IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES

Appellee

v.

Darrius D. UPSHAW
Hospital Corpsman Third Class (E-4)
U.S. Navy,

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 201600053

USCA Dkt. No. 20-0176/NA

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

Clifton E. Morgan III
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
(202) 685-7052
clifton.morgan@navy.mil
CAAF Bar No. 37021

Table of Contents

Table of Cases, Statutes, and Other Authorities

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

STATUTES

MILITARY RULES OF EVIDENCE, MANUAL FOR COURTS-MARTIAL, UNITED STATES

RULES FOR COURT-MARTIAL, MANUAL FOR COURTS-MARTIAL, UNITED STATES

Issues Presented

I

WAS THE MILITARY JUDGE'S IMPROPER PROPENSITY INSTRUCTION, IN VIOLATION OF *UNITED STATES V. HILLS*, 75 M.J. 350 (C.A.A.F. 2016), HARMLESS ERROR BEYOND A REASONABLE DOUBT?

II

WAS A RECUSED JUDGE'S SUBSTANTIVE PARTICIPATION IN APPELLANT'S CASE AFTER HE RECUSED HIMSELF HARMLESS ERROR?

Statement of Statutory Jurisdiction

The Convening Authority approved a court-martial sentence that included a dishonorable discharge. (General Court-Martial Order No. 01-2018, May 14, 2018.) Petty Officer Upshaw's case fell within lower court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ) jurisdiction. 10 U.S.C. § 866 (2012). Accordingly, this Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

Statement of the Case

Petty Officer Upshaw was first tried in 2015 by a general court-martial. At that trial, the Government requested and received, over defense counsel's objection, an M.R.E. 413 propensity instruction that this Court later found erroneous in *United States v. Hills*, 75 M.J. 305 (C.A.A.F. 2016). (J.A. at 150, 184, 190.)

The members ultimately convicted HM3 Upshaw, contrary to his pleas, of two specifications of abusive sexual contact against LCpl K.L.M. and one specification of sexual assault against Cpl K.I., in violation of Article 120, UCMJ. 10 U.S.C. § 920 (2012).[1] (J.A. at 182.) The members then sentenced HM3 Upshaw

[1] The members acquitted HM3 Upshaw of one specification of abusive sexual contact. The military judge consolidated two specifications of abusive sexual contact and two specifications of sexual assault into single specifications of abusive sexual contact and sexual assault because they constituted unreasonable multiplication of charges for findings.

to confinement for ten years, reduction to pay grade E-1, total forfeitures, and a dishonorable discharge. (J.A. at 183.) The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed. (General Court-Martial Order No. 01-2016, Jan. 29, 2016.)

The Navy-Marine Court of Criminal Appeals (NMCCA) later set aside the specifications related to Cpl K.I. based on the *Hills* error. However, the NMCCA affirmed HM3 Upshaw's convictions for abusive sexual contact of LCpl K.L.M. *United States v. Upshaw*, 2017 CCA LEXIS 363 (N-M. Ct. Crim. App. May 31, 2017). The lower court authorized a rehearing on the specifications it set aside and the sentence. *Id.* at *24.

This Court denied, without prejudice, HM3 Upshaw's petition for review of the specifications the NMCCA affirmed. (J.A. at 27); *United States v. Upshaw*, 77 M.J. 35 (C.A.A.F. 2017).

Rather than retrying HM3 Upshaw on the specifications relating to Cpl K.I., the Government dismissed them without prejudice and proceeded with a sentence rehearing for the convictions involving LCpl K.L.M. (J.A. at 263, 336.) A general court-martial, comprised of members with enlisted representation, then sentenced HM3 Upshaw to confinement for thirty-six months, reduction to pay grade E-1, and a dishonorable discharge. (J.A. at 279.) The Convening Authority approved the

sentence as adjudged and, except for the punitive discharge, ordered it executed. (General Court-Martial Order No. 01-2018, May 14, 2018.)

On December 4, 2019, the NMCCA affirmed the findings and sentence. *United States v. Upshaw*, 79 M.J. 728 (N-M. Ct. Crim. App. Dec. 4, 2019) (recon. denied Jan. 17, 2020). This Court granted HM3 Upshaw's timely petition for review.

Statement of Facts

A. The trial court instructed the members they could use charged acts to demonstrate HM3 Upshaw's propensity to commit the other charged acts.

The Government charged HM3 Upshaw with sexual misconduct involving two male Marines: abusive sexual contact of LCpl K.L.M. and sexual assault of Cpl K.I. HM3 Upshaw pled not guilty to all offenses. (J.A. at 38-42.)

i. Lance Corporal K.L.M. alleged HM3 Upshaw touched his penis while HM3 Upshaw drove him home from a bar.

On October 30, 2014, LCpl K.L.M. went to a bar in Oceanside, California. (J.A. at 88.) Though he claimed he went there to meet a girl, LCpl K.L.M. ended up meeting HM3 Upshaw. (J.A. at 88, 91.) As he admitted, the two hit it off and spent considerable time talking and drinking at the bar together. (J.A. at 106-07.) Lance Corporal K.L.M. began drinking when he got to the bar around 1630 and continued drinking until he left around 0015—almost eight hours later. (J.A. at 88-

90.) At the end of the night, HM3 Upshaw offered LCpl K.L.M. a ride home. (J.A. at 91.) Lance Corporal K.L.M. accepted the ride. (*Id*.)

