IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201600053
Darrius D. UPSHAW, Hospital Corpsman Third Class (E-4) U.S. Navy Appellant	)	USCA Dkt. No. 20-0176/NA

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UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801–946 (2012):

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 Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellee's approved sentence included a dishonorable discharge and one year or more of confinement. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

At his initial court-martial, a panel of members with enlisted representation convicted Appellant, contrary to his pleas, of two specifications of abusive sexual contact and one specification of sexual assault against two victims in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012).

On direct appeal, the lower court set aside Appellant's conviction for one of the victims but not the other. *United States v. Upshaw*, No. 201600053, 2017 CCA

LEXIS 363, at *2 (N-M. Ct. Crim. App. May 31, 2017) (setting aside sexual assault specification for instructional error). The court authorized a rehearing on the specifications it set aside and the sentence. *Id.* at *24.

Appellant unsuccessfully petitioned this Court for review. *United States v. Upshaw*, 77 M.J. 35 (C.A.A.F. 2017) (denying petition without prejudice).

On remand, the Convening Authority dismissed the set aside specification and ordered a sentence rehearing on the affirmed specifications. A panel of members with enlisted representation sentenced Appellant to thirty-six months of confinement, reduction to E-1, and a dishonorable discharge. The Convening Authority approved the adjudged sentence and, except for the dishonorable discharge, ordered the sentence executed.

The Record of Trial was docketed a second time at the lower court on June 4, 2018. The court held oral argument on August 2, 2019. On December 4, 2020, the court affirmed the findings and sentence. *United States v. Upshaw*, 79 M.J. 728, 731 (N-M. Ct. Crim. App. 2019). On January 3, 2020, Appellant requested reconsideration. The court denied reconsideration on January 17, 2020.

Appellant again petitioned this Court for review on March 17, 2020, and filed a supplement on April 7, 2020. This Court granted review on May 26, 2020. Appellant filed his Brief and the Joint Appendix on July 17, 2020.

Statement of Facts

A. The United States charged Appellant with abusive sexual contact and sexual assault against two individuals, Victim One and Victim Two.

The United States charged Appellant with abusive sexual contact and sexual assault on Victim One and Victim Two,[1] in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). (Appellate Ex. 1.)

B. At the first trial, the United States introduced evidence that Appellant offered Victim One a ride home after a day of heavy drinking and performed non-consensual sexual acts on him while en route.

1. Victim One met Appellant at a bar and became "extremely intoxicated."

Victim One went to a bar to meet a girl. (J.A. 89, 104–05.) Appellant—a Navy Corpsman—introduced himself to Victim One. (J.A. 89.) Victim One became "[e]xtremely intoxicated," and Appellant offered him a ride home. (J.A. 90–91, 111, 113.)

2. Victim One was clearly intoxicated before and during the ride.

Victim One accepted Appellant's offer and was "stumbling" and "tripping over [himself]" while walking to Appellant's vehicle. (J.A. 91–92.) Appellant assisted Victim One into the vehicle, reclined his seat, and told him he could sleep during the drive. (J.A. 93.)

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[1] Though Appellant was originally convicted of the misconduct against Victim Two, the facts of this specification are omitted because they are irrelevant to the granted issues. *See generally Upshaw*, 2017 CCA LEXIS 363, at *16–21 (background facts).

3. Victim One woke to Appellant sexually abusing him.

Victim One slept most of the drive. (J.A. 93.) At one point, Victim One woke to his "pants . . . unzipped" and Appellant's hand on his penis, "rubbing it up and down." (J.A. 93.) Failing to push Appellant's hand away, Victim One stopped Appellant by "curl[ing] up into the fetal position, . . . and fac[ing] the window." (J.A. 94.)

Appellant began rubbing Victim One's leg, so Victim One "freak[ed] out" and yelled for Appellant to pull over the car. (J.A. 94.) Appellant pulled into a parking lot off the main road on base. (J.A. 78–79; *see also* Prosecution (Pros.) Ex. 6.) Victim One left the vehicle and fell to the ground. (J.A. 94.)

4. Victim One immediately sought assistance, consistently telling two people that Appellant "tr[ied] to rape him."

Victim One sent a text message to his Team Leader: "[t]his fuses [sic] is trying to rape me, man. I need help." (J.A. 94–96; Pros. Ex. 1.) Victim One then vomited near Appellant's vehicle. (J.A. 97.)

Victim One next called his Squad Leader. (J.A. 63, 98.) Taking a few steps away from Appellant, Victim One told his Squad Leader he met a Navy Corpsman who offered him a ride home, that he fell asleep during the ride, and that he woke to the Corpsman "trying to rape him." (J.A. 65, 98.) Victim One explained that he had told Appellant to stop the vehicle and let him out, and that he needed a ride home. (J.A. 65.)

