4 September 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39559
Staff Sergeant (E-5), RYAN G. URIBE, USAF, *Appellee*.	)	USCA Dkt. No. 20-0267/AF

BRIEF ON BEHALF OF THE UNITED STATES

PETER F. KELLETT, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36195

JESSICA L. DELANEY, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36177

MATTHEW J. NEIL, Lt Col, USAF
Deputy Chief, Government Trial
and Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

MARY ELLEN PAYNE
Associate Chief, Government Trial
and Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

SHAUN S. SPERANZA, Colonel, USAF
Chief, Government Trial
and Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33821

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

ISSUE GRANTED

WHETHER THE LOWER COURT ERRED IN FINDING THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING A JOINT MOTION TO RECUSE.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals ("the Air Force Court") reviewed this case pursuant to Article 66, UCMJ, 10 U.S.C. § 866 (2012). (JA at 1-27.) This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case.

STATEMENT OF FACTS

The military judge, Judge MR, and trial counsel, Major BJ, had known each other since 2012. (JA at 33.) In mid-2014, the military judge was assigned to Joint Base Andrews, MD, to work in the same office as Major BJ. (Id.) The two spent one year in the same office until Major BJ was reassigned to Travis Air Force Base, CA, in 2015. (Id.) During their time together at Joint Base Andrews, "they hung out occasionally" and became friends. (Id.) However, their time together in the office was limited due to their responsibility to travel and try cases as Senior Trial Counsel. (*See* Id., stating Major BJ and the military judge would "see each other in the office *while in town*") (emphasis added). In 2015, the military judge held a bachelor's party which Major BJ attended, along with 15-20 others. (JA at 33, 50.) Major BJ later attended the military judge's wedding in June of 2015. (JA at 33.) In 2016, the military judge was reassigned to Travis Air Force Base to take his position as a military judge. (Id.) After arriving at Travis Air Force Base, "their interactions [had] been limited because of [the military judge]'s position" and they only "hung out socially" five times, four times with their significant others and one time without their significant others. (Id.)

On one occasion, while both the military judge and Major BJ were out of town, the military judge's wife prematurely went into labor during the middle of the night. (JA at 33, 50.) Major BJ's girlfriend "went to the hospital and was

present with [the military judge]'s wife for the birth of their children." (JA at 33.) At that time, the military judge and his wife resided in Sacramento, CA, and were without "any friends or family in the local area." (JA at 50.) Additionally, "[a]ll military judges assigned to Travis Air Force Base, California, were also TDY with the military judge for training and none of the military judges or their families resided in Sacramento, California." (JA at 50.) Had the military judge not been out of town on a temporary duty assignment, Major BJ's girlfriend would not have been present at the birth. (Id.)

The military judge was detailed to Appellant's court-martial on 1 March 2018. (JA at 32.) Appellant was tried in March of 2018 and sentenced on 15 March 2018. (JA at 1, 73.) Prior to selection of forum or trial on the merits, Appellant filed a motion for recusal of the military judge. (JA at 29-35.) The government did not join the motion, but neither did the government oppose it, and neither side requested a hearing on the matter. (JA at 30, 43-44.) The military judge denied the motion via a written ruling. (JA at 49-58.) In his written ruling, some of the military judge's "essential findings of fact" were not based on the evidence presented to support Appellant's motion for recusal. (*Compare* JA at 49-52 *with* 29-35.) The military judge noted that some of the facts were "derived from [his] personal knowledge" and "would have been provided in response to questioning under R.C.M. 902(d)(2)." (JA at 50 n.2.) After receiving the ruling,

Appellant did not request to question the military judge further under R.C.M. 902(d)(2) and stated that he did not have a request for reconsideration. (JA at 64, 66.) During a post-trial session, the military judge made the following remarks:

> I want to put on the record again I remain confident in my ability to serve as the military judge in this case under the standards previously discussed, at length, on the record and in the form of the ruling that I had entered on the motion for recusal in this case. Moving forward in time from when I authenticated the record until now, I still remain unaware of any matter that might serve as a ground for challenge against me. I don't believe my impartiality or my fairness could be reasonably questioned on this matter, again, understanding that this issue was litigated earlier in this case.

(JA at 108-09.) Afterwards, the military judge again asked Appellant's trial defense counsel and trial counsel if they desired to question him or to challenge him, to which they replied "No, Your Honor." (JA at 109.)

Prior to trial, Appellant's trial defense counsel discussed with him the differences between trial by members and trial by military judge alone. (JA at 110, 113.) Appellant acknowledged that his counsel explained to him that the choice of forum "was [his] decision" to make. (JA at 115.) The military judge also advised Appellant four separate times that only he had the power to request a trial by military judge alone. (JA at 60, 62, 64, 70.) When asked, Appellant stated that he understood his right to choose trial by members or by military judge alone. (JA at 60, 64, 70. Further, Appellant signed a document stating that he knew that the

choice of forum "was [his] alone to make" and that he "knowingly and voluntarily made the choice" to be tried by a court-martial consisting of military judge alone. (JA at 112, 114.)

Ultimately, Appellant chose to be tried by military judge alone. (JA at 59, 70-71.) Before making his choice of forum, Appellant knew the military judge would be presiding over his court-martial and admitted that his choice was made voluntarily and of his own free will. (JA at 59, 71.) The military judge convicted Appellant of one specification of sexual assault on divers occasions and acquitted him of one specification of non-divers sexual assault. (JA at 1-2, 72.) The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 20 months, and to be dishonorably discharged. (JA at 73.)

SUMMARY OF THE ARGUMENT

The lower court did not err in finding the military judge did not abuse his discretion in denying Appellant's unopposed motion to recuse. The military judge and Major BJ's relationship was not such that it would cause a reasonable member of the public to question the military judge's impartiality while presiding over Appellant's court-martial. But even if this Court finds the military judge abused his discretion by not recusing himself, a review of the entire proceedings shows that the military judge's actions during Appellant's court-martial neither caused injustice to Appellant nor undermined the public's perception of the judicial

process. Accordingly, Appellant is entitled to no relief, and this Court should answer the granted issue in the negative.

ARGUMENT

THE LOWER COURT DID NOT ERR IN FINDING THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANT'S MOTION TO RECUSE.

Standard of Review

Appellate courts "will reverse a military judge's decision on the issue of recusal only for an abuse of discretion." United States v. McIlwain, 66 M.J. 312, 314 (C.A.A.F. 2008) (citing United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F. 2001)). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts was clearly unreasonable." United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010) (citation omitted). To constitute an abuse of discretion, there must be "more than a mere difference of opinion;" rather, the ruling "must be arbitrary, fanciful, clearly unreasonable or clearly erroneous." United States v. Collier, 67 M.J. 347, 353 (C.A.A.F. 2009) (citations omitted).

Law

"[A] military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M.

902(a). "The military judge shall, upon motion of any party or sua sponte, decide whether the military judge is disqualified." R.C.M. 902(d)(1). "Military judges should 'broadly construe' possible reasons for disqualification, but also should not recuse themselves 'unnecessarily.'" McIlwain, 66 M.J. at 314 (quoting United States v. Wright, 52 M.J. 136, 140 (C.A.A.F. 1999); Discussion, R.C.M. 902(d)(1)). "Of course, '[a] . . . judge has as much obligation not to . . . [disqualify] himself when there is no reason to do so as he does to . . . [disqualify] himself when the converse is true.'" United States v. Kincheloe, 14 M.J. 40, 50 n.14 (C.M.A. 1982) (quoting citation omitted); *see also* McCann v. Communications Design Corp., 775 F. Supp. 1506, 1508-09 (D. Conn. 1991) ("Where there is no basis for recusal other than a litigant's unhappiness with a judge's decisions, the presiding judge has an obligation to prevent 'judge shopping' by refusing to recuse himself"). "There is a strong presumption that a judge is impartial." United States v. Quintanilla, 56 M.J. 37, 44 (C.A.A.F. 2001) (citation omitted).

Pursuant to R.C.M. 902(a), where concerns of actual bias or prejudice are not at issue, whether there is an appearance of impartiality is decided under an objective standard. United States v. Norfleet, 53 M.J. 262, 270 (C.A.A.F. 2000). Under this standard, recusal is required when "a reasonable man knowing all the circumstances" concludes that "the judge's 'impartiality might reasonably be

questioned.'" Butcher, 56 M.J. at 91 (quoting citations omitted). However, this Court has recognized this standard does not require judges to be cut-off from society: "'Judges have broad experiences and a wide array of backgrounds that are likely to develop ties with other attorneys, law firms, and agencies.' Personal relationships between members of the judiciary and witnesses or other participants in the court-martial process do not necessarily require disqualification." Id. (quoting Norfleet, 53 M.J. at 270). This Court has further recognized the added challenges that military judges face while serving in the armed forces: "In the course of such assignments, the officer is likely to develop numerous friendships as well as patterns of social activity. These relationships are nurtured by the military's emphasis on a shared mission and unit cohesion, as well as traditions and customs concerning personal, social, and professional relationships that transcend normal duty hours." Id.

Moreover, even under the objective standard, a military judge's "statements concerning his intentions and the matters upon which he will rely are" still relevant to the inquiry. Wright, 52 M.J. at 141 (citations omitted); United States v. Sullivan, 74 M.J. 448, 454 (C.A.A.F. 2015). "Where the military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to voir dire the military judge and to present evidence on the question, and where such record demonstrates that appellant obviously was

not prejudiced by the military judge's not recusing himself, the concerns of RCM 902(a) are fully met." United States v. Campos, 42 M.J. 253, 262 (C.A.A.F. 1995).

When an appellate court finds error in a failure to recuse under R.C.M. 902(a), it must determine whether the error was harmless under the test set forth in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). Butcher, 56 M.J. at 92. The Liljeberg test requires a weighing of three factors: "[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." Butcher, 56 M.J. at 92 (citing Liljeberg, 486 U.S. at 864) (brackets in original).

While the third part of the Liljeberg test is similar to the R.C.M. 902(a) analysis in that it is applied under an objective standard, it differs from R.C.M. 902(a) in that it is not limited only to facts relevant to recusal, but rather includes a "review [of] the entire proceedings, to include any post-trial proceeding, the convening authority action, the action of the Court of Criminal Appeals, or other facts relevant to the Liljeberg test." United States v. Martinez, 70 M.J. 154, 160 (C.A.A.F. 2011); *see also* United States v. Rivers, 49 M.J. 434, 444 (C.A.A.F. 1998) ("Our review of the entire record convinces us that … [there are no] reasonable doubts about the fairness of appellant's trial.").

Analysis

a. The military judge did not abuse his discretion when he denied Appellant's motion for recusal.

The military judge applied the proper legal principles to the facts in this case, and his conclusion that any reasonable, well-informed person observing the proceeding would not question the military judge's impartiality was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. The record demonstrates the relationship between the military judge and trial counsel was not one that required recusal. Simply put, the facts were inadequate to rebut the "strong presumption" that the military judge was impartial. Quintanilla, 56 M.J. at 44. Consequently, this Court should find the military judge did not abuse his discretion.