Before getting to HM3 Upshaw's car, LCpl K.L.M. went with HM3 Upshaw and another person to a sex shop. (J.A. at 92.) After leaving the sex shop, LCpl K.L.M. walked to HM3 Upshaw's car while stumbling and tripping over himself. (*Id*.) Petty Officer Upshaw had to help LCpl K.L.M. get into the car because he had trouble moving around. (*Id.*) Drunk, but apparently still aware of his surroundings, Lance Corporal K.L.M. testified he struggled to adjust his seat in a reclining position, so HM3 Upshaw reclined the seat for him so he could go to sleep. (J.A. at 93.)

Lance Corporal K.L.M. remembered being woken up to show consciousness to the guards at the base gate. But testified he fell back asleep after that. (*Id*.)

According to LCpl K.L.M., the next time he remembered waking up, the "big cowboy style belt buckle" on his pants was still buckled. (J.A. at 100, 107.) But HM3 Upshaw was unzipping his pants. (J.A. at 93.) Lance Corporal K.L.M. testified HM3 Upshaw's hand went inside his pants, touching his penis, rubbing it up and down—all while HM3 Upshaw was still driving. (J.A. at 93, 108.) Lance Corporal K.L.M. claimed he was so drunk that he could not push HM3 Upshaw's hand away, so he curled up and rolled over in the car facing the window. (J.A. at 93.) He stated shortly after this, HM3 Upshaw's hand came out of his pants then

started rubbing his leg. (J.A. at 94.) At this point, LCpl K.L.M. asked HM3 Upshaw to pull over, which he did. (*Id*.)

Instead of calling the police, LCpl K.L.M. texted his "Team Leader," Cpl Davison. (J.A. at 96.) He wrote, "this fuses [*sic*] trying to rape me, man, I need help." *Id.* After LCpl K.L.M. texted Cpl Davidson, he began vomiting. (J.A. at 97.) When he started vomiting, HM3 Upshaw got out of his car, walked over, and rubbed his back. (*Id.*) Lance Corporal K.L.M. told HM3 Upshaw that he needed space, but then asked HM3 Upshaw for a lighter. (J.A. at 98.)

Lance Corporal K.L.M. smoked a cigarette. (J.A. at 99-100.) Because Cpl Davidson did not respond to his text message, LCpl K.L.M. then called his "Squad Leader," LCpl Johnston, and asked to be picked up. (J.A. at 97, 99.) Lance Corporal K.L.M. sat down and began to throw up again. (J.A. at 108.) Lance Corporal K.L.M. alleged that HM3 Upshaw then rubbed his back, his crotch area, and his penis through his clothing. (J.A. at 100.) Lance Corporal K.L.M. said he moved HM3 Upshaw's hand away when it touched his penis. (J.A. at 100, 108-09.)

Lance Corporal Johnston called LCpl K.L.M. back and told LCpl K.L.M. that Cpl Soto, another Marine in his platoon, would be coming with him to pick LCpl K.L.M. up. (J.A. at 101.) Lance Corporal Johnston also asked for directions on where to pick him up. (*Id*.) Unable to tell him where they were, LCpl K.L.M.

handed HM3 Upshaw the phone to speak with LCpl Johnston and provide him directions to their location, which HM3 Upshaw did. (J.A. at 68, 101.)

Lance Corporal Johnston and Cpl Soto did not arrive until after 0200, approximately one hour after the alleged incident inside the car happened. (J.A. at 102.) The entire time, LCpl K.L.M. was there with HM3 Upshaw. (J.A. at 110.) Lance Corporal K.L.M. claimed that he was vomiting the whole hour. (*Id*.)

Lance Corporal Johnston stated HM3 Upshaw walked up to them and said LCpl K.L.M. had a severe case of survivor syndrome. (J.A. at 70.) HM3 Upshaw asked if LCpl K.L.M. had recently returned from deployment. (J.A. at 71.) When LCpl Johnston told HM3 Upshaw no, HM3 Upshaw was surprised to hear that. (*Id.*) They asked HM3 Upshaw why he was surprised, HM3 Upshaw told them LCpl K.L.M. had woken up several times in the vehicle screaming and that he finally had to pull over and let him out. (*Id.*) Petty Officer Upshaw gave LCpl Johnston his name and unit after he asked without hesitation. (*Id.*)

Ultimately, the members convicted HM3 Upshaw of abusive sexual contact. (J.A. at 182.)

ii. Though unrelated, Cpl K.I.'s allegations began similarly to LCpl K.LM.'s.

About four months after the encounter with LCpl K.L.M., Cpl K.I. met HM3 Upshaw at the same bar HM3 Upshaw met LCpl K.L.M. *Upshaw*, 2017 CCA LEXIS 363, at *16-17. Corporal K.I. had been drinking since breakfast that day,

and drank at least three pitchers of beer at the bar with a friend. *Id*. After Cpl K.I. and his friend decided to leave the bar, HM3 Upshaw offered them to stay at his place. *Id*. at *17. Corporal K.I. remembered being in HM3 Upshaw's car. *Id*.

He then remembered going into HM3 Upshaw's apartment along with his friend and HM3 Upshaw making them drinks. *Id*. After that, Cpl K.I. claimed his next memory was waking up to the feeling of something penetrating his anus before falling back asleep. *Id*. When he woke again and realized he was undressed, Cpl K.I. woke his friend up while "crying hysterically" and told him that he had been raped and needed to get out of the house. *Id*. They called a friend to pick them up, and they left. *Id*. at *17-18.