Victim One sounded "emotionally distressed" and was "sobbing," so the Squad Leader told him not to go anywhere and agreed to help. (J.A. 64–65.) The Squad Leader did not realize Appellant was the assailant when he told Victim One to stay in place. (J.A. 65; *see also* J.A. 68.)

5. Before help arrived, Appellant again abused Victim One.

Victim One vomited while waiting for assistance. (J.A. 100.) Appellant approached him and rubbed his back. (J.A. 100.) Appellant also rubbed Victim One's penis through his pants. (J.A. 100, 121.) Victim One immediately pushed Appellant's hand away. (J.A. 100, 121.)

6. Victim One spoke to his Squad Leader a second time and again said Appellant "tried to rape" him, asking his Squad Leader to "please hurry."

En route, the Squad Leader called Victim One to confirm his location. (J.A. 101–02.) Victim One could not provide a location, so the Squad Leader asked to speak with Appellant, whom he heard speaking in the background. (J.A. 68.)

Appellant provided the location and said he could take Victim One home. (J.A. 68.) The Squad Leader asked to speak with Victim One. (J.A. 68.) Victim One repeated his request that the Squad Leader pick him up and, after distancing himself from Appellant, made clear that Appellant "[was] the guy that tried to rape [him]." (J.A. 68.) The Squad Leader obliged. (J.A. 68–69.)

While waiting, Victim One texted his Squad Leader: "please hurry up." (J.A. 70.) Victim One continued to vomit. (J.A. 110.)

7. When his Squad Leader arrived, Victim One approached the vehicle alone, sobbing. Appellant later tried to explain Victim One's behavior as "survivor syndrome."

The Squad Leader later located Victim One. (J.A. 102.) As the Squad Leader arrived, Victim One "c[a]me out [from] between two vehicles" in a parking lot off the main road and approached the car alone. (J.A. 78–79; *see also* J.A. 74.) Victim One "walked with a certain amount of control" and, while "sobbing," hugged his Squad Leader. (J.A. 70, 102; *see also* J.A. 81.) The two had never hugged before. (J.A. 70.) It was clear Victim One had been drinking. (J.A. 70; *see also* J.A. 81.)

After Victim One was in the vehicle, Appellant approached. (J.A. 79, 103; *see also* J.A. 74.) The Squad Leader asked: "[w]hat the hell happened?" (J.A. 70.) Appellant claimed Victim One had fallen asleep during the ride and woke up screaming. (J.A. 71.) Appellant said it was "the strongest case of survivor syndrome that [he had] ever seen." (J.A. 70–71.) But Victim One had neither been in combat nor lost friends in combat. (J.A. 71; *see also* J.A. 128–29.)

8. After leaving the scene, Victim One continued to show signs of intoxication and distress.

When they left, Victim One started crying and said: "[w]hat [Appellant] did wasn't right." (J.A. 82.) Victim One was "sobbing in the backseat for about half

the [ride]." (J.A. 72.) The Squad Leader continued to check on Victim One "to make sure he wasn't going to throw up." (J.A. 72.) Eventually, Victim One fell asleep. (J.A. 72.)

The group later woke Victim One and helped him to his room. (J.A. 82.) Victim One was stumbling and required assistance to walk. (J.A. 82–83.) Victim One still smelled of alcohol, and according to his roommate, appeared "very distraught" and was crying intensely. (J.A. 128.)

C. The Military Judge gave an erroneous propensity instruction.

The Military Judge, relying on the law at the time of trial, erroneously instructed the Members that they could draw propensity conclusions from charged offenses. (J.A. 150); *see also Upshaw*, 2017 CCA LEXIS 363, at *5–7 (finding error under *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016)).

D. The Members convicted Appellant of abusive sexual contact and sexual assault.

The Members convicted Appellant of two specifications of abusive sexual contact and one specification of sexual assault against Victim One and Victim Two, respectively. (J.A. 182); *see also Upshaw*, 2017 CCA LEXIS 363, at *1 n.1. The Members sentenced Appellant to ten years of confinement, reduction to E-1, total forfeitures, and a dishonorable discharge. (J.A. 183.)

E. The Convening Authority approved the sentence as adjudged.

The Convening Authority approved the adjudged sentence and, except for the punitive discharge, ordered it executed. *Upshaw*, 2017 CCA LEXIS 363, at *1.

F. On Appellant's first appeal, the lower court set aside the specification related to Victim Two, affirmed those relating to Victim One, authorized a rehearing, and remanded.

On appeal, the lower court set aside the finding involving Victim Two based on the improper propensity instruction and authorized a rehearing. *Id.* at *22–24.

The lower court held the propensity instruction as to Victim One harmless beyond a reasonable doubt, affirmed, and authorized a sentence rehearing. *Id.* at *6, *24. "[E]vidence of the appellant's guilt," the court explained, "is so overwhelming that we are convinced, beyond a reasonable doubt, that it rendered the . . . sexual assault of [Victim Two] unimportant." *Id.* at *12–16.

