appellate proceedings], or other facts relevant to the *Liljeberg* test." *Id.* at 160. Put simply, courts consider the totality of the facts and circumstances surrounding the basis for disqualification to determine if a remedy is warranted. *See, e.g., United States v. Kish*, No. 201100404, 2014 CCA LEXIS 358 (N.M. Ct. Crim. App. 17 Jun. 2014)

(considering both the military judge's actions during appellant's court-martial and the military judge's public comments made two weeks after appellant's trial as part of the analysis of *Liljeberg's* third factor); *see also Berman*, 28 M.J. at 618 ("What happened on 4 December and after between [the military judge and the prosecuting attorney] is relevant to our assessment of their relationship prior to that date").

To begin our analysis of the impact LTC Henry and Mrs. KC's relationship had on appellant's trial, we must first determine whether a reasonable person, knowing all the circumstances, would question LTC Henry's impartiality. If so, we then must determine whether a remedy is required. For the reasons set out below, we find a reasonable person would question LTC Henry's impartiality in appellant's case, and that a remedy is required to preserve public confidence in the military justice system.

In evaluating whether LTC Henry was disqualified to act as the military judge in appellant's case, we consider factors such as (1) the nature of LTC Henry's relationship with Mrs. KC at the time of trial; (2) the locality of appellant's court-martial; (3) whether CPT AC participated in appellant's court-martial; (4) whether CPT AC was assigned as a prosecutor in the OSJA prosecuting appellant's case; and, (5) any similarity between the charges in appellant's case and the nature of LTC Henry's undisclosed conduct. *See United States v. Anderson*, 79 M.J. 762, 766 (Army Ct. Crim. App. 2020). While appellants court-martial occurred at a locality different from the one to which CPT AC was assigned (appellant's trial occurred at Redstone Arsenal, Alabama instead of Fort Benning, GA) and CPT AC did not participate in appellant's court-martial (nor did the OSJA to which he was assigned), we do find the other factors we considered dispositive. The nature of LTC Henry's relationship with Mrs. KC at the time of appellant's trial and the similarity between the charged offenses and LTC Henry's undisclosed conduct would lead a reasonable person to question LTC Henry's involvement and impartiality in appellant's case.

We find LTC Henry's relationship with Mrs. KC formed the basis for disqualification by the time appellant was tried on the merits on 1-2 February 2018.[7] Appellant's court-martial spanned a period of several months from November 2016

[7] We recognize that this court held that LTC Henry was not disqualified to act as the military judge in a case that was tried in March 2018, a few months after appellant's case. However, we find the facts of that case distinguishable in that there was no similarity in the charged offenses to LTC Henry's undisclosed conduct in that case. In this case, it is the nature of the relationship between Mrs. KC and LTC Henry, coupled with the similarity in some of the charged offenses that we find results in disqualification. *See United States v. Campbell*, 2020 CCA LEXIS 74 (Army Ct. Crim. App. 2020) (mem. op.).

until February 2018. At appellant's arraignment on 8 November 2016, LTC Henry stated he knew of no grounds that would disqualify him. While that may have been true in November 2016, it was certainly not the case by the time of appellant's trial in February 2018.[8] The evidence demonstrates that from the fall of 2016 until he was eventually removed from the bench in April 2018, LTC Henry developed a very close and intimate relationship with Mrs. KC, the wife of a junior officer serving as a prosecutor in his jurisdiction. Most critical to our review is that by the time of appellant's court-martial, the increased pervasiveness of texting and participation in a variety of activities, coupled with the secrecy of the relationship between Mrs. KC and LTC Henry, led CPT AC to suspect the two of them were engaged in an extra-marital affair. While there was no direct evidence uncovered that LTC Henry and Mrs. KC's relationship became physically intimate, the investigation concluded "the relationship created [an] appearance of impropriety." We conclude that under these facts and circumstances, a reasonable person would question the military judge's impartiality. To quote the Supreme Court in *Liljeberg*, "[t]hese facts create precisely the kind of appearance of impropriety that [R.C.M. 902(a)] was intended to prevent. The violation is neither insubstantial nor excusable." 486 U.S. at 867. We therefore find that at the time of the trial on the merits in February 2018, LTC Henry was disqualified under R.C.M. 902(a) and should have either recused himself or disclosed the full details of his relationship with Mrs. KC to determine if the parties waived his disqualification. Failing to recuse himself or make such a disclosure was error.