A forensic medical exam found HM3 Upshaw's semen, identified by DNA, on Cpl K.I.'s genitals, around his anus, in his mouth and on the right side of his chest. *Id*. at *18. The examiner also identified redness and swelling around the exterior of Cpl K.I.'s anus, interior laceration and broken blood vessels in the anus, and an abrasion on his penis. *Id*.

iii. The NMCCA concluded the *Hills* error was not harmless beyond a reasonable doubt for the charge involving Cpl K.I. but harmless for the charge involving LCpl K.L.M.

In its first Article 66 review of this case, the NMCCA found the military judge's M.R.E. 413 instruction erroneous given this Court's holding in *Hills*. *Upshaw*, 2017 CCA LEXIS 363, at *3. The NMCCA held the error was not

harmless beyond a reasonable doubt and set aside the specifications involving Cpl K.I. *Id*. at *20-21.

However, the lower court found that the error was harmless beyond a reasonable doubt with respect to the sexual contact specifications for LCpl K.L.M., and wrote:

> We find no reasonable cause to question LCpl K.L.M.'s credibility. The evidence of the appellant's guilt, with regard to the Charge and its two specifications of abusive sexual contact of LCpl K.L.M. for touching his penis and then his thigh and groin, is so overwhelming that we are convinced, beyond a reasonable doubt, that it rendered the subsequent evidence of the sexual assault of Cpl K.I. unimportant and did not contribute to the members' findings of guilty.

Id. at *10.

B. Judge Sameit, the military judge that presided over HM3 Upshaw's first trial, continued to play a substantive role in his court-martial after recusing himself.

Petty Officer Upshaw was arraigned a second time for the specifications involving Cpl K.I. (J.A. at 236.) Judge Sameit, who presided over HM3 Upshaw's first trial, was detailed to HM3 Upshaw's rehearing for the charges involving Cpl K.I. (J.A. at 226.)

During arraignment, defense counsel moved to have Judge Sameit recuse himself based on implied bias. (J.A. at 229.) The Defense claimed there was a "risk of undermining public confidence in the judicial process" if Judge Sameit presided over the rehearing because he provided the erroneous propensity instruction at the

first trial. (*Id*.) Judge Sameit did not rule on defense counsel's challenge at that time but said he would issue a written ruling if he sat on the case "at future [Article] 39(a)s." (*Id*.)

After arraignment, the Government filed a motion in limine to admit LCpl K.L.M.'s testimony under M.R.E. 413 as propensity evidence to prove Cpl K.I.'s allegations at the rehearing. (J.A. at 312.)[2]

At the following Article 39(a) session, a new military judge, Judge Munoz, was detailed to the case. (J.A. at 238.) Judge Munoz told the parties that Judge Sameit had recused himself. (J.A. at 253.)

The defense counsel conducted voir dire on Judge Munoz to determine whether he had any conversations with Judge Sameit regarding the case. (J.A. at 248-49.) Judge Munoz admitted he consulted with Judge Sameit regarding legal issues in the case. He stated, "I certainly have had conversations with [Judge Sameit] about the original case, and I've also . . . ran legal scenarios past him for the motions that have been filed in this case." (J.A. at 249.) The defense counsel then asked whether he had any "in-depth" conversations with Judge Sameit about the *Hills* issue—the reason for the rehearing. (*Id*.) Judge Munoz answered that he had talked with Judge Sameit about "how that all went down at the first trial." (*Id*.)

[2] After the following Article 39(a) session, Cpl K.I. decided he no longer wished to participate in the case, and the Convening Authority dismissed without prejudice the charges involving him.

He also added, "I told him that we are litigating that matter *today*, and I believe that the law allows the first victim to testify, and so, I wanted to run that past him to see what his thoughts were." (*Id*. (emphasis added).)

Judge Munoz claimed that regardless of his discussions with Judge Sameit on the M.R.E. 413 issue, he would make the decisions he believed were legally correct. (*Id*.) Nevertheless, Judge Munoz was able to articulate Judge Sameit's analysis and highlighted their preliminary conclusions were the same regarding the outcome of the M.R.E. 413 motion. (J.A. at 250, 257-58.) Both Judge Sameit and Judge Munoz believed the law favored granting the Government's motion. (J.A. at 249-50.)

The defense counsel then challenged Judge Munoz, pursuant to Rule for Courts-Martial (R.C.M.) 902(a). (J.A. at 255.) The defense counsel's position was that an objective "reasonable person observing the proceedings could question the impartiality of this court-martial because of [Judge Sameit's] involvement." (J.A. at 257.) And the level of Judge Sameit's involvement was unknown. (J.A. at 256-57.)

Judge Munoz denied the motion and attempted to down-play Judge Sameit's influence. (J.A. at 261.) He said his consultation with Judge Sameit occurred after "[he] had read the filings of both parties," "re-read the *Hills* case again," and

"formed a preliminary conclusion." (*Id*.) He also stated Judge Sameit would not have an impact on any of his decisions. (J.A. at 249, 260-61.)

He claimed "[T]he basis asserted by the Defense doesn't support what recusal is required—you know, is for." (*Id*.) In fact, Judge Munoz believed nothing was wrong with him consulting Judge Sameit at all. He stated, "the law is the law and consulting other military judges about what they think the law is, is certainly within the bounds of propriety." (*Id*.)