G. On remand, the Convening Authority ordered a combined rehearing.

1. Appellant moved for recusal of the original Military Judge.

At the rehearing, the original Military Judge ("Original Judge") presided over the arraignment for the charges related to Victim Two. (J.A. 222.) Appellant conducted *voir dire* and challenged the Original Judge under R.C.M. 902(a), claiming that his continued presence at the court-martial posed a "risk of undermining public confidence in the judicial process." (J.A. 229.)

2. The Original Judge never ruled on recusal. The Detailing Judge assigned a new Military Judge to the rehearing.

The Original Judge stated he would inform the Detailing Judge of Appellant's challenge and rule on recusal if detailed. (J.A. 229.) Later, the Detailing Judge assigned a new Military Judge ("New Judge"), who presided over the rehearing. (J.A. 238.)

3. The United States moved to pre-admit evidence.

In support of the specification involving Victim Two, the United States moved to pre-admit two instances of prior sexual misconduct by Appellant under Mil. R. Evid. 404(b) and 413. (Appellate Ex. XIX.)

4. Appellant conducted *voir dire* of the New Judge and challenged him under R.C.M. 902(a).

Appellant conducted *voir dire* of the New Judge. (J.A. 245–54.) The New Judge stated that he had conversations with the Original Judge about the case and "r[a]n legal scenarios past him for the motions." (J.A. 249.)

Appellant challenged the New Judge under R.C.M. 902(a), arguing a reasonable person could question his impartiality due to conversations with the Original Judge who "recused himself." (J.A. 255–57.)

The New Judge clarified his interactions with the Original Judge, noting that he first "formed [his] own independent conclusion" and later "bounce[d] that off of [the Original Judge]" in order to "see what his thoughts were." (J.A. 258.)

The New Judge did not recuse himself. (J.A. 261.)

5. Before retrial, the Convening Authority withdrew and dismissed the specification involving Victim Two.

The Convening Authority withdrew and dismissed the specification involving Victim Two, mooting the pre-admission issue. (J.A. 263; Appellate Ex. LII.) The Convening Authority ordered that the sentence rehearing proceed on the crimes against Victim One. (J.A. 263.)

H. The New Judge presided over the sentence rehearing.

1. Appellant elected to be sentenced by Members.

Appellant elected to be sentenced by Members. (J.A. 262.) Appellant made five challenges for cause, and the New Judge granted each. (J.A. 264–70.)

2. Without objection, the New Judge allowed the Members to consider redacted testimony transcripts, exhibits, and witnesses.

The Members read redacted testimony of five witnesses from the first court-martial, received six Prosecution Exhibits, and heard testimony from two witnesses—all without objection. (R. 335, 339–43, 346–58.)

3. The Members sentenced Appellant.

Members sentenced Appellant to thirty-six months of confinement, reduction to E-1, and a dishonorable discharge. (J.A. 279.)

Argument

I.

THE UNITED STATES' CASE WAS OVERWHELMING: DOCUMENTARY EVIDENCE AND TESTIMONY FROM MULTIPLE WITNESSES CONSISTENTLY DEMONSTRATED, BEYOND A REASONABLE DOUBT, THAT APPELLANT REPEATEDLY SEXUALLY ABUSED VICTIM ONE. THERE IS NO REASONABLE PROBABILITY THE INSTRUCTIONAL ERROR CONTRIBUTED TO APPELLANT'S CONVICTION, AND THIS COURT SHOULD AFFIRM.

A. Standard of review.

This Court reviews erroneous instructions that impact constitutional rights for harmlessness beyond a reasonable doubt. *Hills*, 75 M.J. at 357 (citation omitted).

B. Prejudice turns principally on the strength of the United States' case.

This Court looks principally to the strength of the United States' case when analyzing *Hills* error for prejudice. *See, e.g.*, *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (asking whether evidence of guilt was "overwhelming" to assess prejudice). "An error is not harmless beyond a reasonable doubt when 'there is a reasonable probability that the [error] complained of might have contributed to the conviction.'" *Hills*, 75 M.J. at 357 (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007)). But an error is harmless beyond a reasonable doubt where it is "unimportant in relation to everything else the [panel]

considered on the issue in question, as revealed in the record." *Moran*, 65 M.J. at 187 (citation and internal quotation marks omitted).

C. The United States' case was so strong that there is no reasonable probability the error contributed to Appellant's conviction.