Finding error, we next test to see if the error was harmless. We do not find that appellant suffered material prejudice to a substantial right. We have not identified any rulings or decisions in appellant's case that appear to spring from LTC Henry's failure to disqualify himself or disclose his relationship with Mrs. KC. However, finding that the military judge's error was harmless pursuant to Article 59(a), UCMJ, does not end our analysis. *See Martinez*, 70 M.J. at 159. Even absent specific prejudice, we must apply the three-prong test outlined in *Liljeberg* to determine if a remedy is required to cure the error. *Id.*

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[8] A military judge has a continuing duty to disclose any potentially disqualifying matters on the record. R.C.M. 902(c)(1). Our Superior Court, on several occasions, has addressed the paramount importance of this duty, emphasizing that in many cases a full disclosure by the military judge, followed by a meaningful voir dire process, is sufficient to quell any concerns a reasonable member of the public may have about the fairness of the judicial process. *See United States v. Allen*, 33 M.J. 209, 213 (C.M.A. 1991); *United States v. Campos*, 42 M.J. 253, 262 (C.A.A.F. 1995); *United States v. Wright* , 52 M.J. 136, 141 (C.A.A.F. 1999); *United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000).

Under the facts of this case, the third prong of *Liljeberg* is dispositive. Accordingly, it is unnecessary to examine the case under the first two factors. As noted above, the analysis for the third *Liljeberg* factor is "similar to the standard applied in the initial R.C.M. 902(a) analysis," but is much broader in scope because we must consider the totality of the facts and circumstances surrounding the basis for disqualification to determine if a remedy is warranted. *Martinez*, 70 M.J. at 159-60; *Kish*, 2014 CCA LEXIS 358, at *11-15. There may be times when we apply *Liljeberg* and conclude the military judge should have disqualified himself or herself under R.C.M. 902(a), but can say with certainty that a reasonable person knowing the entire record would have confidence in the judicial process. This is not such a case. Having reviewed the entire record and subsequent appellate proceedings in this case, we conclude that failing to remedy the error in this case would undermine the public's confidence in the judicial process.

At the time of appellant's trial on the merits, the evidence demonstrates that LTC Henry and Mrs. KC's relationship had become pervasive, secretive, and intimate. In *United States v. Sullivan*, our Superior Court noted that while "[p]ersonal relationships between members of the judiciary and witnesses or other participants in the court-martial process do not necessarily require disqualification," they do create "special concerns." 74 M.J. 448, 454 (C.A.A.F. 2015) (citation and internal quotations omitted). Regardless of the fact that there was no direct evidence of a physical relationship between LTC Henry and Mrs. KC, such a close relationship between two married individuals objectively carries implications of impropriety which further heighten the "special concerns" alluded to in *Sullivan*. This is particularly true given Mrs. KC's secrecy and LTC Henry's failure, at any point, to disclose the relationship on the record.

The relationship, through texting and other interactions, evolved to the point that CPT AC believed that his wife and LTC Henry were engaging in adultery, causing him concerns about his ethical obligations with regard to appearing in front of LTC Henry. Additionally, it wreaked havoc on CPT AC's marriage. Other than the secretive nature of the text messages between Mrs. KC and LTC Henry, their interactions were open and notorious in that they often interacted in public places such as attending yoga classes together, dining together, and LTC Henry taking food to Mrs. KC at her classroom. It is possible that LTC Henry could have been charged with Conduct Unbecoming an Officer and Gentlemen[9] for the relationship's effect on good order and discipline and morale. While we recognize that some of appellant's charged offenses involve sexually violent offenses, we balance that against the fact that: (1) appellant was convicted of all three charged offenses in this case which are similar to LTC Henry's undisclosed conduct; (2) LTC Henry was the fact-finder in

[9] Article 133, UCMJ.

this case; and (3) the government's case relied solely upon the credibility of witnesses. In our view, a reasonable member of the public would lose confidence in the judicial process where the presiding military judge fails to disclose that he is so intimately involved with the opposite-gendered spouse of a prosecutor in his jurisdiction that there is a belief he is engaging in an extra-marital affair while serving as a judge in a bench trial that involves similar charges of conduct unbecoming for engaging in openly adulterous relationships for which the military judge himself could have been charged.

III. CONCLUSION

The guilty findings and sentence are SET ASIDE. A rehearing may be ordered by the same or a different convening authority.

Senior Judge BROOKHART and Senior Judge BURTON concur.

FOR THE COURT:

[redacted]

JOHN P. TAITT
Clerk of Court