1. The military judge and Major BJ's relationship was not close enough to create an appearance of impartiality.

Major BJ and the military judge did not have a close relationship that would create an automatic appearance of impartiality. This Court observed the nature of serving in the military inevitably results in "ties with other attorneys" and "[p]ersonal relationships" that do not "necessarily require disqualification." Butcher, 56 M.J. at 91. Although the military judge and Major BJ had developed a social relationship during their overlapping assignments at Joint Base Andrews, it was not one that automatically required disqualification. Id. During this period, they only socialized "occasionally" outside of the office and spent limited time

together in the office due to regular travel for duty. Their personal and professional friendship, for the most part, did not exceed the type of relationship "nurtured by the military's emphasis on a shared mission and unit cohesion" as contemplated by Butcher, 56 M.J. at 91.

Major BJ's attendance at the military judge's bachelor's party and wedding creates a closer call. However, that party was held in April 2015, almost three years before Appellant's court-martial. (JA at 50.) Following the military judge's assignment to the trial judiciary, he ceased socializing with Major BJ out of respect for his position. In the nearly two years before Appellant's court-martial, they had "hung out socially" only five times. (JA at. 33.) Given the significant amount of time that had passed since the bachelor's party and wedding, these two events do not overcome, or make clearly erroneous, the military judge's finding that the professional and social interactions between himself and Major BJ were "relatively limited." (JA at 56 ¶ 36.) *See* Sullivan, 74 M.J. 454 (finding the military judge's relationships with a "social component," which included the appellant and his wife, the appellant's individual military defense counsel, witnesses, and other court-martial participants, had "occurred years prior to the court-martial" and did not require recusal). And as the Air Force Court pointed out, there was no evidence that Judge MR "had any personal contact with Maj BJ during or close in time to Appellant's trial." (JA at 15.) Thus, any member of the public "knowing all the

circumstances" would not question the military judge's impartiality at the time of Appellant's court-martial. Butcher, 56 M.J. at 91.

Indeed, Major BJ's statement was uncontroverted in that he and the military judge had only "hung out occasionally" while stationed together and that they had "limited interactions" after the military judge left the office to which they were both assigned. (JA at 33.) The record does not support a finding that Major BJ and the military judge socialized so frequently that the military judge would put their friendship above his duties as the presiding official at Appellant's court-martial. Rather, their interactions at Travis AFB were consistent with an acceptable "personal, social, and professional relationship[] that transcend[ed] normal duty hours," and did not create an appearance of partiality. Butcher, 56 M.J. at 91.

Appellant contends that the number of times Major BJ and the military judge socialized from mid-2016 to Appellant's court-martial in March 2018, showed the "extensiveness" of their relationship. (App. Br. at 12-13.) However, the record discloses that they only socialized four times with their significant others and once one-on-one, over an approximate eighteen-month period. This amounted to Major BJ and the military judge socializing approximately once every three to four months and is not frequent enough to call into question the military judge's impartiality. As the lower court found, "their social contact was not particularly

extensive or intense." (JA at 12.) And while Major BJ's girlfriend was present with the military judge's wife when she went into labor, this was the result of exceptional circumstances and "not typical of the nature of their relationship at that point." (JA at 12.) Indeed, the undisputed facts were that Major BJ's girlfriend only went to support the military judge's wife because she went into labor prematurely in the middle of the night while the military judge was out of town, and there were no other "friends or family in the local area." (JA at 50 ¶ 4.c.) In addition, Major BJ was not present for the birth of the military judge's child and their significant others' relationship should have little bearing on whether the military judge appeared to be biased in favor of Major BJ.

Further, Appellant declined to conduct voir dire with the military judge. While Appellant argues that the military judge's ruling that he and Major BJ had "relatively limited involvement professionally and socially" is clearly unreasonable, Appellant declined to voir dire the military judge at trial and did not develop any facts to support his claim. Nothing before this Court contradicts the military judge's ruling, that in the time leading up to Appellant's court-martial, he had relatively limited interactions with Major BJ. Appellant argues that their relationship "developed and continued in the four-year time span leading up to [Appellant's] court-martial" but points to nothing in the record to support that claim. (App. Br. at 13.)

The record demonstrates the military judge's relationship with Major BJ did not rise to such a level that would call his impartiality into question. In United States v. Hamilton, this Court decided whether two appellate military judges' "impartiality might reasonably be questioned" when the judges reviewed an allegation of unlawful command influence against a staff judge advocate who was "a good friend … and may have played golf with them on several occasions." 41 M.J. 32, 38-39 (C.M.A. 1994). Despite the apparent close relationship, this Court determined the appellate military judges were not disqualified and cited the fact that they had expressly "disclaimed any 'personal friendship of such a nature as to disqualify them.'" Id. at 39. While Hamilton addressed the question of whether voir dire was appropriate for appellate judges, the Court also reviewed the standard of recusal for appellate judges, requiring them to recuse themselves in any proceeding in which their "impartiality might reasonably be questioned" – the same standard applicable in Appellant's case. The reasoning in Hamilton, then, is still instructive in Appellant's case.

Here, the "type of contacts that the military judge had with [Major BJ] …" were a "consequence of the military judge's" service in the military and do not support "a sufficient basis to conclude that a reasonable person familiar with all the circumstances in this case would conclude that the "military judge's impartiality might reasonably be questioned." Sullivan, 74 M.J. at 455 (citations omitted). The

military judge's relationship did not even rise to the level of the appellate military judge's relationship with the staff judge advocate in Hamilton. But even assuming the military judge and Major BJ were "good friends," the military judge disclaimed that his "prior interactions and relationship with [Major BJ]" could reasonably call his impartiality into question. (JA at 56.)

Further, the military judge's relationship with Major BJ was in line with the Seventh Circuit Court of Appeals' recognition of the balance that judges must strike in their social lives:

> In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or risking disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend -- *even a close friend* -- appears as a lawyer.

United States v. Murphy, 768 F.2d 1518, 1537-38 (7th Cir. 1985) (citing In re United States, 666 F.2d 690 (1st Cir. 1981)) (emphasis added). Thus, even if this Court agrees with Appellant and concludes the military judge and Major BJ had a close friendship, this, without more, is not automatically disqualifying.

2. Major BJ was not a party to the case and there was no reason to believe the military judge would rule in the government's favor based on their relationship.

It is important to consider the fact that Major BJ was not a party to the case. Justice Scalia recognized that "while friendship is a ground for recusal of a [judge] where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer." Cheney v. United States Dist. Court, 541 U.S. 913, 916 (2004) (emphasis in original). Further, the Fifth Circuit has recognized that "[b]ias for or against an attorney, who is not a party, is not enough to require disqualification unless it can also be shown that such a controversy would demonstrate a bias for or against the party itself." Henderson v. Dep't of Pub. Safety & Corr., 901 F.2d 1288, 1296 (5th Cir. 1990). Other federal courts have held the same. *See* Panzardi-Alvarez v. United States, 879 F.2d 975 (1st Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990) (finding bias against counsel is insufficient to require recusal absent evidence of such strong prejudice against counsel that it would have been reasonable to infer that defendant would have been denied fair trial); Gilbert v. Little Rock, 722 F.2d 1390 (8th Cir. 1983) (holding relationships between judge and counsel are insufficient to require recusal unless they affect the parties).

Here, Major BJ was not a party to the case, nor was his "personal fortune" or "freedom" at issue. There was no indication on the record that he would personally benefit from any outcome in the case. His role as counsel for the government was not such that it called into question whether the military judge would be tempted to rule in the government's favor to assist Major BJ. Even if this Court finds Major BJ to have been more than just a casual friend of the military judge, such a friendship by itself is insufficient to rebut the strong presumption that the military judge was impartial. In light of the above-cited, persuasive federal cases, it was not an abuse of discretion for the military judge not to recuse himself, where Major BJ was not party to the litigation.

Further, nothing in the record supports that the military judge might have had an inclination to favor Major BJ because of their relationship. There are no facts demonstrating that the military judge held Major BJ in high legal esteem, trusted his judgment, or found him to be credible as a lawyer. In fact, the military judge initially disclosed his prior relationship with Maj BJ during an R.C.M. 802 conference and stated that he did not find that it would cause any impartiality on his part. (JA at 36.) This showed that the military judge was not trying to hide anything, nor that he valued his friendship with Major BJ over the integrity of the court-martial proceedings. Further, the military judge never demonstrated any undue familiarity with Major BJ on the record. As demonstrated by the email

exchanges between counsel and the military judge prior to the military judge's ruling, all parties were respectful of the others' positions. (JA at 35-48.) And nothing in the record suggests that Major BJ would condition any continued friendship on Judge MR ruling in the government's favor or that Judge MR believed that to be the case. Thus, no reasonable member of the public would think that the military judge had anything to gain from supporting Major BJ over either of the trial defense counsel, or over Appellant himself.

3. The military judge affirmatively disclosed the prior relationship and restated his understanding of his obligation to remain impartial.

The military judge allayed any appearance of partiality through his written ruling. The military judge fully considered "the relationships and behaviors" in applicable precedent cited in his thorough written ruling. (JA at 57 ¶ 38.) The military judge also expressly disclaimed "any offense whatsoever" and noted that the raising of the issue was consistent with the parties' obligations. (JA at 57 ¶ 40.) His thorough ruling demonstrated full consideration and understanding of the issue and showed that recusal was unnecessary under R.C.M. 902. The military judge's ruling preserved more facts than those elicited by Appellant through his motion or interview of Maj BJ. No reasonable member of the public would question the military judge's impartiality given his written ruling's complete analysis of Appellant's motion before deciding not to recuse himself.

Perhaps most importantly, the military judge fully disclosed his relationship

with Major BJ, "affirmatively disclaim[ed] any impact on him," and gave Appellant "full opportunity to voir dire" him. Campos, 42 M.J. at 262; Norfleet, 53 M.J. at 270; Hamilton,41 M.J. at 38-39); *see also* Sullivan, 47 M.J. 454 ("the military judge fully heard the views of both parties on this issue and then affirmatively stated on the record he could remain impartial to both sides"); United States v. Allen, 33 M.J. 209, 213 (C.M.A. 1991), *overruled on other grounds*, (military judge divulged inappropriate ex parte communication and allowed voir dire, thus eliminating "the possibility of creating the misperception that he might not be impartial"); United States v. Dinger, 77 M.J. 447, 453 (C.A.A.F. 2018) ("informing the parties and allowing voir dire on the issue … eliminated the possibility of creating the misperception that [the military judge] might not be impartial").

Appellant learned of the relationship between the military judge and Major BJ due to the military judge's disclosure in an R.C.M. 802 session. Rather than requesting a hearing to voir dire either trial counsel or the military judge, Appellant conducted an interview with Major BJ and then filed a motion directly with the court – all without questioning the military judge on the record about any potential for bias. The military judge allowed Appellant to defer his selection of forum until after receiving his ruling on the motion to recuse himself. (JA at 64.) After denying the motion for recusal, the military judge allowed Appellant to file a

request for reconsideration. (JA. at 66.) Appellant declined to do so. Nonetheless, the military judge issued an extensive ruling, providing additional facts behind his relationship with Major BJ.