The Court in *Hills* set aside one specification of abusive sexual contact because the United States could not prove, beyond a reasonable doubt, that the erroneous instruction did not prejudice the appellant. 75 M.J. at 352. Consistent with the preliminary hearing officer's finding that the victim's testimony was inconsistent and the DNA evidence inconclusive, *id.*, the government introduced no corroborating evidence at trial and relied exclusively on testimony that the victim recalled her assailant wearing white sweatpants, the appellant was the only person wearing white sweatpants on the evening in question, and the victim believed she had at one point seen the appellant's face, *id.* at 358. This "weak" case left the Court unable to conclude "whether the [erroneous] instructions may have tipped the balance," and the Court therefore found prejudice. *Id.*

In *Williams*, on the other hand, the Court confronted the same type of instructional error and affirmed part of the conviction. *United States v. Williams*, 77 M.J. 459, 464–65 (C.A.A.F. 2018). The victim escaped from the appellant, who had been anally sodomizing her, and hid behind a door; the appellant kicked in the door, hitting and injuring the victim's head; and the victim ran to a neighbor's house and called the police. *Id.* at 461. At trial, the government

introduced documentary evidence of the broken door and the victim's wounds. *Id.* at 464. The appellant's sworn statement confirmed the victim's story, except for the forcible sodomy. *Id.* at 464. The Court found this sufficient to demonstrate harmlessness beyond a reasonable doubt. *Id.*

Here, four points demonstrate harmlessness beyond a reasonable doubt. First, as in *Williams* and unlike *Hills*, Victim One's report was corroborated by multiple testifying witnesses and documentary evidence. (J.A. 63–65, 68, 70–72, 82–83, 93–98, 128; Pros. Exs. 1–4, 6.) In fact, several facts are undisputed: Victim One drank to excess, was driven to base by Appellant, fell asleep during the drive, woke up screaming, made three consistent, contemporaneous reports that Appellant attempted to "rape" him, and appeared to be under emotional duress during all subsequent periods of consciousness. (J.A. 63–65, 68, 70–72, 82–83, 93–98, 128; Pros. Exs. 1–4.) Like the appellant in *Williams*, Appellant's statements corroborated virtually all major details—except the sexual abuse. (*Compare* J.A. 65, 93–96, 98, 100–02, *and* Pros. Ex. 1, *with* J.A. 70–71.)

Second, despite Appellant's belief otherwise, the testimony at trial was overwhelmingly consistent. (*Contra* Appellant's Br. at 20–21, July 17, 2020.) No witnesses "saw [Victim One] vomit" because they arrived after the fact, away from the area in which Victim One vomited. (*Compare* Appellant's Br. at 20, July 17, 2020 (alleging inconsistency), *with* J.A. 74, 78–79, 97.) Neither did Victim One

inconsistently reference alcohol-induced immobility; Victim One testified that he woke up to Appellant's hand around his penis, initially failed to push him away, and ended the abuse by "curl[ing] up in the fetal position." (*Compare* Appellant's Br. at 20, July 17, 2020 (claiming Victim One stated "he was too drunk to move [Appellant's] hand off his penis"), *with* J.A. 93–94.) Relatedly, the Record also belies Appellant's suggestion that the Squad Leader thought Victim One neither smelled of alcohol nor appeared scared of Appellant. (*Contra* Appellant's Br. at 20–21, July 17, 2020.) The Squad Leader instead testified he "could tell [Victim One had] been drinking," noted that he did not remember smelling anything, and qualified Victim One's apparent lack of fear with the fact that Appellant was not present when the Squad Leader arrived. (J.A. 70, 74.)

Third, overwhelming evidence of guilt does not require a confession, eyewitness testimony, or conclusive physical evidence. (*Contra* Appellant's Br. at 18–19, July 17, 2020.) Though *Williams*, *Hazelbower*, and *Hills* may have discussed this type of evidence, none held that these categories are prerequisites for harmlessness. *See Williams*, 77 M.J. at 464; *United States v. Hazelbower*, 78 M.J. 12, 12 (C.A.A.F. 2018); *Hills*, 75 M.J. at 357–58. To the contrary, this Court has stated that "an accused can properly be convicted of a sexual offense on the word of a single victim alone." *Prasad*, 80 M.J. at 31 (discussing harmlessness in context of *Hills* error).

Finally, trial counsel's reliance on the erroneous instruction does not diminish the strength of the United States' case. (*Contra* Appellant's Br. at 18, 24, July 17, 2020.) While failure to emphasize an erroneous instruction may contribute to harmlessness, reliance on an erroneous instruction does not *per se* result in prejudice. Instead, this Court "can rest assured that an erroneous propensity instruction did not contribute to the verdict" when the evidence of guilt was "overwhelming." *Williams*, 77 M.J. at 464 (internal quotation marks and citation omitted); *see also Prasad*, 80 M.J. at 29; *Hills*, 75 M.J. at 358.

The United States' case was overwhelmingly strong, and this Court can safely conclude beyond a reasonable doubt that the Members did not rely on the erroneous instruction to convict Appellant. Appellant's claim therefore fails.

II.

NONE OF THE *LILJEBERG* FACTORS DEMONSTRATE PREJUDICE TO APPELLANT. APPELLANT URGES RELIEF BASED ON SPECULATION AND SHOWS NO SPECIFIC PREJUDICE, CONTRARY TO ARTICLE 59(a). ANY ERROR WAS HARMLESS.