On appeal, the NMCCA concluded Judge Sameit continued to substantively participate in HM3 Upshaw's case after he recused himself. *United States v. Upshaw*, 79 M.J. 728, 734 (N-M. Ct. Crim. App. 2019). And Judge Munoz "clearly erred" by consulting Judge Sameit and "abused his discretion in denying Appellant's recusal motion." *Id*. at 735. Despite this, the lower court found no prejudice and affirmed HM3 Upshaw's sentence. *Id*. at 736.[3]

Additional facts necessary for the analysis are discussed in the argument below.

Summary of the Argument

For two reasons, the military judge's erroneous propensity instruction was not harmless.

[3] The lower court, under "law-of-the-case" doctrine, did not reconsider its decision on the *Hills* instructional error. *Upshaw*, 79 M.J. at 733.

First, the Government's case against HM3 Upshaw involving LCpl K.L.M. was not strong. Though LCpl K.L.M. claimed HM3 Upshaw touched him improperly, there was no DNA evidence supporting this claim. Nor did HM3 Upshaw make any admissions or incriminating statements. The Government witnesses could only testify as to what LCpl K.L.M., who was drunk, told them happened. When LCpl K.L.M.'s friends arrived, they did not see anything suspicious in HM3 Upshaw's demeanor. Due to his level of intoxication, LCpl K.L.M. was an unreliable witness, yet the entire Government's case was based on his testimony.

Second, the Government heavily relied on the propensity instruction to its benefit. Trial counsel referred to the instruction several times throughout its arguments to the members. In fact, he used it to draw attention to the similarities between the allegations of both alleged victims.

Judge Sameit played a substantive role in HM3 Upshaw's case after he recused himself by consulting with Judge Munoz that morning regarding a pending evidentiary issue before the court. His involvement created a significant risk of undermining the public's confidence in the military judicial process. This case is indistinguishable from all of the other cases where a military judge played a procedural or substantive role in a case from which they were recused, and this Court should follow that precedent: reverse the lower court's opinion.

Argument

I

GIVEN THE EVIDENCE WAS NOT OVERWHELMING AND TRIAL COUNSEL MADE THE *HILLS* INSTRUCTION CENTRAL TO HIS CLOSING ARGUMENT, THIS COURT CANNOT BE CERTAIN BEYOND A REASONABLE DOUBT THAT THE ERRONEOUS PROPENSITY INSTRUCTION WAS HARMLESS.

Standard of Review

Whether an error was harmless beyond a reasonable doubt is reiewed *de novo*. *See United States v. Tovarchavez*, 78 M.J. 458, 469 (C.A.A.F. 2019). The Government bears the burden of proving that a constitutional error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

Discussion

The Government may not use M.R.E. 413 "as a mechanism for admitting evidence of charged conduct to which an accused has pleaded not guilty in order to show a propensity to commit the very same charged conduct." *Hills*, 75 M.J. at 354. Since 2016, this Court has reversed a number of cases where the military judge gave an erroneous propensity instruction. *See United States v. Prasad*, No. 19-0412, 2020 CAAF LEXIS 280 (C.A.A.F. May 19, 2020); *United States v. Williams*, 77 M.J. 459 (C.A.A.F. 2018); *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017).

It is a foundational tenet of the Fifth Amendment's Due Process Clause that an accused is presumed innocent until proven guilty. *In re Winship*, 397 U.S. 358, 363 (1970) (citing U.S. Const. amend. V). To instruct that "conduct of which the accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent" "is antithetical to the presumption of innocence." *Hills*, 75 M.J. at 356.

"The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the [accused's] conviction or sentence." *Id.* (quoting *Kreutzer*, 61 M.J. at 298). An error is not harmless beyond a reasonable doubt when "there is a reasonable possibility that the [error] complained of *might have* contributed to the conviction." *Hills*, 75 M.J. at 357 (emphasis added) (citing *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007)). This Court must be certain that the erroneous propensity instruction did not taint the proceedings in any way. *Williams*, 77 M.J. at 464.

In analyzing whether a *Hills* error was harmless beyond a reasonable doubt, this Court evaluates: (1) the strength of the Government's case; and (2) the pervasiveness of the Government's mistaken arguments. *Prasad*, 2020 CAAF LEXIS 280, at *15.

A. The Government cannot overcome the high burden of convincing this Court beyond a reasonable doubt that Cpl K.I.'s allegations did not contribute to HM3 Upshaw's conviction.

i. Evidence is overwhelming where there is an admission, credible eyewitness testimony, or conclusive physical evidence.

"There are circumstances where the evidence is overwhelming, so we can rest assured that an erroneous propensity instruction did not contribute to the verdict by 'tipping the balance in the members' ultimate determination." *Williams*, 77 M.J. at 464 (quoting *United States v. Guardado*, 77 M.J. 90, 94 (C.A.A.F. 2017)). This case is not one of them.

In finding that the erroneous propensity instruction was not harmless, for example, this Court noted in *Hills*, "there was no eyewitness testimony other than the allegations of the accuser, the members rejected the accuser's other allegations against the [a]ppellant, and there was no conclusive physical evidence." *Hills*, 75 M.J. at 358.

Similarly, in *United States v. Guardado*, the appellant was charged with sexual misconduct involving his daughter, niece, and several other teenage girls. *Guardado*, 77 M.J. at 92. This Court held the erroneous instruction was not harmless. *Id*. at 94-95. Despite the alleged victim seeming credible, this Court could not be certain the members convicted appellant on the strength of the evidence alone because of the lack of supporting evidence. *Id*. at 94.

