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

REPLY TO APPELLEE'S ANSWER

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:

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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?

Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, Hospital Corpsman Petty Officer Third Class (HM3) Darrius Upshaw, USN, the Appellant, hereby replies to the Government's brief concerning the granted issues, filed August 17, 2020.

Law and Argument

I. The evidence in this case was not overwhelming as LCpl K.L.M.'s allegations are undermined by him being severely intoxicated—a fact he concedes.

The totality of the circumstances show the alleged victim was unreliable due to his level of intoxication. Lance Corporal K.L.M. admits the alleged incident occurred while he was "extremely intoxicated," unable to walk or stand—after drinking for almost eight hours at a bar. (J.A. at 88-90, 92, 94.) The sheer implausibility of LCpl K.L.M.'s version of events further underscores the unreliable nature of his intoxicated memory. Lance Corporal K.L.M. claimed that while HM3 Upshaw was driving the car, he awoke to his "pants *being* unzipped" with his "big cowboy style belt buckle" still fastened the entire time. (J.A. at 93, 100, 107-08) (emphasis added). This would require the following: while keeping one hand on the steering wheel and maintaining focus on the road, with his other hand, HM3 Upshaw: (1) unzipped LCpl K.L.M.'s pants while LCpl K.L.M.'s pants remained buckled; (2) inserted his hand through the zipper opening of LCpl K.L.M.'s pants; and (3) reached down and masturbated LCpl K.L.M.'s penis.

Aside from the unreliable version of events, there are other evidentiary weaknesses in the case. There was no DNA evidence despite LCpl K.L.M.'s point that HM3 Upshaw rubbed his penis with HM3 Upshaw's bare hand against his will. And HM3 Upshaw never admitted to any wrongdoing. Furthermore, the Government does not dispute that HM3 Upshaw stayed in the parking lot with LCpl K.L.M. until the other Marines arrived, provided directions to the Marines when LCpl K.L.M. did not know how to get to their location, was surprised when one of the Marines did not confirm what he thought explained LCpl K.L.M.'s distraught behavior, and immediately provided his name, rank, and unit when asked. (J.A. at 71, 74-75.) Before providing his name, LCpl K.L.M. only knew HM3 Upshaw as "Doc." (J.A. at 89.) In short, these actions are not signs of guilt but rather cast further doubt on LCpl K.L.M.'s claims about HM3 Upshaw's alleged action moments before.

The Government's claim that the evidence was "overwhelming" overlooks that trial counsel bootstrapped Cpl K.I.'s allegations to this specification. Indeed, trial counsel emphasized the similarities between LCpl K.L.M. and Cpl K.I.'s allegations as evidence of HM3 Upshaw's propensity to commit sexual assault, while urging Members to use the preponderance of the evidence standard. (J.A. at 56, 153-54, 157, 161, 180-81.)

A. This Court cannot overlook the relevance of a specification involving a separate victim in assessing prejudice under a *United States v. Hills* error.

Contrary to what the Government asserts, this Court would not be able to accurately determine Issue I if it did not consider Cpl K.I.'s allegations, and the Government's use of those facts to make its case. *See Prasad*, 2020 CAAF LEXIS 280, at *29 (emphasis added) (noting that a court must be "confident that there was no reasonable *possibility* that the error *might have* contributed to the conviction.").

In *United States v. Prasad*, members convicted the appellant of sexual misconduct involving two different alleged victims. *Id*. at *26. The Court of Criminal Appeals set aside the findings involving one victim because the strength of the evidence was deficient, and affirmed the findings for the other. *Id*. at *25. In analyzing the appellant's case for prejudice, this Court noted "although no longer before us on appellate review, we cannot overlook the fact that the members convicted [the appellant] of a third specification involving a different victim . . . ." *Id*. at 33. "Thus, in deciding to convict [the appellant] of certain offenses where there were significant deficiencies in the [g]overnment's evidence, it appears that the members may have been influenced by the military judge's clearly erroneous instructions regarding propensity evidence." *Id*. at *34.

Like *Prasad*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) set aside the findings involving Cpl K.I. because the Government's evidence was

deficient, and affirmed the findings involving LCpl K.L.M. *United States v. Upshaw*, No. 201600053, 2017 CCA LEXIS 363, at *15-16, 20-21 (May 31, 2017). This fact should be considered the same way the Court did in *Prasad*—Cpl K.I.'s deficient allegations undermine the Government's position that Members convicted HM3 Upshaw on the strength of the evidence alone. *Prasad*, 2020 CAAF LEXIS 280, at *33.