The military judge reaffirmed "his understanding of and obligation to the oath of his office" that requires "faithful and impartial performance of all the duties incumbent upon him, according to his conscience and the laws applicable to trial by court-martial." (JA at 56, ¶ 34 (citing Article 42(a), UCMJ; Discussion, R.C.M. 807(b)(2)). "The military judge's full disclosure, sensitivity to public perceptions, and sound analysis objectively supported his decision not to recuse himself, and these factors contribute to a perception of fairness."[1] Wright, 52 M.J. at 142; *see also* Sullivan, 74 M.J. at 454 (weighing favorably the fact that "the military judge fully disclosed his relationships with the participants in the court-martial"). The military judge's candor and full consideration of the motion to recuse allayed any potential concern the public might have that the he was not committed to his oath to impartially preside over Appellant's court-martial. Therefore, the Air Force Court did not err when it found the military judge did not abuse his discretion when he declined to recuse himself from this case. (JA at 12.)

[1] The military judge also contributed to the perception of fairness when he disclosed, without a question from counsel, that he was familiar with one of the people in the list of anticipated witnesses. (JA at 51, ¶ 5.e.)

4. The fact that the government did not oppose the motion to recuse is not dispositive.

Appellant attributes great weight to the fact that his motion for recusal was unopposed by the government. (App. Br. at 14-15.) However, in Sullivan, this Court did not find even a joint request for disqualification to be dispositive. 74 M.J. at 455. The Court in Sullivan decided the issue based on the "circumstances surrounding the basis for the disqualification request" and, despite the fact that it was a joint request, still did not "find an adequate basis to conclude that the military judge abused his discretion when he decided not to disqualify himself." 74 M.J. at 455. Here, the Air Force Court also determined a joint motion could not be dispositive by itself because "[t]o hold otherwise would effectively give the parties collective control over whether a military judge could hear a particular case." (JA at 13.) More importantly, the fact that Appellant's motion was unopposed did not relieve the military judge from his "obligation" not to recuse himself "when there [was] no reason to do so." Kincheloe, 14 M.J. at 50 n.14; R.C.M. 902(d)(1); *see also* McIlwain, 66 M.J. at 314 (observing that military judges "should not recuse themselves "unnecessarily"). Therefore, this Court should not give undue weight to the fact that Appellant's motion was unopposed.

5. Appellant's choice to be tried by military judge alone supports that there was no appearance of partiality.

Finally, Appellant's request to be tried by the military judge significantly

contributes to the perception of fairness in his court-martial. While an appellant's request for trial by military judge alone does not automatically waive a previously raised motion for recusal, United States v. Cornett, 47 M.J. 128, 131 (C.A.A.F. 1997), it is a factor to be considered by the Court. United States v. Burton, 52 M.J. 223, 226 (C.A.A.F. 2000) (giving weight to the fact that the appellant "requested a bench trial, knowing the identity of the military judge" in finding the military judge was not disqualified from presiding over the court-martial). Here, Appellant demonstrably knew that he alone had the power to decide trial by members or by military judge alone after being advised by his trial defense counsel and the military judge. Appellant made his request to be tried by the military judge only after he filed the motion for recusal, declined to voir dire the military judge or request a hearing on the matter, and received the written ruling denying the motion. The sequence of events shows Appellant, who knew the identity of the military judge before making the request, still believed he would receive a fair trial despite the allegation of an appearance of partiality. These facts further dispel any concern that a reasonable member of the public would believe the military judge should have been disqualified. The lack of voir dire further indicated Appellant's lack of concern that there would be any bias inherent in his court-martial as a result of the military judge's relationship with Major BJ. Appellant's own confidence in the fairness of the military judge also should allay any concerns on the part of a

"reasonable [person] knowing all the circumstances." Butcher, 56 M.J. at 91.

In sum, the military judge did not abuse his discretion when he denied the motion for recusal. Appellant has failed to "overcome a high hurdle" to rebut the strong presumption that the military judge was impartial. Quintanilla, 56 M.J. at 44. The military judge carefully considered applicable precedent, compared the facts of this case with relationships and behaviors in other cases, reaffirmed his understanding of and his obligation to the judicial oath, and disclaimed any offense from the filing of the motion before reaching his resolution of the motion to recuse. His ruling shows "the findings of fact upon which he predicate[d] his ruling are [] supported by the record," "incorrect legal principles were [not] used," and "his application of the correct legal principles to the facts was [not] clearly unreasonable." Ellis, 68 M.J. at 344. And as recognized by this Court, even if "it could fairly be argued that the military judge should have disqualified himself out of a sense of prudence…. that is not the standard of review [courts are] obligated to apply in deciding such cases on appeal." Sullivan, 74 M.J. at 454. Instead, Appellant must show that the military judge abused his discretion. Id. Appellant has failed to meet that high standard. The military judge was aware of the relevant law and carefully and appropriately weighed and applied it in coming to his decision. Even though another military judge might have disqualified himself "out of a sense of prudence," more than a difference of opinion is required to find an

abuse of discretion. Here it was not arbitrary, fanciful, clearly erroneous, or clearly unreasonable for Judge MR to conclude that a reasonable person with knowledge of all of the circumstances would not question his impartiality. Therefore, Appellant is entitled to no relief.

b. Reversal is not required because Appellant suffered no prejudice, and public confidence in the judicial process has not been undermined.

Should this Court find the military judge erred by failing to recuse himself, the error was still harmless under the Liljeberg test and does not require relief from this Court.

1. The record is devoid of any risk of injustice to Appellant.

Under the first Liljeberg factor, Appellant has failed to show that the military judge's decision not to recuse himself resulted in a "risk of injustice." In Martinez, this Court found the first Liljeberg factor was "not implicated under the facts of [the] case" because "the record does not support nor has Martinez identified any specific injustice that he personally suffered under the circumstances." 70 M.J. at 159. *see also* Sullivan, 74 M.J. at 454 ("Appellant has not pointed to any rulings that raise appearance concerns."). Just as in Martinez and Sullivan, so too is the case here.

As evidence of alleged bias, Appellant unpersuasively argues that the military judge overruled several of his motions, "objections to evidence and testimony throughout the court-martial." (App. Br. at 17.) Specifically, Appellant

lists "motions to suppress under Mil. R. Evid 404(b), to admit evidence under Mil. R. Evid 412, [] to exclude evidence under Mil. R. Evid. 413" and a "motion to dismiss due to assistant trial counsel's prior representation of [Appellant]" as issues that risked injustice to him. (Id.) However, when he was provided the opportunity to raise any improper rulings on direct appeal, Appellant did not allege that the military judge abused his discretion in excluding evidence under Mil. R. Evid. 412 or 413. (JA at 2.) Appellant's failure to allege error on those issues is a tacit admission that the military judge did not abuse his discretion on those issues – that his denial of those motions was not the result of any bias.

In addition, the Mil. R. Evid 404(b) issue Appellant identifies as evidence of bias was raised personally by Appellant on direct appeal under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1992), and found to be non-meritorious, warranting no discussion by the lower court. Finally, Judge MR did not decide the motion to dismiss due to trial counsel's prior representation of Appellant. Instead, that ruling was issued by a different military judge, who had presided at the earlier arraignment session. (JA at 2, 9 n.8, 12.)

As the Air Force Court correctly found, "other than the motion to recuse itself, a claim of legal and factual insufficiency, and one non-meritorious issue personally raised by Appellant, Appellant fails to identify any alleged abuse of discretion by [the military judge] over the course of the trial that materially

prejudiced his substantial rights, or any other manifestation of partiality toward the Government." (JA at 12.) In short, Appellant's argument of bias before this Court is undercut by the fact that his appellate defense counsel did not argue any of the military judge's rulings to be an abuse of discretion before the court below.

Moreover, the military judge did not rule only in the government's favor, as demonstrated by several evidentiary objections throughout the trial. (JA at 97-107.) The record of trial shows that the military judge did not make unbalanced rulings and therefore, there was no risk of injustice in the outcome of the court-martial.

The military judge's findings also showed no risk of injustice to Appellant. The military judge acquitted Appellant of one of the two specifications of sexual assault, and, as the lower court observed, "there was very strong evidence supporting his conviction of the other specification." (JA at 13.) Appellant was ultimately convicted of digitally penetrating the victim on divers occasions when he knew or reasonably should have known she was asleep. In addition to the credible testimony of the victim, Appellant himself confirmed the sexual assault allegations in a recorded phone call with the victim, in which he admitted to his misconduct and apologized. (JA at 15.) Appellant stated on the recording, "I tried to initiate more while you were sleeping" and admitted, "I was wrong every night I

tried to, that I fingered you in your sleep." (Id.) The strength of the evidence alone shows no risk of injustice in this case.

The adjudged sentence further demonstrated no risk of injustice to Appellant. The military judge only adjudged 20 months of confinement, 16 months less confinement than the 36 months the government requested during sentencing argument and far less than the maximum term of 30 years. Manual for Courts-Martial, United States pt. IV, ¶ 45.e.(2) (2016 ed.). Appellant did not allege on appeal that his sentence was inappropriately severe.

"[T]he fact that the military judge acquitted appellant of one of the [specifications] and adjudged a sentence considerably more lenient than that authorized under the [] Manual" should also lead this Court to also conclude that "the judge's failure to [ ] recuse himself did not result in prejudice to [Appellant]." United States v. Elzy, 25 M.J. 416, 419 (C.M.A. 1988). The just results of Appellant's court-martial show the military judge impartially decided the findings and sentence and was not influenced by his relationship with Major BJ. The military judge's failure to recuse himself created no risk of injustice to Appellant.

As federal courts applying Liljeberg have recognized, the risk of injustice to an appellant from an improper failure to recuse is particularly low when "the appellate court has conducted a plenary review of the trial court's judgment – any risk that the trial court's bias tainted the outcome in such a case has been cured by

the de novo review of the unbiased court of appeals." United States v. Cerceda, 172 F.3d 806, 816, n. 10, 15 (11th Cir. 1999). *See also* Selkridge v. United of Omaha Life Ins. Co., 360 F.3d 155, 171 (3d Cir. 2004) (even though judge erroneously failed to recuse, any error was harmless where the impartial appellate court independently approved the judgments in the case). This is the exact case here. An unbiased Court of Criminal Appeals conducted a plenary, de novo review of Appellant's findings and sentence under Article 66(c), UCMJ. The Air Force Court unanimously found no instance where Judge MR abused his discretion and that the findings were legally and factually sufficient. (JA at 19.) The Court also unanimously found that the findings and sentence were correct in law and fact and that no error that materially prejudiced a substantial right occurred. (JA at 29.) Therefore, there was no risk of injustice to Appellant.