Even in *United States v. Williams*, two alleged victims claimed the appellant sexually and physically assaulted them. *Williams*, 77 M.J. at 461. One of the alleged victims disclosed the sexual abuse to a neighbor, a police academy trainee she met through an acquaintance, and even reported the abuse to the police department. *Id*. This Court agreed the victims' testimonies were credible. *Id*. at 464. Nevertheless, this Court still found three of the four specifications were largely uncorroborated by "eyewitness testimony or any conclusive documentary or physical evidence." *Id*. "While [the victim's] account was bolstered by evidence of prior consistent statements she made to neighbors, acquaintances, and police officers, these witnesses had no firsthand knowledge of the abuse and *could only testify as to what [the victim] told them*." *Id*. at n.4 (emphasis added).

On the other hand, in cases where this Court found a *Hills* error harmless, the victims' testimony was corroborated by admissions from the accused, eyewitness testimony, and conclusive physical evidence. *See id.* at 461, 464 (finding the military judge's propensity instruction harmless for one specification where the Government introduced photographs of damage to the home and injuries to the victim, a sworn statement from the accused that corroborated the victim's version of events, and witnesses who saw the victim's distraught demeanor and injuries); *see also United States v. Hazelbower*, 78 M.J. 12 (C.A.A.F. 2018) (finding harmless error when there is a "wealth of independent supporting

evidence" such as an admissions of rape, incriminating text and Skype messages, and nude photographs from the accused).

ii. In determining harmlessness, this Court has considered the degree to which trial counsel relied on the instruction and whether it may have confused the members.

Whether the Government relied on the judge's erroneous propensity instruction is important to evaluating harmlessness. *See United States v. Luna*, No. 201500423, 2017 CCA LEXIS 314, at *17-18 (N-M. Ct. Crim. App. May 9, 2017), *aff'd*, 2018 CAAF LEXIS 65 (C.A.A.F. 2018) (finding *Hills* error was harmless because the victim's testimony was corroborated by a witness and the accused's incriminating texts, and the Government did not argue propensity evidence during closing or rebuttal arguments); *see also United States v. Harrison*, No. 38745, 2016 CCA LEXIS 431, at *34-36 (A.F. Ct. Crim. App. Jul. 20, 2016), *aff'd*, 76 M.J. 127 (C.A.A.F. 2017) (finding error was harmless because the appellant's admission supported the findings, and the propensity evidence was not the prosecution's focus).

iii. Here, HM3 Upshaw did not make admissions and there was no eyewitness testimony or conclusive physical evidence.

This case is analogous to *Hills*, *Guardado*, and the *Williams* specifications this Court set aside. Lance Corporal K.L.M.'s story was internally inconsistent. He claimed he went to the bar to meet a girl, but no evidence emerged that there was such a girl. To the contrary, he sat down with HM3 Upshaw for hours drinking,

enjoying his company, and even went with him to a sex shop. While LCpl K.L.M. testified it was hard to undo his pants due to his cowboy belt buckle, this casts doubt on the allegation itself. For LCpl K.L.M.'s claim to be true, HM3 Upshaw would have had to unzip his pants, insert his hand through a small zipper opening, reach down to the penis, and start moving his hand up and down the penis—all while watching the road and holding the steering wheel with his other hand.

The only Government witness with first-hand knowledge of the allegations was LCpl K.L.M. Just like the witnesses in *Hills*, *Guardado*, and *Williams*, all the Government's witnesses in this case *could only testify as to what LCpl K.L.M. told them*. The Government did not present any DNA or other physical evidence to corroborate LCpl K.L.M.'s claims that HM3 Upshaw touched his genitals. Though LCpl K.L.M. sent his friend a text message alleging HM3 Upshaw tried to sexually assault him, this occurred while LCpl K.L.M. was drunk and after a full day at the bar.

Additionally, HM3 Upshaw did not make any incriminating statements or admissions, as was the case in *Hazelbower*, *Luna*, and the specification upheld in *Williams*. The lower court concluded that HM3 Upshaw's statement that LCpl K.L.M. had "survivor syndrome" displayed consciousness of guilt. *Upshaw*, 2017 CCA LEXIS 363, at *15. But it is hardly clear that is the case, and it is contradicted by HM3 Upshaw's actions.

Lance Corporal K.L.M. was intoxicated, and it is possible HM3 Upshaw was merely describing erratic drunken behavior. Moreover, HM3 Upshaw openly answered questions. Petty Officer Upshaw provided his name, rank, and unit to LCpl Johnston when he asked without hesitation. He also was the one who provided LCpl Johnston and Cpl Soto directions so they could get to LCpl K.L.M.

The "survivor syndrome" statement is also more probative of HM3 Upshaw's confusion after LCpl K.L.M.'s unfounded accusation. Lance Corporal Johnston testified that HM3 Upshaw looked surprised when he denied knowing of anything that could have explained symptoms of survivor syndrome. Conversely, HM3 Upshaw's reaction is indicative of his sincere belief rather than guilt.

There were also inconsistencies in the Government witnesses' testimonies, which question their veracity. Lance Corporal K.L.M. claimed he threw-up continuously for over an hour. However, neither LCpl Johnston nor Cpl Soto—the Marines who came to pick LCpl K.L.M. up—ever saw him vomit. (J.A. at 73, 84.) He also claimed he was too drunk to move HM3 Upshaw's hand off his penis in the car. Yet LCpl K.L.M. claimed he was able to open the car door himself, send texts, call his friends, and use Google maps to search his location. (J.A. at 112.)