A. Standard of review.

Recusal error is reviewed for harmlessness. *United States v. Roach*, 69 M.J. 17, 20 (C.A.A.F. 2010) (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 874 (1988)).

B. The *Liljeberg* factors generally govern whether recusal error is harmless.

A military judge's erroneous failure to recuse "does not end appellate review." *United States v. Butcher*, 56 M.J. 87, 92 (C.A.A.F. 2001). Recusal error is often tested for harmlessness under the *Liljeberg* factors, which analyze the risk of: (1) injustice to the appellant; (2) injustice in other cases; and (3) undermining the public's confidence in the judicial system. *Id.* (citation omitted); *accord United States v. Witt*, 75 M.J. 380, 384 (C.A.A.F. 2016); *United States v. McIlwain*, 66 M.J. 312, 315 (C.A.A.F. 2008). This Court has also suggested the *Liljeberg* factors supplement Article 59(a), even absent specific prejudice. *United States v. Martinez*, 70 M.J. 154, 159 (C.A.A.F. 2011) ("We initially consider whether the error materially prejudiced [the appellant's] substantial rights . . . [and afterwards apply] *Liljeberg* to determine if reversal is otherwise warranted . . . .").

C. *Liljeberg* must be applied consistent with the Code. Specific prejudice is a prerequisite for appellate relief, absent structural error.

1. Article 59(a) limits appellate relief.

Article 59(a) "only permits appellate error correction where the error 'materially prejudices . . . substantial rights.'" *United States v. Tovarchavez*, 78 M.J. 458, 467 (C.A.A.F. 2019) (quoting Article 59(a), UCMJ). This circumscribes the application of Article III precedent by military appellate courts. *See, e.g.*, *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998) (addressing adoption of plain error test from *United States v. Olano*, 507 U.S. 725, 734 (1993)).

In *Powell*, for example, this Court reviewed a service court of criminal appeals' adoption of the *Olano* plain error test, noting: "the military rules have a higher threshold than the federal rules in that they require plain error to 'materially prejudice' substantial rights." *Id.* "By holding that there was plain error under the *Olano* test [alone]," the lower court "held only that the error 'affects substantial rights.'" *Id.* at 465 (emphasis removed). But "[t]his holding f[ell] short of the requirement . . . set out in Article 59(a)," and the Court reversed. *Id.*

2. The *Liljeberg* factors were imported from civilian precedent free of Article 59(a)'s limits. But this Court never aligned those factors with the Code's individual prejudice requirement.

The Supreme Court's test in *Liljeberg*, which originally analyzed error under the civilian statutory analog to R.C.M. 902(a), reflected that "Congress ha[d] wisely delegated to the [Article III] judiciary the task of fashioning the remedies that will best serve the purpose of . . . legislation." *Liljeberg*, 486 U.S. at 862. This three-factor test relates directly to Article III courts' authority to vacate judgments in pursuit of "justice." *Liljeberg*, 486 U.S. at 863–64. The Supreme Court also noted this inquiry typically provides deference to lower courts, which are "in a better position to evaluate the significance of a violation." *Id.* at 862.

This Court first adopted the full *Liljeberg* analysis in *Butcher*. *Butcher*, 56 M.J. at 92–93; *see also United States v. Mitchell*, 39 M.J. 131, 140 (C.A.A.F. 1994) (citing *Liljeberg*, no analysis). As did the Supreme Court in *Liljeberg*, the

Butcher Court commented on the lack of guidance about "a 'particular remedy' for situations in which an appellate court determines that the military judge should have removed himself or herself from a case." *Butcher*, 56 M.J. at 92. The Court then applied the entire *Liljeberg* framework without commenting on deference or the mandate of Article 59(a). *Id.* at 92–93.

But nothing supports that Congress or the President invested military courts with "the task of fashioning the remedies that will best serve the purpose of" R.C.M. 902 violations, as was fundamental in *Liljeberg*. *Compare Liljeberg*, 486 U.S. at 862 (emphasizing congressional "delegation" to Article III courts), *with United States v. Simmermacher*, 74 M.J. 196, 201–03 (C.A.A.F. 2015) (rejecting notion that the President delegated authority to fashion remedy, and holding text of R.C.M. 703, which identifies both error and prejudice, mandated abatement).

The President cannot delegate authority he does not have. *See, e.g.*, *United States v. Smith*, 44 M.J. 387, 392 (C.A.A.F. 1996) ("It is beyond cavil that the President cannot abrogate a statute passed by Congress . . . ."). Nor can this Court, without authorization,[2] create remedies that are inconsistent with Article 59(a)'s

[2] Congress can lawfully expand the aperture of relief available under the Code, but there is no indication that Congress has done so here. *Cf., e.g.*, *United States v. Nerad*, 69 M.J. 138, 145–47 (C.A.A.F. 2010) (prohibiting equitable relief under the Code based on lack of congressional mandate); *cf. also, e.g.*, *United States v. Ward*, 74 M.J. 225, 229 n.5 (C.A.A.F. 2015) (commenting that "even if an appellant establishes a violation of Article 25, UCMJ, there exists no remedy . . . if the government shows it was harmless").

mandate. *Compare United States v. Boyce*, 76 M.J. 242, 254 (C.A.A.F. 2017) (Ryan, J., dissenting) (lack of individual prejudice bars relief under Article 37), *with* Article 37(c), 10 U.S.C. 837(c) (2016) (adding language to Article 37 that mirrors Article 59(a)).