B. Witnesses' testimonies were inconsistent, which question their veracity.

Building on the mistaken proposition that its witnesses' testimonies were "overwhelmingly consistent," the Government misconstrues facts in the Record. Appellee's Br. at 13-14. The Government asserts LCpl K.L.M. did not state that he was too drunk to push HM3 Upshaw's hand off his penis—but he did. *Contra* Appellee's Br. at 14. Lance Corporal K.L.M. testified:

> Q: Was it that you didn't have the strength to push his hands away?
> A: Yes, Ma'am.
> . . .
> Q: Now, did you tell Lance Corporal Soto that HM3 Upshaw tried to undo your pants?
> A: Yes, Ma'am.
>
> Q: Did you tell Lance Corporal Soto that you were too drunk to do anything against HM3 Upshaw?
> A: Yes, Ma'am.

(J.A. at 108, 111.) Here, LCpl K.L.M. claimed the alcohol prevented him from physically resisting HM3 Upshaw in any way, then claimed moments later he

developed the strength to open the car door himself, send texts, call friends, and use Google maps to search his location. (J.A. at 112.)

In addition, Cpl Johnston's testimony that LCpl K.L.M. neither stumbled nor smelled of alcohol was contradicted by Cpl Soto's testimony that LCpl K.L.M. did. *Contra* Appellee's Br. at 14. Corporal Johnston claimed:

> Q: What kind of shape was he in?
> A: I could tell he'd been drinking, sir, but he wasn't – *he wasn't stumbling up to us*, like, he walked with a certain amount of control.
> . . .
> Q: Did you smell anything on him?
> A: *Not that I can remember*, Sir.

(J.A. at 70) (emphasis added). Conversely, Cpl Soto testified:

> Q: What happened when you got down there?
> A: [LCpl K.L.M.] walked up to the car, *he was like stumbling a little*.
>
> Q: I'm going to stop you right there. What do you mean by, "he was stumbling?"
> A: He was obviously drunk.
> . . .
> Q: And is that how you knew he was drunk or – how did you know he was drunk, besides he just stumbled?
> A: Well, the fact Cpl Johnston told me that he was drunk, plus the fact that *he was stumbling*. And when he came into the car, *he smelled like booze and alcohol*.

(J.A. at 81) (emphasis added).

II. When a judge acts inconsistent with recusal in a way that undermines the public's confidence in the judicial system, the material rights of the accused are prejudiced under Article 59(a). The Government's claim to the contrary is incorrect.

The Government suggests that this Court's application of *Liljeberg v. Health*

Service Acquisition Corp., 486 U.S. 847 (1988), is flawed because it is derived from a prejudice analysis applicable to Article III courts that is incompatible with Article 59(a). Appellee's Br. at 16-19 (citing *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998)). But the Government is mistaken.

The Government's reliance on *Powell's* plain error test analysis is misplaced. In holding the language "affects substantial rights" falls short of the Article 59(a) requirement, *Powell* highlighted two concerns. *Powell*, 49 M.J. at 465. First, prejudice in the military requires the error have "an unfair prejudicial impact on the jury's deliberations." *Id*. (citing *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986). The phrase "affects substantial rights" falls short of Article 59(a) and *Fisher's* requirement that error have an unfair prejudicial impact on the jury's deliberations. *Id*. at 465 (comparing *Fisher* and Article 59(a)). Second, the Supreme Court in *United States v. Olano*, 507 U.S. 725 (1993), "expressly declined to decide whether the phrase affecting substantial rights is always synonymous with prejudicial." *Fisher*, 21 M.J. at 463.

However, six years later, the Supreme Court decided *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), which addressed the two concerns this Court had in *Powell*. First, the Supreme Court noted that the phrase "error that affects substantial rights" means "error with a prejudicial effect on the outcome of a judicial proceeding." *Id*. at 81. Secondly, the Court explained "[n]o reason has

appeared for treating the phrase "affecting substantial rights" as untethered to a prejudice requirement when applying *Olano*. *Id*. at 82.

A. This Court has consistently applied the *Liljeberg* factors.

The Government attempts to detach the *Liljeberg* factors from Article 59(a) and argues *United States v. Roach*, 69 M.J. 17 (C.A.A.F. 2010), is flawed. However, in *Roach*, this Court recognized that the risk of undermining the public's confidence in the judicial process implicated the appellant's substantial rights, which explains why the Court unanimously vacated the judgement despite finding "no discernible prejudice to the appellant." *Roach*, 69 M.J. at 20-22. This Court did the same in *United States v. Thornton*, 69 M.J. 178 (C.A.A.F. 2010) (summary disposition), where no particular prejudice to the appellant was noted.

The same approach was taken in other cases in which a military judge's recusal error presented no obvious defect on the findings or sentence of the court-martial. For example, this Court proceeded to analyze the third *Liljeberg* factor in *United States v. Martinez* despite not being able to identify any specific injustice to the appellant. 70 M.J. 154, 159 (C.A.A.F. 2011) (finding "[t]he first two parts of the *Liljeberg* test are not implicated . . . [but] [t]he third part of the *Liljeberg* test, however, requires further discussion.").