Lance Corporal Johnston claimed LCpl K.L.M. was not stumbling nor smelled of alcohol. (J.A. at 70.) But Cpl Soto stated that LCpl K.L.M. stumbled, could barely walk unaided, and smelled of alcohol. (J.A. at 81-83.) Corporal

Davison even testified LCpl K.L.M. had to lean against the wall for balance. (J.A. at 126.) Despite LCpl K.L.M.'s claim that HM3 Upshaw tried to "rape" him, LCpl Johnston stated LCpl K.L.M. did not seem scared of HM3 Upshaw when he arrived in the parking lot to pick LCpl K.L.M. up. (J.A. at 74.)

Although the lower court found LCpl K.L.M. credible, and that his immediate report bolstered his allegations, this Court made clear in *Williams* that a victim's credibility and prior consistent statements are not enough to eliminate the prejudice of a propensity instruction.

In a case where the Government's primary witness was unreliable due to his level of intoxication, the most probative evidence, by far, was the propensity evidence Cpl K.I.'s allegation provided. In the Government's own words, despite two unrelated claims of HM3 Upshaw sexually assaulting Marines, "the events leading up to the sexual assaults [were] the same."

iv. The Government centered its trial strategy on propensity evidence and similarities between the allegations involving LCpl K.L.M. and Cpl K.I.'s allegations.

The Government heavily relied on the erroneous propensity instruction to its advantage. The lower court found that the Government "robust[ly]" used M.R.E. 413 and propensity evidence in prosecuting its case. *Upshaw*, 2017 CCA LEXIS 363, at *7. During argument, the trial counsel did not hesitate to "capitalize[] on

the parallels" between LCpl K.L.M. and Cpl K.I.'s allegations "as evidence of HM3 Upshaw's predisposition to commit sexual assault." *Id*. at 8.

At the beginning of its opening, the Government claimed LCpl K.L.M. and Cpl K.I.'s allegations were interchangeable. The trial counsel stated, "In a snapshot, the events leading up to the sexual assaults is [sic] the same." (J.A. at 56.) The Government circled back to this theme on rebuttal stating:

> The accused went to the bar, he found a vulnerable Marine, he sidled up to that Marine, he identified himself as a corpsman, he offered that safe sober ride, and then he assaulted the Marine. And then, while under investigation for the first incident, he does it again. Same thing. He goes to a bar, sidles up to a Marine, safe sober ride, and he assaults him. It's what he does. That's the type of person he is.

(J.A. at 180.)

The Government then explicitly asked the members to use the propensity instruction to convict HM3 Upshaw:

> The military judge instructed you about propensity, members, and that's what makes this trial unique. These cases are connected[,] and they are connected only by the accused's involvement.
>
> What did he tell you? He said that if you find that an offense occurred, whether that be grabbing the penis, rubbing the thigh and the groin, or penetrating the anus, you may use that on any other point to which it is relevant if you find that that initial charge was just by a preponderance of the evidence.
>
> So if you find that by a preponderance of the evidence the accused grabbed K.L.M.'s penis, Specification 2 of Charge I, simply by a preponderance of the evidence, you may use that—you may even use that to find that he has a predisposition to engage in sexual assault. So if you find that any one of these things happened by a preponderance

> of the evidence, you can use that to find that he is the type of person that does these things.

(J.A. at 153-54.)

As the trial counsel transitioned from one alleged offense to another, trial counsel reminded the members—*twice*—they only needed to reach the preponderance standard to build a bridge between the two charges:

> Remember that propensity instruction though. If you believe by a preponderance of the evidence that that first [abusive sexual contact] happened, you can use that for the second.
> . . .
> And, members, keep in mind, once you find by a preponderance of the evidence that any of the offenses have occurred, you can use that evidence to draw the conclusion that he is the type of person that commits these acts.

(J.A. at 157, 161.)

Moreover, right before deliberations, one of the Government's final statements in rebuttal was: "Are there people in our world with a propensity for sexual assault? Yes, there are. Is Petty Officer Upshaw one of those people? Yes, he is." (J.A. at 181.)

After closing arguments, the members deliberated for less than four hours and returned a verdict of guilty on all but one specification. (J.A. at 182.)

The Government "repeatedly emphasized the similarities between the two incidents and encouraged the members to find predisposition and propensity in the appellant's conduct." *Upshaw*, 2017 CCA LEXIS 363, at *11. There is a

substantial likelihood that the members followed the Government's urging and applied the wrong burden of proof to the evidence and convicted on a weak case. *See Prasad*, 2020 CCA LEXIS 280, at *26.

The Government's arguments highlight how prejudicial the evidence was. The prosecutors in *Williams*, *Guardado*, and *Hills* did not appear to incorporate the propensity instruction in their arguments. *See Williams*, 77 M.J. 459; *see also Guardado*, 77 M.J. 90; *Hills*, 75 M.J. at 353. But here, the Government recognized and exploited the improper instructions for an unfair advantage, overcoming potential reasonable doubts and "tipp[ing] the balance in the members' ultimate determination." *Hills*, 75 M.J. at 358.

The Government made propensity evidence the cornerstone of its case. Therefore, it is impossible to deny the possibility that propensity evidence tainted the remaining convictions.