Finally, under the first Liljeberg factor, appellate courts must weigh not only the risk of injustice to the appellant, but also the risk of injustice to the government, should a conviction be set aside and a retrial authorized. United States v. Orr, 2020 U.S. App. LEXIS 25215 (7th Cir. 2020); Cerceda, 172 F.3d at 812-13. Here, the government would necessarily spend valuable time and money to retry this case – an unjust result, particularly given the strength of the evidence in the case. This Court should also consider that the government did not oppose the motion to recuse the military judge, and there is no evidence that Major BJ

attempted to exploit his relationship with the judge during the course of the trial to benefit the government. Thus, there is no need for this Court to grant a remedy to "punish" the government or to deter future government misconduct. Lastly, the victim in this case would necessarily be required to testify again and be forced to relieve a traumatizing experience.

Given the lack of prejudice to Appellant, the strength of the government's case, and the risk of injustice to the government were the conviction to be vacated, the first Liljeberg factor weighs in the government's favor.

2. Denial of relief is not likely to produce injustice in other cases.

Under the second Liljeberg factor, there is no risk that "denial of relief will produce injustice in other cases." *See* Butcher, 56 M.J. at 92. Appellant concedes this point. (App. Br. at 16.) In assessing the second factor, the Court looks to whether granting relief would "encourage a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." Liljeberg, 486 U.S. at 868. Here, the military judge disclosed his previous relationship with Major BJ. He conducted a careful consideration of the particular circumstances underlying the basis for Appellant's motion for recusal before ruling.

The military judge also demonstrated his sensitivity to any appearance of impartiality arising out of contacts with Major BJ prior to Appellant's trial when he

assumed his position as a judge. Specifically, the military judge exhibited "deliberate and increased separation [from Major BJ] since the military judge's assignment," which Major BJ confirmed. (JA at 33, 56 ¶ 36.) There is no evidence that the military judge intentionally disregarded his duty to keep an appearance of impartiality. In fact, he took care in his written ruling to detail his intent and efforts to maintain an appearance of fairness. In sum, the military judge here *did* carefully examine possible grounds for disqualification and promptly disclosed them. Under the facts of this case "[i]t is not necessary to reverse the results of the present trial in order to ensure that [this military judge or any other] exercise[s] the appropriate degree of discretion in the future." Butcher, 56 M.J. at 92.

As the Air Force Court pointed out, each case must be assessed on its own merits, and in this case the concern with an appearance of impropriety was specific to the military judge's relationship with Major BJ, and would only arise again if he was detailed to another case with Major BJ. (JA at 13.) But even if this Court desired to send a message to other judges facing similar circumstances, the mere fact that this Court held that Judge MR erred in Appellant's case would be enough to prevent military judges from making similar recusal decisions in future cases. Military judges in later courts-martial will be presumed to be aware of this case and to apply it holding correctly. United States v. Phillips, 70 M.J. 161, 168

(C.A.A.F. 2011). It is not necessary for this Court to take the additional step of overturning Appellant's conviction in order to prevent or deter future occurrences. *See* Selkridge, 360 F.3d at 171 (Reasoning that the court's determination that a recusal error occurred "will provide virtually the same encouragement to other judges and litigants as would a remand"). Therefore, the second factor weighs in favor of the government.

3. There is no risk that the public's confidence in judicial process was undermined by the military judge denying Appellant's motion to recuse.

As to the final Liljeberg factor, there is little risk of undermining the public's confidence in the judicial process by upholding Appellant's conviction. As the Air Force Court recognized, this case did "not involve unethical judicial behavior." (JA at 13.) The military judge and Major BJ were forthcoming about their relationship, rather than trying to hide it. The matter was fully addressed on the record and Appellant was given the opportunity to voir dire the military judge further, which he declined to do. The military judge disavowed any bias toward either party on the record and denied any offense in being challenged. As discussed above, Appellant's choice to be tried by military judge alone adds to the perception of fairness and leads to the logical conclusion that Appellant did not actually believe the judge to be impartial. *See* Burton, 52 M.J. at 226; Elzy, 25 M.J. at 419. Further, the military judge sua sponte informed the parties that he was

familiar with one of the named witnesses, which further contributed to the appearance that he was committed to being transparent and fair. (JA at 51 ¶ 5.e.)

Appellant has failed to show a specific instance where the military judge was biased in favor of Major BJ or otherwise abused his discretion with any ruling. Indeed, the lower court also found no such instances when it conducted its plenary review of the entire record before affirming the findings and sentence. Martinez, 70 M.J. at 160. Major BJ made no attempt during trial to use his friendship with the military judge to the government's advantage. And there is no evidence in the record that the military judge made any ruling in favor of the government based on his friendship with Major BJ, rather than because it was the correct ruling based on the facts before him. *See* Wiseman v. Spaulding, 573 S.W.2d 490 (Tenn. Ct. App. 1978) (upholding the judge's refusal to recuse because the judge ruled correctly on the merits of the case despite finding the judge and a party were friends).

Moreover, the fact that the military judge acquitted Appellant of one specification and sentenced him well below trial counsel's recommendation demonstrates Appellant's case is not one that would undermine the public's confidence in the judicial process. Elzy, 25 M.J. at 419. The military judge based the guilty finding on the victim's testimony which was strongly corroborated by Appellant's own recorded admissions to committing the offense, and the sentence of 20 months of confinement was just and significantly less than the 30 year

maximum. In a plenary review, the Air Force Court was convinced itself of Appellant's guilt beyond a reasonable doubt and determined that the sentence as adjudged should be approved. (JA at 19, 29.) As this Court recognized in Martinez, 70 M.J. at 160, the third Liljeberg factor considers the entire proceeding including "the action of the Court of Criminal Appeals," in determining the risk to undermining confidence in the justice system. Under the circumstances of the entire proceedings here, no member of the public would harbor doubts that Appellant received a fair trial.

Conversely, in cases where the defense fails to establish "any significant possibility that they suffered any harm" from the judge's determination not to recuse himself, the public would lose confidence in the judicial process if the judgments were vacated – especially where the appellate court has conducted a plenary review and found no error. Cerceda, 172 F.3d at 816, n.15. The public would believe that the "costly remedy" of vacatur "would be unnecessary to ensure fairness to the parties." Id. *See also* Marcavage v. Bd. of Trs. of Temple Univ. of the Commonwealth Sys. of Higher Educ., 232 F. App'x 79, 85 (3d Cir. 2007) ("ordering a new trial with a new judge risks harming the public's confidence in the judicial process" when the appellate court found no error in the judge's trial decisions). Here, too, given the overwhelming nature of the government's case, and the Air Force Court's plenary review of issues raised by Appellant and their

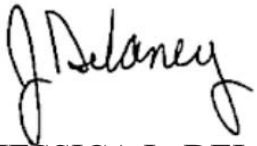
own independent review of the record, the public might lose faith in the military justice system were Appellant's conviction to be vacated. Thus, the third factor weighs in favor of the government.

On balance, the Liljeberg factors weigh in favor of finding that reversal is not required. Appellant received a fair trial through his requested forum of military judge alone because an independent review of the case reveals there were no errors committed by the military judge that materially prejudiced Appellant. Put simply, a complete review of the record reveals no "reasonable doubts about the fairness of [Appellant]'s trial." Rivers, 49 M.J. at 444. Accordingly, even if this Court determines the military judge should have recused himself, reversal is unwarranted and would risk undermining public confidence in the military justice system. Appellant therefore is entitled to no relief.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court answer the granted issue in the negative and affirm the Air Force Court's decision.

PETER F. KELLETT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36195



JESSICA L. DELANEY, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36177

MATTHEW J. NEIL, Lt Col, USAF
Deputy Chief, Government Trial and
Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

SHAUN S. SPERANZA, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33821

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division via electronic means on 4 September 2020.

JESSICA L. DELANEY, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36177

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/s/_____

JESSICA L. DELANEY, Maj, USAF

Attorney for USAF, Government Trial and Appellate Counsel Division

Dated: 4 September 2020

APPENDIX

Marcavage v. Bd. of Trs. of Temple Univ. of the Commonwealth Sys. of Higher Educ.

United States Court of Appeals for the Third Circuit

February 15, 2007, Argued ; May 1, 2007, Filed

No. 05-5521

Reporter
232 Fed. Appx. 79 *; 2007 U.S. App. LEXIS 10273 **

MICHAEL ANTHONY MARCAVAGE, Appellant v. BOARD OF TRUSTEES OF TEMPLE UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION; WILLIAM BERGMAN, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS VICE PRESIDENT OF OPERATIONS FOR TEMPLE UNIVERSITY; CARL BITTENBENDER, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS MANAGING DIRECTOR OF CAMPUS SAFETY SERVICES FOR TEMPLE UNIVERSITY

Prior History: On Appeal from the United States District Court for the Eastern District of Pennsylvania. (District Court No. 00-cv-05362). District Judge: The Honorable Petrese B. Tucker.

Marcavage v. Bd. of Trs., 2004 U.S. Dist. LEXIS 9471 (E.D. Pa., May 21, 2004)
Marcavage v. Bd. of Trs., 2002 U.S. Dist. LEXIS 19397 (E.D. Pa., Sept. 30, 2002)

Counsel: Brian Fahling (argued), Stephen M. Crampton, Michael J. DePrimo, AFA Center for Law & Policy, Tupelo, MS, Counsel for Appellant.

Joe H. Tucker, Jr. (argued), Bacardi L. Jackson, Booth & Tucker, LLP, Philadelphia, PA, Counsel for Appellees.

Judges: Before: SMITH and FISHER, Circuit Judges and DOWD, District Judge. * DOWD, District Judge, concurring.

Opinion by: SMITH

Opinion

[*80] SMITH, *Circuit Judge*.

The main issue in this case is whether the District Judge should have disqualified herself pursuant to *28 U.S.C. § 455(a)*. We conclude that the District Judge did not abuse her discretion by not disqualifying **[**2]** herself pursuant to *§ 455(a)*. We also note that, even if the language of the District Judge's written order denying the *§ 455(a)* motion created a situation where her impartiality might be reasonably questioned, no party was harmed by any rulings made by the District Judge during the course of these proceedings. We will therefore affirm. We find no error in the District Court's orders at issue in this appeal, including the District Judge's decision to permit an expert to testify as to reasonableness under Pennsylvania's Mental Health Procedures Act (MHPA), *50 P.S. § 7101 et seq*.

I.

Because we write primarily for the parties, we omit a discussion of facts not relevant to our disposition. This case arises out of a series of unfortunate incidents involving Plaintiff/Appellant Michael Marcavage, then a Dean's List student at Temple University, and high-ranking Temple officials. During the Fall 1999 semester, Marcavage learned

* The Honorable David D. Dowd, Jr., Senior District Judge for the Northern District of Ohio, sitting by designation.

of an upcoming campus-sponsored play that planned on depicting Jesus Christ and his disciples as gay. This production offended Marcavage. In late October and early November 1999, Marcavage began meeting with the University's **[**3]** Vice President of Operations, William Bergman, and Director of Campus Safety, Carl Bittenbender, to see if he could arrange logistics for a protest event that he was organizing. This alternative event, scheduled to occur in early November, would portray Jesus in a different light than the event that depicted him and his disciples as gay.