More recently, in *United States v. Witt*, this Court held that it prejudiced the appellant's substantial rights when a military judge who was disqualified continued

to participate in the appellant's case. 75 M.J. 380, 384 (C.A.A.F. 2016) (internal citation omitted) (stating the disqualified judge's continued participation "produced a significant 'risk of undermining the public's confidence in the judicial process,' and thus prejudice Appellant's substantial rights."). This holding was "[c]onsistent with [*Roach*]."[1] And there again, this Court did not point to an outcome-determinative ruling to find this prejudice.

B. Regardless, the Government, without any regard to stare decisis, provides no compelling reason why this Court should overturn settled precedent.

"Stare decisis is defined as the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018). "The doctrine encompasses at least two distinct concepts: (1) an appellate court must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself (horizontal stare decisis); and (2) courts must strictly follow the decisions handed down by higher courts (vertical stare decisis)." *Id*.

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[1] *Id* (stating, "In *Roach*, we found the third *Liljeberg* factor determinative:"

> First, public confidence in the military judicial process is undermined where judges act in cases from which they are recused. This is true, whether the judge's role is significant or minimal . . . . [A] military judge is recused or he is not. A military judge who acts inconsistently with a recusal, no matter how minimally, may leave a wider audience to wonder whether the military judge lacks the same rigor when applying the law).

The party requesting this Court to overturn precedent bears a substantial burden of persuasion. *Id*. And this Court has said, "[A]dherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States v. Sills*, 56 M.J. 239, 241 (C.A.A.F. 2002).

The Government conducted no analysis of stare decisis. Accordingly, this Court should find that the Government has not met its burden in persuading the Court to overturn its precedent applying *Liljeberg* to cases involving recusal.

III. The third *Liljeberg* factor is determinative: there is a significant risk of undermining the public's confidence in the judicial process.

The error presented before this Court is that—despite being recused—Judge Sameit remained substantively involved in HM3 Upshaw's case. The Government asserts that there is "little reason for the public to perceive the military justice system's response as anything but . . . fair and favorable." Appellee's Br. at 26. That is not the case here where Judge Sameit consulted with Judge Munoz on a substantive motion—then pending before the court—by providing his assessment and legal conclusions. (J.A. at 249-50.)

There is a significant risk of undermining the public's confidence in the judicial process if HM3 Upshaw's sentence is not set aside. Judge Sameit's successor, whom he consulted post-recusal, continued to preside and exercise his

discretion over HM3 Upshaw's case during motions and throughout his sentence rehearing. Adding to the risk, Judge Munoz did not *sua sponte* bring up the fact he consulted Judge Sameit. It was not until after the Defense asked him whether he had conversations with Judge Sameit that he disclosed that information. (J.A. at 248-49.)

Additionally, Judge Munoz refused to grant the Defense's challenge for cause and severely misapprehended the law. (J.A. at 260-61.) Judge Munoz claimed the Defense's basis for disqualification "doesn't support what recusal . . . is for." (J.A. at 261.) This was incorrect. In fact, the Defense questioned Judge Munoz's impartiality because of Judge Sameit's involvement under R.C.M. 902(a). The lower court held that by consulting Judge Sameit and not recusing himself, Judge Munoz "clearly erred" and "abused his discretion." *United States v. Upshaw*, 79 M.J. 728, 134 (N-M. Ct. Crim. App. 2019) Even after the Defense emphasized how improper his actions were, Judge Munoz failed to recognize any issue in seeking Judge Sameit's advice. (J.A. at 249-50.)

In *Martinez*, this Court mentioned that "if no remedy is granted . . . [that fact] would increase the risk that the conduct . . . would undermine the public's confidence in the military justice system." *Martinez*, 70 M.J. at 160. Unlike the appellant's case in *Martinez*, HM3 Upshaw has not received any remedy or substantive relief at trial, clemency, or NMCCA. *See Upshaw*, 79 M.J. at 736. This

is in spite of both judges' flagrant errors. Thus, the risk of undermining the public's confidence in HM3 Upshaw's case is heightened.

Finally, the Government further attempts to minimize the role Judge Munoz played at HM3 Upshaw's rehearing because HM3 Upshaw elected members. Appellee's Br. at 20, 25-26. However, "[i]t is well-settled in military law that the military judge is more than a mere referee . . . and the impartiality of a presiding judge is crucial . . . ." *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008). Moreover, this Court did not highlight any errors in the judges' opinions in *Roach*, *Thornton*, or *Witt*. *See* Appellee's Br. at 26 (highlighting that Judge Munoz permitted broad *voir dire* and granted all challenges for cause).

Conclusion

For the reasons set forth above and in his initial brief, HM3 Upshaw respectfully ask this Court to set aside his convictions and sentence.

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Certificate of Compliance

This reply brief complies with the type-volume limitations of Rule 24(c) because it does not exceed 7,000 words, and it 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 September 8, 2020.

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