Conclusion

The military judge's erroneous instruction was not harmless beyond a reasonable doubt. This Court should set aside the findings and sentence for the abusive sexual contact charge involving LCpl K.L.M.

II

THE RECUSED MILITARY JUDGE'S SUBSTANTIVE PARTICIPATION IN HM3 UPSHAW'S CASE AFTER HE RECUSED HIMSELF SIGNIFICANTLY RISKS UNDERMINING THE PUBLIC'S CONFIDENCE IN THE JUDICIAL PROCESS.

Standard of Review

"[W]hether a judge has acted consistent with a recusal, as a mixed question of law and fact, is reviewed *de novo*." *United States v. Roach*, 69 M.J. 17, 19 (C.A.A.F. 2010) (citing *Walker v. United States*, 60 M.J. 354, 356-57 (C.A.A.F. 2004)).

Discussion

A recusal means the "judge may not preside over any subsequent proceedings in the case or perform any other judicial actions with respect to it." *Roach*, 69 M.J. at 19-20. "Once recused, a military judge should not play any procedural or substantive role with regard to the matter about which he is recused." *Id*. at 20. Simply put, a recused judge is "prohibited from further participation in the case." *United States v. Witt*, 75 M.J. 380, 384 (C.A.A.F. 2016).

This Court cautioned that because the critical players in a court-martial are invariably uniformed officers and drawn from small military judge communities, "it is all the more important for participants to engage in their assigned duties without blurring legal and ethical lines; however well intentioned." *Roach*, 69 M.J.

at 21 (citing *United States v. Greatting*, 66 M.J. 226, 232 (C.A.A.F. 2008)). When a recused judge continues to participate in a case, the remedy is reversal. *See Witt*, 75 M.J. at 385; *see United States v. Thornton*, 69 M.J. 178 (C.A.A.F. 2018); *see Roach*, 69 M.J. at 22.

A. Judge Sameit recused himself from HM3 Upshaw's case yet continued to substantively participate.

Judge Munoz made it clear that Judge Sameit recused himself from HM3 Upshaw's case:

> DC: Not knowing what his reasons were specifically for recusing himself . . . have you had any conversations with him about *why he believed he should recuse himself in this case*?
>
> MJ: Yeah; not detailed, and I'm not going to speak for him but my characterization of it was, it was really just, you know, to remove any possible doubt whatsoever.
>
> I will say, I have perused the case law. I don't believe he was required to recuse himself at all. I believe there's case law 100 percent on point. *So, I don't think that he was legally required to recuse himself, but he chose to do so because there was a challenge, and so that was his decision*.
>
> DC: So, as far as you're aware, it was more of an abundance of caution --
>
> MJ: Yes.
>
> DC: -- sort of, decision?
>
> MJ: That's correct.

(J.A. at 253-54 (emphasis added).) The NMCCA found that "Judge Sameit was recused and that by consulting on an important evidentiary issue, he continued to participate substantively in [HM3 Upshaw's] case." *Upshaw*, 79 M.J. at 734. When the presiding judge informs the parties on the record that the prior judge recused himself, neither they nor this Court need inquire further into that as fact. *Id*.

B. Judge Sameit's actions post-recusal undermined the public's confidence in the military judicial process and the assumption that military judges know and follow the law.

Prejudice from a recused judge's subsequent actions is analyzed under the factors outlined in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). *Witt*, 75 M.J. at 384. The three *Liljeberg* factors require this Court to consider: "(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." *Liljeberg*, 486 U.S. at 864. Only one factor has to be met for this Court to reverse, *id*. at 867-68, and the third factor is determinative here. *See Roach*, 69 M.J. at 20 (vacating the lower court's decision even though the recused judge's influence resulted in "no discernible prejudice to the appellant").

In every case this Court has reviewed where a recused judge continued to play a procedural *or* substantive role after their recusal, it has found the recused judge's actions significantly risked undermining the public's confidence in the

military judicial process.

For example in *United States v. Witt*, this Court found that appellate judges who were present for duty but elected not to participate in an *en banc* decision were *de facto* disqualified from further participation in a case. *Witt*, 75 M.J. at 384. Three appellate judges were present and did not participate in the *en banc* decision but later continued to participate substantively by being involved in the rehearing and potentially voted to reconsider the initial opinion. *Id*. This Court vacated the lower court's decision and held the judges' error "produced a significant risk of undermining the public's confidence in the judicial process." *Id*. (citations omitted).

In *United States v. Thornton*, the Chief Judge of the Air Force Court of Criminal Appeals recused herself from the appellant's case. *Thornton*, 69 M.J. at 178. After her recusal, she appointed a special panel to review the case. *Id*. This Court summarily vacated the lower court's decision. *Id*. at 179. It held the Chief Judge erred, and "it tended to undermine the public's confidence in the military justice process." *Id*. at 178-79.

And in *United States v. Roach*, the Chief Judge recused himself from the case without qualification and without stating a reason. *Roach*, 69 M.J. at 20. After he was recused, the Chief Judge then recommended a successor to sit as the new judge, who the Air Force TJAG appointed to the panel that same day. *Id*. This

created the *appearance* of directly impacting a case from which he was recused. *Id*. (emphasis added). This Court vacated the lower court's decision and held the Chief Judge's actions undermined the public's confidence in the judicial process whether the panel was influenced by him or not. *Id*. at 20-21.

i. Judge Sameit remained substantively involved in HM3 Upshaw's case after he recused himself.