3. The failure to resolve *Liljeberg* with Article 59(a) has created inconsistent precedent.

The unresolved gap between *Liljeberg* and Article 59(a) has left Service Courts to choose between this Court's incompatible alternatives: *Liljeberg* either provides the Article 59(a) prejudice test or operates independent of that test. *See supra* Section II.B (identifying conflicting precedent).

Most Service Courts have erroneously opted for the latter, independently applying *Liljeberg* in violation of Article 59(a). *See, e.g.*, *United States v. Anderson*, 79 M.J. 762, 765 (A. Ct. Crim. App. 2020) ("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* . . . ."); *United States v. Springer*, 79 M.J. 756, 760 (A. Ct. Crim. App. 2020) ("Even absent specific prejudice, we must apply the three-prong test outlined in *Liljeberg* to determine if a remedy is required . . . ."); *United States v. Bremer*, 72 M.J. 624, 628 (N-M. Ct. Crim. App. 2013) ("We analyze separately whether this error was harmless under *Liljeberg*, and whether it materially

prejudiced the appellant's substantial right under Article 59(a), UCMJ."). *But see Upshaw*, 79 M.J. at 735–36 (applying *Liljeberg* alone).

D. Appellant relies on the third *Liljeberg* factor despite failing to demonstrate specific prejudice under Article 59(a), as he must.

1. Nothing in the Record supports a risk of injustice to Appellant.

In *Butcher*, the Court analyzed "injustice" by focusing on the timing of "events [that gave] rise to the disqualification motion" and whether the military judge "was . . . called upon to exercise discretion on any matter of significance . . . after that point." *Butcher*, 56 M.J. at 92 (emphasizing the number and outcome of rulings by the military judge after recusal required). The Court noted the "appellant was sentenced by a panel," which limited "the military judge's subsequent participation . . . to instructions and rulings during the sentencing proceedings," and highlighted the fact "that the members rejected the more severe punishment argued for by trial counsel." *Id.* This, considered together, made it clear there was no risk of injustice to the appellant. *Id.* at 93.

Here, three points highlight the absence of any injustice—let alone any risk of the same—to Appellant. First, the New Judge's failure to recuse was mooted by withdrawal and dismissal, obviating any claim of prejudice. After the New Judge discussed the pending Mil. R. Evid. 404(b) and 413 Motions with the Original Judge, the Convening Authority withdrew and dismissed the associated specification. (J.A. 263; *see also Upshaw*, 79 M.J. at 736.) Appellant correctly

concedes this mooted the issue, (Appellant's Br. at 30, July 17, 2020) (conceding mootness), and rendered "the risk of injustice directly affecting [Appellant] relatively low," (Appellant's Br. at 25, Jan. 7, 2019) (conceding, lower court).

Second, as in *Butcher*, the Record affirmatively demonstrates a lack of prejudice to Appellant. Not only was the timing of the New Judge's erroneous refusal to recuse such that his "subsequent participation . . . was limited to instructions and rulings during the sentencing proceedings," *Butcher*, 56 M.J. at 92, but the New Judge's rulings from that point onward were infrequent and favored Appellant, (*see, e.g.*, J.A. 264–70 (granting all challenges for cause); *see also, e.g.*, R. 335, 339–43, 346–58 (no objections to evidence)). Relatedly, Appellant's election of member sentencing resulted in a "reject[ion of] the more severe punishment argued for by trial counsel," *Butcher*, 56 M.J. at 92–93, and a sentence closer to that requested by Appellant, (*compare* J.A. 271, *with* J.A. 279).

Third, despite Appellant's passing claim of a constitutional right to a judge that "appears impartial," neither *Wright* nor the cases it cites purport to recognize any such right.[3] *Compare United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F.

[3] Notably, Appellant challenged the New Judge under R.C.M. 902, not the Constitution. (J.A. 255); *see generally United States v. Couch*, 896 F.2d 78, 81–82 (5th Cir. 1990) (observing that the civilian analog to R.C.M. 902 "and the Due Process Clause are not coterminous"). As this Court has made clear, however, "review . . . is properly based on a military judge's disposition of the motion submitted to him or her—not on the motion that appellate defense counsel now wishes [for]." *See United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018).