The meeting that formed the basis for this lawsuit occurred on November 2, 1999. Marcavage, Bergman, and Bittenbender met in Bergman's office to discuss the logistics of Marcavage's play. Immediately prior to this meeting, Marcavage met with a secretary at the Board of Trustees' office. While the parties disagree as to what happened between Marcavage and the secretary, the secretary pressed the panic button to summon campus police because she believed Marcavage was making a commotion in the office. Bergman responded personally, and took Marcavage to his office. In the office, Bergman told Marcavage that the University would not provide a stage for his event. The interpretations of Marcavage's actions in the office differ significantly between Bergman and Bittenbender on one hand and Marcavage on the other.

According to Bittenbender, during this meeting **[**4]** Marcavage began to cry and then sob, shake, and otherwise behave erratically. **[*81]** Bittenbender testified that Marcavage then hopped up out of his chair, said "it's over," and ran into the bathroom, slamming and locking the door. Bittenbender became concerned about Marcavage's safety, and testified that he shouted to Marcavage to see if he was doing all right. Bittenbender testified that he banged and kicked on the bathroom door and then frantically asked for the keys to the bathroom, worrying that Marcavage might be trying to commit suicide. After about fifteen minutes, Marcavage came out of the bathroom and, according to Bittenbender, looked like he was going to collapse. Bergman provided similar testimony.

Marcavage's version of events differs greatly. He testified that, after the officials told him that the stage would not be provided, tears welled up in his eyes and he excused himself to go into a nearby restroom to pray. According to Marcavage, he locked the door and, "within moments," heard someone yelling for him to come out.

After these events, Dr. Denise Walton of the University's counseling center arrived. She found Marcavage to be very confused and in a great deal of crisis **[**5]** and distress. Dr. Walton testified that "the most humane thing was for [Marcavage] to have an evaluation" because she saw him sobbing, his body occasionally jerked, he looked confused, and "at times it didn't even look like he understood that [she] was there or he didn't even understand what [she] was saying." Bittenbender then ordered Marcavage to be evaluated for his own protection pursuant to Pennsylvania's MHPA. Marcavage was transported by campus police to the Temple University Hospital. Bittenbender then filled out the paperwork for the "302 Application" for Marcavage's involuntary examination. *See 50 P.S. § 7302*. After doctors at the hospital concluded that Marcavage was not in need of emergency involuntary treatment, Marcavage was released.

Marcavage then filed a civil rights action pursuant to *42 U.S.C. § 1983*, alleging violations of his *First* and *Fourteenth Amendment* rights. Marcavage alleged that, in retaliation for the exercise of his *First Amendment* rights, he was assaulted, physically restrained, placed in custody, and forced to undergo an involuntary mental examination pursuant to *§§ 301* and **[**6]** *302* of the MHPA. *See 50 P.S. §§ 7301*, *7302*. Marcavage also included several state law claims in his suit. After several pre-trial rulings, the case went to trial. After the dismissal of some of the state law claims via *Federal Rule of Civil Procedure 50*, the jury returned a verdict in favor of the defendants. Marcavage's appeal raises numerous issues, two of which we discuss here. [1]

[7]** II.

28 U.S.C. § 455(a) states that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." [2] In a **[*82]** Motion for Recusal filed on July 17, 2002, Marcavage argued that the District Judge's impartiality could be reasonably questioned for three reasons. First, Marcavage noted that the District Judge and the lead counsel for the defense are both members of the Barristers' Association, and that trial counsel for the defense, in his

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[1] The District Court exercised jurisdiction under *28 U.S.C. §§ 1331* and *1343(a)*. We have jurisdiction under *28 U.S.C. § 1291*. In addition to the issues we discuss here, Marcavage also argues that the District Court erred by: dismissing some of his state and federal claims at the summary judgment stage and through *Rule 50*, dismissing Temple University as a defendant, issuing improper jury instructions, excluding two doctors' records and testimony, and limiting the scope of cross-examination of an expert witness. We find no error in these District Court rulings.

[2] We use the terms "recusal" and "disqualification" interchangeably, consistent with the way the parties and the District Court used them. *See In re Sch. Asbestos Litig., 977 F.2d 764, 769 n.1 (3d Cir. 1992)*.

capacity as president of the Association, commented on the District Judge's selection by the Association for an award. Referring to the award selection, which took place during the pendency of the case, defense counsel stated that the District Judge was a "friend[] of the Barristers' Association" who "gives both her time and her ear to Barristers' members." Second, Marcavage pointed to the fact that the District Judge received two awards from two Temple University Beasley School of Law student organizations. Finally, he complained that the District Judge did not disclose the awards or appearances at these events.

[8]** The defendants objected to the plaintiff's recusal motion, and suggested that, aside from the stated recusal reasons, Marcavage's argument "suggests a more darker and sinister belief as the true basis for his recusal motion." The defendants asserted that, according to the plaintiff's argument:

> Her Honor would have to recuse herself every time a Barristers' Association member represented a party. Plaintiff's counsel surely does not suggest that every time a Catholic lawyer appears in front of a Catholic judge that the judge should recuse himself because they too are members of the same religion. This thinking is improper, ludicrous and, worse off, dangerous.

Referring to *Pennsylvania v. International Union of Operating Engineers 542, 388 F. Supp. 155 (E.D. Pa. 1974)*, [3] the defendants charged that "lawyers like Mr. Fahling [] would attempt to intimidate black judges and lawyers by arguing in effect that blacks should essentially not be allowed to practice law before black judges and black judges must disassociate themselves from their race." The defendants also discussed why the District Judge's affiliation with Temple University is not grounds for recusal.

[9]** The District Judge denied Marcavage's disqualification motion. Marcavage filed a mandamus petition, which was summarily denied by this Court. The disqualification review that we now conduct focuses on two different sets of facts. The first set relates to the District Judge's activities that led Marcavage to seek disqualification. The second set is contained in the District Judge's statements discussing her denial of Marcavage's recusal motion. "Where a motion for disqualification was made in the District Court, we review the denial of such a motion for abuse of discretion." *Selkridge v. United of Omaha Life Ins. Co., 45 V.I. 712, 360 F.3d 155, 166 (3d Cir. 2004)*. We may review both sets of facts "because the ultimate issue here is whether the public can have confidence in the integrity of the court's judgments." *Id. at 169*. Our review is objective, so that we focus on whether an "observer reasonably might question the judge's partiality." *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026, 1042 (3d Cir. 1997)*; *In re Kensington Int'l Ltd., 353 F.3d 211, 220 (3d Cir. 2003)*. The disqualification statute seeks to balance **[**10]** the need for federal judges to be free of actual and apparent **[*83]** bias or prejudice against the need to prevent counsel from essentially having a veto over whether a particular judge hears a case. *See In re Boston's Children First, 244 F.3d 164, 167 (1st Cir. 2001)*.

The District Judge did not abuse her discretion by not recusing herself because of her connections with the Barrister's Association, Temple University, or the lead defense counsel. "[W]hether to recuse from hearing a matter lies within the sound discretion of the trial judge." *United States v. Wilensky, 757 F.2d 594, 599-600 (3d Cir. 1985)*. Common membership in a legal organization between a judge and counsel is not, by itself, enough to create a situation in which a judge's impartiality might reasonably be questioned. Any other rule would potentially preclude a substantial number of judges from presiding over cases before a large portion of the bar. Similarly, in this case, the District Judge's minimal contacts with her law school alma mater contained in the record before us do not constitute grounds for disqualification. *See United States v. Nackman, 145 F.3d 1069, 1076 (9th Cir. 1998)* **[**11]** (collecting cases from several circuits as support for this non-controversial point). Finally, the District Judge did not abuse her discretion when she declined to recuse herself because of her relationship with the lead defense counsel. There are a variety of reasonable interpretations of defense counsel's statement that the District Judge is a "friend[] of the Barristers' Association" who "gives both her time and her ear to Barristers' members." The District Judge stated that "a reasonable person would undoubtedly draw the conclusion that the Barristers' Association had my attention for the purpose of advancing its mission." [4] This interpretation of the defense counsel's statement is reasonable, and it certainly does not rise to the level of an abuse of discretion. *See, e.g.*, *Henderson v. Dep't of Pub. Safety and Corr., 901 F.2d 1288, 1295-96 (5th Cir. 1990)* (affirming a denial of a *§ 455(a)* motion where the trial judge and

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[3] The famous and eloquent opinion in *Local Union* 542 was authored by then-District Judge Leon Higginbotham. In it, he rejects a recusal motion in a civil rights suit. The groundless motion raised his leadership in the civil rights movement as a basis for disqualification.

[4] According to its website, "the Barristers' Association's purpose, then and now, has been to address the professional needs and development of African American lawyers in the City of Philadelphia and surrounding counties through programs such as seminars, cultural events, and publications." *See http://www.phillybarristers.org/index.html*.

opposing counsel knew each other for a long time and the judge had been a friend of the opposing counsel's late father).

[12]** The District Judge was not required to recuse herself under § 455(a) because of these connections. We need not decide whether the District Judge's memorandum and order denying the plaintiff's motion to recuse created a situation where her "impartiality might reasonably be questioned." *See* 28 U.S.C. § 455(a). We conclude that any possible error was harmless, and therefore make no ultimate decision as to any potential appearance of impartiality. We write only to illustrate some of our concerns. The District Judge labeled the plaintiff's argument as "full of vehemence and innuendo." More specifically, the District Judge referred to the "true motivation underlying" the plaintiff's disqualification motion, and proceeded to discuss the "race-based tactic such as the one present in this recusal motion." Mentioning two other federal judges who are members of the Barristers' Association, the District Judge stated that "since these distinguished jurists are also members of the dark cabal known as the Barristers' Association, it is reasonable to believe, if guided by Plaintiff's logic, that these gentlemen are similarly guided by a personal desire for a fellow Barristers' **[**13]** Association member to succeed. In any case, they would **[*84]** also be subject to disqualification under Plaintiff's analysis."

Marcavage argues, in contrast, that his recusal motion was not racially motivated. In Marcavage's view, he expressed a legitimate concern that the District Judge had a sufficiently close relationship with the lead defense counsel that her impartiality could be reasonably questioned. Marcavage contends that the purpose of the Barristers' Association is almost inconsequential. Marcavage's point is that the lead defense counsel was president of an organization that presented the District Judge with an award during the pendency of the case and stated that she "gives both her time and her ear to [the organization's] members."