Here, the trial judges appeared to work around the recusal by allowing Judge Munoz to be the public facing judge, while Judge Sameit continued to work on the case as a consultant. The lower court recognized this, finding "Judge Sameit was recused and that his consultation with Judge Munoz on substantive legal issues constituted substantive participation in Appellant's case." *Upshaw*, 79 M.J. at 734.

This is supported by Judge Munoz's statements in voir dire. He admitted he consulted with Judge Sameit that morning to prepare for a hearing on the Government's M.R.E. 413 motion—the very basis why a rehearing was necessary and why defense counsel challenged Judge Sameit. Thus, by conferring with Judge Munoz on this critical motion, Judge Sameit played a substantive role in the proceedings even while recused. Although Judge Munoz protested that Judge Sameit's analysis played no impact on his decision, it begs the question why the consultation happened at all.

It is also possible Judge Munoz continued to consult with Judge Sameit through sentencing. After all, he stated there was nothing wrong with his

conversations with Judge Sameit. (J.A. at 261.) This makes it reasonable that he would continue to work with Judge Sameit behind the scenes.

ii. Petty Officer Upshaw's case is analogous to this Court's previous cases on the same issue.

Petty Officer Upshaw's case is most similar to *Roach*. Like the Chief Judge in *Roach*, Judge Sameit recused himself from HM3 Upshaw's case without qualification or a reason. And similar to the military judge who succeeded the recused judge in *Roach*, Judge Munoz claimed to not be influenced by Judge Sameit's solicited advice. This Court held these facts were immaterial to its prejudice analysis in *Roach*, and it should conclude the same in this case.

It is also insignificant that HM3 Upshaw selected to be tried by members rather than military judge alone for his rehearing. *See id*. at 20 (whether the judge's role is significant or minimal, "public confidence in the military judicial process is undermined where judges act in cases from which they are recused"). Neither is it dispositive that the M.R.E. 413 issue Judge Sameit consulted with Judge Munoz about became moot. *See id*. at 21 ("A military judge who acts inconsistently with a recusal . . . may leave a wider audience to wonder whether the military judge lacks the same rigor when applying the law").

These facts are more indicative of prejudice to HM3 Upshaw's trial results than prejudice to the judicial process. Consequently, to find these facts dispositive against HM3 Upshaw conflates *Liljeberg* factors one (injustice to the parties) and

three (undermining public confidence), making the third factor defunct.

Judge Sameit's continued involvement created the appearance of directly impacting a case from which he was recused. And despite HM3 Upshaw having a constitutional right to a judge who is and appears to be impartial, *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999), he was not given that right during his rehearing because of Judge Sameit's involvement. *See Upshaw*, 79 M.J. at 735 (holding Judge Munoz should have also disqualified himself and abused his discretion by not doing so because reasonable observers "could reasonably question [his] impartiality" resulting from his consultation with Judge Sameit). The public assumes that military judges know and follow the law. *See United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). Because both judges acted contrary to well-established precedent, this increases the risk of undermining the public's confidence.

Either a military judge is recused or he is not. The public appearance is that both Judge Sameit and Judge Munoz either did not know or consciously disregarded this Court's jurisprudence on recusal. Judge Munoz was puzzled that the defense would find *any* problem with him consulting a recused judge. (J.A. at 260-61.) This bewilderment should call into question the fairness of the proceedings and the confidence the public would have that the military judges acted properly.

iii. Judge Sameit's actions were not ministerial in nature. He provided his successor advice on a substantive legal issue.

Despite this Court's history of reversals, the error at issue is not structural. *Roach*, 69 M.J. at 20. There are some cases where, if the judge acts in a ministerial role only, there is no prejudice. For instance, *In re BellSouth Corp*., the Eleventh Circuit found harmless error. 334 F.3d 941 (11th Cir. 2003). After the judge recused himself, he referred the matter to his clerk for a random judge assignment and stayed all matters before him. *Id*. at 950. He did not assign the matter to another judge, nor did he designate the judge. *Id*. The court held his actions were merely ministerial and thus harmless error. *Id*. at 949-50.

Petty Officer Upshaw's case is not *In re BellSouth Corp*. Judge Sameit's continued participation after his recusal was more significant and substantive than the judge's ministerial actions in *In re BellSouth Corp*. Once Judge Sameit gave Judge Munoz guidance on how to rule on evidentiary issues before the court, he was no longer performing a solely administrative task. Therefore, Judge Sameit's actions were not harmless.

One key protection of due process is an impartial military judge. When military judges are allowed to recuse themselves in name only, it becomes unclear what recusal actually means. Moreover, it creates the appearance that the military judge is hiding behind the word "recusal" while continuing to influence the trial. This appearance of a "shadow judge" is antithetical to a fair and impartial military

justice system. Judge Munoz may have been the face of the trial, but it *appears* Judge Sameit ruled from behind the scenes even though he was no longer qualified to preside over the case.

Conclusion

Because Judge Sameit's substantive participation after his recusal was not harmless, this Court should set aside the sentence and order a rehearing.

Clifton E. Morgan III
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
(202) 685-7052
clifton.morgan@navy.mil
CAAF Bar No. 37021

Certificate of Compliance

This brief complies with the type-volume limitations of Rule 24(c) because it does not exceed 14,000 words, and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on July 17, 2020.

Clifton E. Morgan III
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
(202) 685-7052
clifton.morgan@navy.mil
CAAF Bar No. 37021