1999) (enumerated disqualification per R.C.M. 902(b)), *Ward v. Village of Monroeville*, 409 U.S. 57, 59 (1972) (due process violation, judge had actual adverse financial interest), *and Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (same, judge had "direct, personal, substantial, pecuniary interest . . . against [the appellant]"), *with* (Appellant's Br. at 31, July 17, 2020). This is consistent with federal analysis of 28 U.S.C. § 455—the civilian analog to R.C.M. 902—for which the "appearance of impropriety standard" is not "mandated by the Due Process Clause." *Hardy v. United States*, 878 F.2d 94, 97 (2d Cir. 1989).

The first *Liljeberg* factor clearly indicates the recusal error was harmless.

2. Even assuming the second *Liljeberg* factor can be resolved with Article 59(a), there is no risk of injustice in other cases.

This Court has analyzed the second *Liljeberg* factor three times. Once, this Court disclaimed any significant risk of injustice because the basis for recusal extended to the appellant's court-martial alone. *McIlwain*, 66 M.J. at 315. Twice, this Court concluded "[i]t [was] not necessary to reverse . . . in order to ensure that military judges exercise the appropriate degree of discretion in the future." *Butcher*, 56 M.J. at 93; *accord Martinez*, 70 M.J. at 159.

Butcher involved a judge that attended a social event at the home of a trial counsel and played doubles tennis with that trial counsel, all during trial. 56 M.J. at 89. *Martinez*, on the other hand, involved a detailed judge whose supervisory judge maintained substantive contact with the trial counsel during trial and

accompanied the detailed judge to chambers during recess and deliberations. 70 M.J. at 156–59.

But neither set of facts counseled pause under the second *Liljeberg* factor. *Butcher*, 56 M.J. at 92–93; *accord Martinez*, 70 M.J. at 159. This turned partly on the fact that "the Government ha[d] not asked [the Court] to endorse the military judge's conduct." *Butcher*, 56 M.J. at 93. Moreover, reversal was "not necessary . . . to ensure" appropriate behavior in the future. *Id.*; *Martinez*, 70 M.J. at 159.

Here, two points merit comment. First, Appellant makes no argument that there is any risk of injustice in other cases. (Appellant's Br. at 1–33, July 17, 2020.) Even had Appellant argued otherwise, which is at this point inappropriate,[5] the basis for recusal extended no further than appellant's court-martial and, as in *McIlwain*, this weighs against relief. *McIlwain*, 66 M.J. at 315.

Second, nothing distinguishes the speculative risk here from that in *Butcher* or *Martinez*. The New Judge's erroneous consultation with the Original Judge presents no more pernicious a problem than did the mid-trial socialization in

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[5] Civilian "courts have consistently concluded that the failure . . . to include an issue or argument in the opening brief will be deemed a waiver." *See, e.g.*, *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999). This has been understood to bar arguments that are omitted, *see, e.g.*, *United States v. Jenkins*, 904 F.2d 549, 554 n.3 (10th Cir. 1990) (waived, argument first raised in reply brief), or poorly developed, *see, e.g.*, *United States v. Combs*, 218 F. App'x. 483, 488 (6th Cir. 2007) (waived, argument raised in a "perfunctory manner"). Although the Federal Rules of Appellate Procedure are not binding on this Court, the United States would respectfully encourage a similar approach.

Butcher or the ex parte communications in *Martinez*. *See Butcher*, 56 M.J. at 92–93; *Martinez*, 70 M.J. at 159. Nor is there a risk other judges will engage in similar misbehavior where the lower court clearly identified the error and, as in *Butcher*, the United States does not dispute the error. *See Butcher*, 56 M.J. at 93.

Thus, as this Court previously observed, "[i]t is not necessary to reverse the results of the present trial in order to ensure that military judges exercise the appropriate degree of discretion in the future." *Butcher*, 56 M.J. at 93; *accord Martinez*, 70 M.J. at 159.

3. There is no risk to public confidence where Appellant received exhaustive, impartial review both at trial and after.

The public confidence analysis under *Liljeberg* is distinct from the R.C.M. 902 analysis that considers the appearance of impropriety at trial. *Martinez*, 70 M.J. at 160; *accord United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001). Indeed, the third *Liljeberg* factor concerns the entire judicial process, which includes how "the military justice system . . . responds once it has been determined that a military judge . . . should have been recused." *Martinez*, 70 M.J. at 160. This analysis looks to the process afforded at trial and "all post-trial actions." *Id.*

In practice, nearly every case where this Court invoked the third *Liljeberg* factor to reverse involved a loss of "public confidence" coupled with specific prejudice to the appellant. That was so in *Witt*, where the loss in public confidence due to disqualified judges participating in the reconsideration process was linked to

specific prejudice—re-imposition of a previously vacated death sentence. 75 M.J. at 384 (noting "[i]t is difficult to conceive of a more striking example of prejudice to an appellant's substantial rights"). So too in *McIlwain*, where the loss in public confidence from the judge's flagrant refusal to recuse was linked to specific prejudice resulting from the typical discretion—ranging from evidentiary rulings to asking questions and answering member questions—exercised throughout a trial. 66 M.J. at 314–15 & n.2.