With this background in mind, we do not decide whether the District Court's September 30, 2002 Memorandum and Order denying the Plaintiff's Motion for Recusal created a situation where her impartiality could be reasonably questioned because harmless error applies. The Supreme Court has stated that "[t]here need not be a draconian remedy for every violation of § 455(a)." *Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).* **[**14]** There are three factors that we must consider in determining the remedy: "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id. at 864*. While these three factors were applied in the context of a Rule 60(b) motion in *Liljeberg*, this Court has used the *Liljeberg* analysis more broadly to determine whether prior rulings should be vacated. *See In re Sch. Asbestos Litig., 977 F.2d 764, 785 (3d Cir. 1992)*. We have agreed with the majority position that harmless error applies to violations of § 455(a). *See Selkridge, 360 F.3d at 171*; *In re School Asbestos Litig., 977 F.2d at 786*; *see also Faulkner v. Nat'l Geographic Enters. Inc., 409 F.3d 26, 42 n.10 (2d Cir. 2005)*; *Patterson v. Mobil Oil Corp., 335 F.3d 476, 485 (5th Cir. 2003)*; *Parker v. Connors Steel Co., 855 F.2d 1510, 1527 (11th Cir. 1988)*.

With respect to "the risk of injustice to the parties in the particular case," the able District Judge's trial **[**15]** rulings were all correct. After a careful review of the voluminous record, we have found no prejudice suffered by Marcavage as a result of these rulings. *See Martin v. Monumental Life Ins. Co., 240 F.3d 223, 237 (3d Cir. 2001)* (stating that "when the court has invested substantial judicial resources and there is indisputably no evidence of prejudice, a motion for recusal of a trial judge should be supported by substantial justification, not fanciful illusion").

The second factor of the *Liljeberg* test is "the risk that the denial of relief will produce injustice in other cases." We can envision no future injustice as a consequence of this ruling, because there were no mistakes in the District Judge's actual trial rulings. Opening up a jury verdict would be an unnecessary and grossly inefficient remedy.

The analysis of the third factor, "the risk of undermining the public's confidence in the judicial process," also weighs in favor of finding the District Judge's disqualification error harmless. As we have already stated, her trial decisions were all proper. Further, ordering a new trial with a new judge risks harming the public's confidence in the judicial process. **[**16]** *See United States v. Cerceda, 172 F.3d 806, 816 (11th Cir. 1999)* ("Without evidence that bias could have tainted the outcome of the hearings, there is a significant risk that the public would find it unjust to require the Government to expend time and money to conduct these proceedings a second time.").

[*85] We therefore conclude that, under the three *Liljeberg* factors, Marcavage suffered no harm by the District Judge's failure to disqualify herself.

The next issue is whether Dr. Ilene Rosenstein should have been allowed to testify as to the reasonableness of Bittenbender's actions with respect to the MHPA. We review a district court's decision to admit expert testimony under the abuse of discretion standard. *United States v. Davis, 397 F.3d 173, 178 (3d Cir. 2005)*; *GE v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)*. "To show an abuse of

discretion, appellants must show the district court's action was arbitrary, fanciful or clearly unreasonable. We will not disturb a trial court's exercise of discretion unless no reasonable person would adopt the district court's view." *Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 412 (3d Cir. 2002)* **[**17]** (citation and quotation marks omitted). This Court gives wide latitude to district courts in determining whether to admit expert testimony. *See Kannankeril v. Terminix Int'l., Inc., 128 F.3d 802, 806 (3d Cir. 1997)* ("The Rules of Evidence embody a strong and undeniable preference for admitting *any evidence* which has the potential for assisting the trier of fact." (emphasis added)). This Court has stated that "*Rule 702*, which governs the admissibility of expert testimony, has a liberal policy of admissibility." *Id*. Further, *Rule 704* states that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *See Forrest v. Beloit Corp., 424 F.3d 344, 353 (3d Cir. 2005)*.

Section 301 of the MHPA provides for the involuntary emergency examination and treatment of severely mentally disabled individuals in need of immediate treatment. *50 P.S. § 7301*. *Section 302* allows "authorized person[s]" to apply for such an examination. *50 P.S. § 7302*. "[T]he guiding inquiry **[**18]** must be whether, when viewing the surrounding facts and circumstances, a reasonable person in the position of the applicant a| could have concluded that an individual was severely mentally disabled and in need of immediate treatment." *In re J.M., 556 Pa. 63, 726 A.2d 1041, 1049 (Pa. 1999)*. The MHPA provides broad immunity "to physicians and others who participate in the involuntary commitment process." *Benn v. Universal Health Sys., Inc., 371 F.3d 165, 176 (3d Cir. 2004)*. Immunity from civil and criminal liability attaches unless the individual acts with "willful misconduct or gross negligence." *50 P.S. § 7114(a)*.

We address the propriety of Dr. Rosenstein's testimony. With respect to Dr. Rosenstein's qualifications, she is the Director of the University of Pennsylvania's Counseling and Psychological Services. She received a Ph.D. in Counseling Psychology from the University of Missouri-Columbia, an M.Ed. in Counseling Psychology from the American University, and a B.A. in Psychology and Sociology from Ithaca College. She has been actively involved in college counseling since the early 1980s. According to her testimony, **[**19]** she has vast experience with *§ 302* examinations. Dr. Rosenstein testified that, during the academic year, Counseling and Psychological Services saw several cases a month that implicated the MHPA. She also ran seminars on emergency response and crisis intervention. Dr. Rosenstein has guest lectured on voluntary and involuntary exams and treatment. Her research focuses in part on university students with mental disorders. Dr. Rosenstein was also previously a psychiatric intake worker in a hospital setting.

[*86] With respect to her specific testimony, on direct examination she discussed her qualifications, her experience with the MHPA, and then the circumstances surrounding Marcavage's involuntary examination. On direct examination, she affirmatively answered the question of whether she could give an opinion within a reasonable degree of psychological certainty that Carl Bittenbender had reasonable grounds to believe that Marcavage was in the type of mental state to qualify for a *Section 302* commitment. Dr. Rosenstein stated that she based her opinion on the testimony she heard and depositions she read. One representative exchange on direct examination illustrates this point:

> Q: **[**20]** Would it have been appropriate based upon what you have heard for Mr. Bittenbender and Mr. Bergman to let Mr. Marcavage leave that room in his state?
>
> A: Absolutely not. First of all, I don't know how he could leave the room. He could hardly walk according to their testimony. And on top of that, even if he could, this was somebody who was in their mind, that's the important piece, in their perception as irrational, not in control of self, showing poor judgment, and really had a kind of demeanor and wasn't able to discern reality.

This type of testimony is admissible to aid the jury in deciding the reasonableness of Bittenbender's actions. Dr. Rosenstein's testimony also assisted the trier of fact in determining whether Bittenbender's actions were grossly negligent or willful. She was able to discuss these issues as an expert under the MHPA, and could therefore give her considered opinion as to Bittenbender's perception of Marcavage's psychological status. [5]

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[5] There are statements made by Dr. Rosenstein on cross-examination that might be construed as vouching for Bittenbender and Bergman's testimony. However, these statements must be viewed against the backdrop of Dr. Rosenstein's entire testimony, where she repeatedly states that she was not present at the November 2, 1999 meeting and based her psychological opinion on depositions and testimony of other witnesses. Even if we were to conclude that the admission of Dr. Rosenstein's testimony was erroneous--which we do not--we would deem the error harmless because of the testimony of other witnesses who easily support the conclusion that Marcavage's involuntary examination was reasonable under the MHPA. *See Betterbox Communications Ltd. v. BB Techs., Inc., 300 F.3d 325, 329 (3d Cir. 2002)* ("In a civil case, an error is harmless if it is highly probable that it did not affect the complaining party's substantial rights. Under this standard, the admission of [the expert's] testimony, even if erroneous, was harmless." (citation omitted)).

[21]** III.

For these reasons, we will affirm the orders of the District Court.

Concur by: David D. Dowd

Concur

DOWD, District Judge, concurring:

Although I concur in Judge Smith's opinion, I write separately with respect to one issue.

Marcavage argues that it was reversible error for the District Court to allow defendants' expert, Dr. Ilene Rosenstein, to testify on the ultimate issue of reasonableness under the MHPA, first, declaring that Bittenbender's application contained no false information (a fact that was strenuously disputed by the plaintiff at trial) and, second, declaring that, on the facts presented by Bittenbender, he acted reasonably when seeking the involuntary emergency examination of Marcavage. [6]

[*87] In my **[**22]** view, it was error for the District Court to permit expert testimony with respect to the question of whether Bittenbender acted reasonably. This is not a matter that requires expert testimony. I have no problem with Dr. Rosenstein's testifying as to the simple *procedural* steps which must be taken under the MHPA; however, her testimony went beyond that. In particular, I am troubled by what I consider to be, essentially, Dr. Rosenstein's "vouching" for Bittenbender's version of the facts as expressed by him in the application for the involuntary examination of Marcavage, as opposed to Marcavage's version. [7] During cross-examination, while being questioned with respect to the facts set forth by Bittenbender on the application form, the following exchange occurred:

> Q. If I'm following, you have testified that the descriptive narrative that Mr. Bittenbender signed here under oath was sufficient to meet the requirements of the Mental Health Procedures Act, correct?
>
> A. Let me say two parts to that. One is that it doesn't matter if it was sufficient or not. This was his statement of what he perceived was going on. And in my mind -- so that is one piece. Because there are **[**23]** many people who fill out -- who -- quite frankly, oftentimes it's rejected even when it's filled out by the mental health worker. So there was enough in here that it was approved, even though it didn't need the approval in my mind.
> The second part, as a psychologist reading -- as someone who does this all the time, it was sufficient stuff here to be of concern.
> Q. When you say approved, you are referring to a mental health advocate?
> A. Yes, I am.
> Q. Now, the mental health advocate relies on the recommendations of the people making --
> A. Correct.
>
> Q. **So if he is not telling the truth and they say -- How significant is it that they approve an application that contains blatant false information?**
>
> A. **I don't believe these have false information.**
> Q. I'm not asking that. How significant with the mental health advocate is it if it contains blatant falsehoods, is that significant then?
> A. Is it significant? Yes, it's a problem.

(Trial Day 5 at 191-92, emphasis added). When further pressed, her testimony was as follows:

> Q. Doctor, is it fair to say based on answers such as that one that you really don't allow for much possibility **[**24]** that there is another version of what happened that day that could have occurred, do you?
> A. I believe what I said in this report, which is that, in fact, they did the exact thing I would want them to do. It was the right thing to do.
>
> Q. But that all depends on your conclusion, Doctor -- and you're not the finder of facts -- that Mr. Marcavage was in fact irrational, was in fact **[*88]** mute; that there were legitimate reasons to be concerned?
> A. His behavior as observed by Mr. Bittenbender clearly indicated to Mr. Bittenbender that this was a young man in crisis. This was beyond just slight agitation or annoyance. This was up to a point of serious mental illness. And because of that, he went ahead with the procedure.

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[6] Marcavage argues that this error was exacerbated when the District Court refused to allow him to cross-examine Dr. Rosenstein regarding the medical reports of Drs. Villaluz and King, who examined Marcavage at the hospital and whose reports Dr. Rosenstein had considered when forming her own expert opinion.

[7] Dr. Rosenstein listened to the testimony of several witnesses at trial, including that of Bittenbender, but not that of Marcavage. She was ill when Marcavage testified (*see* Trial Day 5 at 174); however, she did read his deposition testimony (*see*, Trial Day 5 at 195).

> Q. Doctor, can you assume that the actions of Defendant Bittenbender and Defendant Bergman in processing this application was not motivated by concern for his safety?
> A. Why, no.
> Q. You can't, can you?
>
> A. I can't understand -- from reading everything, I could not understand why -- It seemed to me these were people that really, really cared and wanted to do a good job, I think, at their university, and cared about safety. They are both policemen. **[**25]**
> Q. It was a simply yes or no. I'm just thinking to limit -- so really you can't consider any alternate, can you?
>
> A. I did consider the alternate. In the beginning when I went through all the stuff, I went with an open mind reading the stuff. **Mr. Tucker knows clearly I don't do this as a profession. I'm not an expert witness. I have another full-time job and a family. So going through this stuff, I didn't know which way I was going to go. My conclusion was absolutely that this was the right thing to do.**

(Trial Day 5 at 199-201, emphasis added).

In my view, the District Judge abused her discretion by allowing Dr. Rosenstein to testify as an expert *and* to wander into the province of the jury by testifying as to **[**26]** whose facts she believed.

That having been said, I would not conclude, in light of the record as a whole, that this was reversible error. There clearly was enough testimony from which the jury could have independently decided that Bittenbender's actions were reasonable and in compliance with the MHPA. In other words, although I believe it was error to allow Dr. Rosenstein to testify as to anything but the procedures relating to the MHPA, I also conclude that it was harmless error because the result would have been the same with or without her testimony.

I concur in the result.

United States v. Orr

United States Court of Appeals for the Seventh Circuit

May 21, 2020, Argued; August 10, 2020, Decided

No. 19-1938

Reporter
2020 U.S. App. LEXIS 25215 *

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EARL R. ORR, Defendant-Appellant.

Prior History: **[*1]** Appeal from the United States District Court for the Central District of Illinois. No. 2:16-cr-20052 — Sara Darrow, Chief Judge.

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Katherine Virginia Boyle, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Urbana, IL.

For EARL R. ORR, Defendant - Appellant: Robert J. Palmer, Attorney, MAY, OBERFELL & LORBER, Mishawaka, IN.

Judges: Before MANION, HAMILTON, and BRENNAN, Circuit Judges.

Opinion by: BRENNAN,

Opinion

BRENNAN, *Circuit Judge*. A search warrant for illegal drugs at the home of Earl Orr led to his arrest for possessing a firearm as a felon. After a two-day trial, a jury found him guilty. Orr appeals a number of decisions made by the district court before and during that trial.

We conclude that the district court properly denied Orr's motion to suppress evidence. But Judge Bruce, who presided over this case at trial, had engaged in improper ex parte communications with the U.S. Attorney's Office in other matters. That cast a pall over certain decisions in this case which required the exercise of substantial discretion. This was not harmless error, so we vacate Orr's conviction and remand for further proceedings before a different judge.

I.

In March 2016, a confidential **[*2]** source known as "Dave Bonz" told a member of the Champaign Police Department that he knew a crack cocaine dealer named Moe. Bonz had provided police with information on drug dealers in the past and had participated in three controlled buys. According to Bonz, Moe had sold him crack cocaine on several occasions. Each time, Bonz dialed a number ending in 1335 and Moe delivered the crack cocaine in a four-door maroon Mitsubishi registered in Illinois to Moe's girlfriend.

Over a few months, officers with the department conducted five controlled buys from Moe. Each time Bonz called Moe at the number ending in 1335 and bought crack cocaine from Moe or one of his associates using pre-recorded or marked money. Officers surveilled all five of the controlled buys, and three of the transactions were recorded with a covert video-recording device. During four of the controlled buys, officers watched a maroon Mitsubishi described by Bonz travel between the meet location and an apartment on Smith Road in Urbana, Illinois.

After reviewing the video footage, officers identified Moe as Earl Orr, who was on parole after being convicted of unlawful possession of a controlled substance with intent to deliver. **[*3]** Orr's identity was confirmed in three ways. First, officers showed Bonz a picture of Orr from a law enforcement database, with all identifiers concealed. Bonz identified Orr as Moe. Second, officers tied the maroon Mitsubishi to Orr. Officers discovered that the Mitsubishi was registered to Jakaeya Biggers, and, after being presented with a copy of Biggers' driver's license, Bonz identified Biggers as "Moe's girlfriend." Third, officers linked the apartment on Smith Road to Orr. Both a law enforcement database and a list of tenants provided by the owner of the apartment

revealed that Orr and Biggers lived together at the apartment on Smith Road.

The police filed for a search warrant of Orr's apartment and included an affidavit in which they described the information provided by Bonz, the corroboration performed by officers, and the controlled buys. A judge issued the search warrant and officers searched Orr's apartment. They found a .25 caliber semi-automatic pistol along with ammunition, approximately 22 grams of crack cocaine, approximately 15 grams of powdered cocaine, a digital scale, razor blades, and five boxes containing small Ziplock baggies. After officers arrested Orr and **[*4]** read him his *Miranda* rights, Orr voluntarily admitted that the gun and cocaine were his, and he reaffirmed ownership of those items during a second interview after the search. A grand jury later charged Orr with possessing a firearm as a felon in violation of *18 U.S.C. § 922(g)*, and his case proceeded to a jury trial. Because the gun was not found in Orr's actual possession, the prosecution's case centered on circumstantial evidence and Orr's confessions.

Before trial, Orr moved to suppress the evidence gathered from his apartment, asserting Bonz was an unreliable source. The district court denied Orr's motion. It found Bonz reliable and, in the alternative, that any defects in his credibility were remedied through the controlled buys and the good faith exception outlined in *United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)*.

Orr and the government then moved in limine concerning the admissibility of the drug evidence recovered during the search and the controlled buys. The government argued the drug evidence proved Orr's motive for possessing the gun. Orr disagreed, asserting the drug evidence was irrelevant to the gun charge and unduly prejudicial. The district court granted the government's motion in limine and denied Orr's motion in limine. Even **[*5]** so, the district court conditioned the admissibility of the drug evidence on whether Orr placed his motive for possessing the gun at issue during trial. After Orr took the stand and testified that he did not have any reason to possess a firearm in response to a question asked by the government, the prosecutor and the defense attorney argued at sidebar about whether Orr had placed his motive at issue. The district court agreed with the government and ruled that Orr had placed it "squarely [] at issue" by claiming he had no reason to possess a firearm, so the prosecutor was allowed to present evidence of Orr's drug involvement. As a result of this ruling, a witness for the prosecution testified that Orr had drug dealing paraphernalia and "several thousand dollars[']worth of drugs" stored in his apartment. Following the close of evidence, the district court instructed the jury to consider this testimony only in the context of whether Orr had a motive to possess the gun.

Also during trial the district court permitted the prosecutor to cross-examine Orr on his prior conviction for unlawful possession with intent to deliver a controlled substance, to which Orr's counsel did not object. On **[*6]** this topic the court gave the jury another limiting instruction, directing them to consider evidence of Orr's prior conviction only when evaluating the credibility of his testimony and whether he was a convicted felon at the time he was alleged to have possessed the gun.

The jury found Orr guilty. Before sentencing, the Judicial Council of the Seventh Circuit determined that the trial judge, Judge Bruce, had breached the Code of Conduct for U.S. Judges by engaging in improper ex parte communications in other cases with members of the U.S. Attorney's Office for the Central District of Illinois. *In re Complaints Against Dist. Judge Colin S. Bruce*, Nos. 07-18-90053, 07-18-90067 (7th Cir. Jud. Council May 14, 2019). Although the Judicial Council found no evidence that those communications affected the outcome of any case, the Council suspended Judge Bruce from all criminal matters involving the U.S. Attorney's Office for the Central District of Illinois for one year. *Id.* Accordingly, Orr's case was transferred to another judge for sentencing and Orr received 210 months of imprisonment.

II.

Orr raises a number of issues on appeal. He argues the district court erred by denying his pretrial **[*7]** motion to suppress the evidence gathered from his apartment. He also submits that the district judge should have recused himself because of his ex parte communications with the U.S. Attorney's office in other cases. He further challenges the admission of drug evidence under *Federal Rule of Evidence 404(b)* and the allowance of cross-examination questions about his prior felony conviction. We begin with the suppression ruling.

A. The Motion to Suppress

Orr contends the search warrant was not supported by probable cause because Bonz was neither credible nor reliable. Orr's argument fails, however, because the affidavit established probable cause and, in the alternative, the good faith exception in *Leon* applies.

Under the *Fourth Amendment*, warrants may not be issued "but upon probable cause." *U.S. CONST. amend. IV*. Probable cause exists when, considering the totality of the

circumstances, there is a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)*. To determine whether an issuing judge correctly determined that probable cause for a search existed, district courts must give "'great deference' to the issuing judge's determination so long as the judge had a 'substantial basis' for the finding." *United States v. Miller, 673 F.3d 688, 692-93 (7th Cir. 2012)* (citations omitted). **[*8]** This court reviews the district court's probable cause determination de novo but, like the district court, must also give "'great deference' to the conclusion of the judge who initially issued the warrant." *United States v. Searcy, 664 F.3d 1119, 1122 (7th Cir. 2011)* (quoting *United States v. Garcia, 528 F.3d 481, 485 (7th Cir. 2008))*.

When, as here, the information used to support a probable cause finding is primarily derived from an informant's tip, "the legitimacy of [the] probable cause determination turns on that '[informant]'s reliability, veracity and basis of knowledge.'" *United States v. Olson, 408 F.3d 366, 370 (7th Cir. 2005)* (quoting *United States v. Johnson, 289 F.3d 1034, 1038 (7th Cir. 2002))*. Courts assess an informant's credibility by considering: "(1) the degree of police corroboration; (2) the informant's firsthand knowledge; (3) the detail provided; (4) the time between the reported events and the warrant application; and (5) whether the informant appeared before the judge." *United States v. Haynes, 882 F.3d 662, 665 (7th Cir. 2018)* (citing *United States v. Johnson, 655 F.3d 594, 600 (7th Cir. 2011))*. We review how those factors were considered.

First, the extensive police corroboration detailed in the affidavit strongly supports the issuing judge's probable cause determination. Officers linked the maroon Mitsubishi and apartment on Smith Road to Orr and his girlfriend. Officers also determined that Orr had a prior conviction for dealing drugs. *See United States v. Bell, 585 F.3d 1045, 1053 (7th Cir. 2009)* (deciding that a defendant's prior conviction for a drug-related **[*9]** crime helped establish probable cause for a drug-related search). Most importantly, however, Orr sold crack cocaine to Bonz while under police surveillance. "Generally, a controlled buy, when executed properly, is a reliable indicator as to the presence of illegal drug activity." *United States v. Sidwell, 440 F.3d 865, 869 (7th Cir. 2006)* (footnote omitted). Here, officers conducted not one but five controlled buys in the month before the search warrant's execution. Over the course of these controlled buys, officers watched Orr as he sold substances to Bonz, confirmed those substances contained cocaine base, and observed the maroon Mitsubishi traveling between Orr's apartment and the pre-arranged deal locations. Even though Bonz did not report seeing crack cocaine in Orr's house, these facts are strong evidence that Orr stored crack cocaine in his apartment. *See Haynes, 882 F.3d at 666* (finding "a 'fair probability' that the [defendant's] house contained evidence of illegal activity" after the defendant left his house, sold crack cocaine to an informant, and then returned to his house).