In *Roach*, on the other hand, the Court found no "discernable prejudice to the appellant" and, inconsistent with Article 59(a), reversed on the basis of "public confidence" alone. 69 M.J. at 20–21 (citation and internal quotation marks omitted). But this was not for want of facts that, upon closer examination, might have supported specific prejudice: the recused chief judge recommended appointment of his successor, and that successor sat on the case, ruled on the appellant's motion to vacate, and authored the court's opinion. *Id.* at 20–21.

Here, three points demonstrate the recusal error was harmless. First, unlike *Witt* or *McIlwain*, the hypothetical loss of public standing is not coupled with any specific prejudice. Appellant asks this Court to adopt the flawed analysis in *Roach* to avoid this reality. (Appellant's Br. at 30–31, July 17, 2020.) But even *Roach* is distinguishable: whereas the recused judge in *Roach* touched every aspect of appellate review, the grounds for recusal here arose at a point during Appellant's

rehearing when the New Judge exercised almost no discretion, and his remaining discretionary rulings favored Appellant. (*See, e.g.*, J.A. 264–70 (granting all challenges for cause)); *see also supra* Section II.D.1 (emphasizing timing of erroneous failure to recuse); *McIlwain*, 66 M.J. at 314 n.2 (same). Thus any risk here is more speculative than in *Roach* and clearly conflicts with Article 59(a).

Second, Appellant enjoyed extensive, unbiased process both during and after trial: (1) the New Judge permitted broad *voir dire* and explained his conduct; (2) Appellant was sentenced by a neutral, properly instructed Panel, which largely rejected Trial Counsel's sentencing request; (3) Appellant twice had the opportunity to request clemency; (4) Appellant twice received appellate review by the Navy-Marine Corps Court of Criminal Appeals, which dismissed a substantial part of his original conviction; and (5) Appellant now has the added benefit of discretionary review by this Court. Appellant's proposed analysis erroneously narrows *Liljeberg*'s aperture, conflating prejudice with error. *Compare Martinez*, 70 M.J. at 160, *and Quintanilla*, 56 M.J. at 45, *with* (Appellant's Br. at 30–31, July 17, 2020). The full process afforded to Appellant leaves little reason for "the public [to] perceive [the military justice system's] response" as anything but far-reaching, fair, and favorable. *See Martinez*, 70 M.J. at 160.

Third, Appellant's characterization of the Record bears individual emphasis. Appellant suggests that the New Judge and Original Judge together "work[ed]

around the recusal" by erecting a "public facing judge" and goes on to claim that "[i]t is possible [the Original Judge] continued to consult with [the New Judge] throughout sentencing." (Appellant's Br. at 29–30, July 17, 2020.) This has no support in the Record. Though the New Judge discussed the case with the Original Judge, the New Judge openly admitted that he initially sought the Original Judge's "thoughts" but made clear he would decide the matter based on what "the law requires . . . not based on anybody's opinion or preference." (J.A. 250–51.) The New Judge erred; he did not conspire. Appellant's belief otherwise is unfounded.

E. There is no legitimate claim that the recusal error was structural.

"'Structural errors involve errors in the trial mechanism' so serious that 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008) (citations omitted) (noting presumption against structural error). Structural error is confined to a "very limited class of [constitutional] cases." *Neder v. United States*, 527 U.S. 1, 8 (1999); *see generally Johnson v. United States*, 520 U.S. 461, 468–69 (1997) (accumulating examples).

Here, Appellant correctly concedes the recusal error is not structural. (Appellant's Br. at 32, July 17, 2020.) This reality is reflected in this Court's long history of assessing recusal error for prejudice. *Compare Brooks*, 66 M.J. at 224 (accumulating examples of error that cannot be tested for prejudice and are

therefore structural), *with Butcher*, 56 M.J. at 92 (analyzing recusal error for harmlessness), *Witt*, 75 M.J. at 384 (same), *McIlwain*, 66 M.J. at 315 (same), *and Martinez*, 70 M.J. at 159 (same).

Yet Appellant claims the third *Liljeberg* factor is "determinative," relying on *Roach*'s reversal without any "discernible prejudice to the appellant." (Appellant's Br. at 27, July 17, 2020 (quoting *Roach*, 69 M.J. at 20).) Appellant cannot have it both ways. *Cf. United States v. Vazquez*, 72 M.J. 13, 17 (C.A.A.F. 2013) (highlighting agreement that error was not structural, holding it was error for the lower court to reverse "without identifying prejudice to a substantial right of the accused"). To hold otherwise would, as in *Roach*, disclaim structural error in name alone. *See Roach*, 69 M.J. at 20 (highlighting agreement that recusal error was not structural, finding no specific prejudice, and reversing). But Article 59(a) requires more. *See generally* Article 59(a), UCMJ.

Conclusion

The United States respectfully requests that this Court affirm.

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