Next, on the second and third factors, Bonz had firsthand knowledge of Orr's drug dealing, and he shared that knowledge in detail with police. Nevertheless, Orr argues the affidavit **[*10]** was deficient because Bonz never described Orr's identifying features, the quantity of drugs he believed was on Orr's person, or the quantity of drugs he believed was at Orr's residence. None of these arguments are persuasive. Although Bonz first described Moe only as a Black male, that description is not problematic because Bonz later identified Moe as Orr when presented with a picture of Orr from a law enforcement database. Nor does the affidavit's failure to mention the quantity of cocaine possessed by Orr on his person or in his residence pose a problem. Precedent does not require a confidential informant to provide officers with every detail of illicit conduct. *See United States v. Garcia, 528 F.3d 481, 485-86 (2008)* (concluding affidavit established probable cause despite failing to mention how much cocaine was seen by the informant). Here, Bonz gave officers Orr's telephone number and described how Orr delivered cocaine. On these facts, the second and third factors support a probable cause finding.

The fourth factor concerns timing. The last controlled buy occurred within days of the search. Our court has found similar timeframes support probable cause findings under the fourth factor. *See, e.g.*, *Searcy, 664 F.3d at 1122* ("This information was [] transmitted **[*11]** within a relatively short period of time—72 hours—before the application for the search warrant and certainly was not stale."); *Garcia, 528 F.3d at 487* ("The information here was fresh (3 days old)."). Therefore, the time between the last controlled buy and the search supports a probable cause finding. But the fifth factor weighs against probable cause. Bonz did not testify in front of the issuing judge, depriving the judge of the opportunity "to evaluate the informant's knowledge, demeanor, and sincerity." *United States v. Koerth, 312 F.3d 862, 866 (7th Cir. 2002)*.

Because four of the five factors support a probable cause determination, a reasonable fact finder could conclude that the warrant affidavit set forth facts to establish probable cause. And if the affidavit was deficient in some respect, namely Bonz's failure to testify, the controlled buys provide strong enough corroboration to support a probable cause finding. *See Haynes, 882 F.3d at 666* ("A properly executed controlled buy can establish probable cause, even when the tip that prompted it might not have been reliable."); *United States v. Brack, 188 F.3d 748, 756 (7th Cir. 1999)* ("[A] deficiency in

one factor may be compensated for by a strong showing in another or by some other indication of reliability.").

Even if the affidavit for the search warrant failed to establish probable **[*12]** cause, the good faith exception in *Leon* provided alternative grounds to reject Orr's suppression motion. Under the good faith exception, "[a] facially valid warrant issued by a neutral, detached magistrate will be upheld if the police relied on the warrant in good faith." *United States v. Peck, 317 F.3d 754, 757 (7th Cir. 2003)* (citing *Leon, 468 U.S. at 914, 922-23)*. The district court found that Officer Cully Schewska, who swore out the affidavit, relied on the search warrant in good faith, and we review that determination de novo. *See Sidwell, 440 F.3d at 869*.

Officer Schewska's decision to obtain a search warrant is prima facie evidence of good faith. *See Leon, 468 U.S. at 920 n. 21*. Orr may rebut this presumption by showing that the issuing judge "wholly abandoned his judicial rule" or that the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Olson, 408 F.3d at 372* (quotation marks omitted) (citing *Leon, 468 U.S. at 914, 923)*. Orr's sole argument here is that Officer Schewska's reliance on the warrant was unreasonable because he omitted mention of Bonz's history of criminal behavior and substance abuse in the affidavit. But even if such omissions were significant, the warrant affidavit contained extensive corroboration, referenced detailed information gathered firsthand by Bonz and Champaign **[*13]** police officers, and referred to a controlled buy that occurred only days before. Given these details, no reasonable officer would have believed the search of Orr's apartment was unconstitutional. Therefore, the district court correctly rejected Orr's argument under *Leon*.

B. The Judicial Recusal Statute

Orr next argues he is entitled to a new trial because the trial judge's ex parte communications with the prosecuting U.S. Attorney's Office violated *28 U.S.C. § 455(a)*, the judicial recusal statute. Under *§ 455(a)*, "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Although the government concedes Judge Bruce's conduct violated this statute, it argues that any error was harmless. "Not every violation of *§ 455(a)* warrants a drastic remedy, like a new trial." *United States v. Williams, 949 F.3d 1056, 1063 (7th Cir. 2020)*. Mere appearance of impropriety is not enough for reversal and remand—a party must show a risk of harm. *See id.* (citing *In re Bergeron, 636 F.3d 882, 883 (7th Cir. 2011))*. To determine whether Judge Bruce's violation is harmless, we consider the three factors announced in *Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)*: (1) "the risk of injustice to the parties in the particular case," (2) "the risk that the denial of relief will produce injustice **[*14]** in other cases," and (3) "the risk of undermining the public's confidence in the judicial process." *Id. at 864*; *see Williamson v. Indiana Univ., 345 F.3d 459, 464 (7th Cir. 2003)* (applying the *Liljeberg* factors to claim under *§ 455(a)*).

Before applying the *Liljeberg* factors, we provide more background. This is not the first case to come before our court arising out of Judge Bruce's ex parte communications. In *United States v. Atwood, 941 F.3d 883 (7th Cir. 2019)*, our court reviewed Judge Bruce's sentencing of a defendant after he pleaded guilty to federal drug crimes. *Id. at 884-85*. Atwood argued that because of Judge Bruce's ex parte communications in other cases, he was entitled to resentencing. *Id. at 885*. We vacated Atwood's sentence and remanded his case for re-sentencing by a different judge. *Id. at 886*. We ruled that all three *Liljeberg* factors counseled remand "[b]ecause of [Judge Bruce]'s broad discretion in sentencing." *Id. at 884-86*.

In *United States v. Williams, 949 F.3d 1056 (7th Cir. 2020)*, we decided whether Judge Bruce's ex parte communications in other cases entitled Williams, a criminal defendant, to a new trial. *Id. at 1063-66*. Judge Bruce presided over Williams's trial at which he was convicted, but the case was transferred to another judge for sentencing. *Id. at 1064*. Unlike the defendant in *Atwood*, Williams did not show that Judge Bruce made any decisions that involved broad discretion. All pre-trial and trial rulings **[*15]** in *Williams* were "minimal" and "none [were] challenge[d] on appeal." *949 F.3d at 1064*. And because Williams was sentenced by another judge, he was unable to argue that Judge Bruce exercised discretion in sentencing as in *Atwood*. *See Williams, 949 F.3d at 1064* ("Judge Bruce did not preside over Williams's sentencing hearing. This distinction matters because judges generally have more discretion over sentencing than the outcome of a jury trial."). Although we affirmed Williams's conviction after finding that all three of the *Liljeberg* factors suggested Judge Bruce's *§ 455(a)* violation was harmless error, we clarified that the first and third *Liljeberg* factors could have come out differently had Judge Bruce issued discretionary rulings. *Williams, 949 F.3d at 1064-65*.

Like the defendant in *Williams*, Orr appeals his conviction after a jury trial presided over by Judge Bruce. But unlike the defendant in *Williams*, Orr challenges three seemingly

discretionary decisions by Judge Bruce: the denial of the motion to suppress, the admission of drug evidence under *Federal Rule of Evidence 404(b)*, and the allowance of cross-examination questions about Orr's prior felony conviction.

A few months before trial, Judge Bruce issued the order denying Orr's motion to suppress the evidence recovered during the apartment **[*16]** search. While Orr contends Judge Bruce's suppression ruling was a close discretionary call, we disagree. As discussed above, four of the five factors our court uses to determine an informant's credibility and reliability strongly supported the district court's probable cause finding. The five controlled buys, all of which occurred under police surveillance, provided persuasive evidence that a search of Orr's apartment would reveal controlled substances. Even more, the good faith exception created in *Leon* furnishes a compelling and alternative rationale for denying Orr's motion to suppress. Given the manifest facts and applicable law, Orr's appeal of the district court's suppression ruling fails to present a colorable claim. Because no reasonable district court would have reached a different result, the suppression ruling here required little discretion and it does not affect our analysis of this case under *Liljeberg*.

But Orr's challenges to two of Judge Bruce's trial decisions are a different matter. The first was the district court's admission into evidence of drugs and drug paraphernalia gathered during the controlled buys and search of Orr's apartment. When deciding this question **[*17]** before trial, this was not a difficult choice in the event Orr placed his motive at issue. This court had already decided—in a similar case Judge Bruce relied on—that such evidence is admissible under *Federal Rule of Evidence 404(b)*. *See* *United States v. Schmitt, 770 F.3d 524, 534 (7th Cir. 2014)* ("[T]he evidence proffered by the government was relevant to motive. The testimony that [the defendant] was a drug dealer and that drugs were found in his home when he was arrested was relevant to suggest to the jury why he would have a firearm.").

But when Orr said he had no reason to own a firearm, Judge Bruce made a close discretionary call by deciding that Orr placed his motive at issue. While Orr was on the witness stand the prosecutor asked: "You didn't have any reason to possess a firearm?" Orr responded: "I haven't, I haven't touched a firearm in 25 years, sir." "[B]ased upon [Orr's] answers, ... tone[,] and manner," the district court determined Orr placed his motive at issue. Yet given this exchange, whether Orr or the prosecutor placed motive at issue is not a simple question. As Orr points out on appeal, he denied having a reason to possess a firearm *in response to* the prosecutor's questioning. Orr asserts the prosecutor placed motive at issue when he asked Orr if he **[*18]** had any reason for possessing a firearm. The parties dispute who opened the door to admitting the drug evidence, and this evidentiary ruling involved a substantial amount of discretion.

The second close discretionary call the district court faced was when the prosecutor asked Orr if he had been convicted of dealing drugs and if that conviction should affect his credibility. The district court permitted the prosecutor's line of questioning but cautioned him not to "get into a prejudicial area" by "overplay[ing] it." Although the parties on appeal characterize the government's inquiry as potentially falling under the "motive" exception of *Federal Rule of Evidence 404(b)*, the questioning likely occurred within the parameters of the impeachment exception contained in *Federal Rule of Evidence 609*. The district court issued a pre-trial order clarifying that Orr's prior conviction could not be introduced to prove motive, and the prosecutor mentioned Orr's prior conviction only in the context of impeaching him. Further, the jury was instructed to consider Orr's prior conviction only when deciding the credibility of his testimony and whether he was a felon at the time he possessed the gun. All of these facts indicate the district court permitted the **[*19]** prosecutor to impeach Orr under *Rule 609*.[1] But regardless of which rule the questioning occurred under, the district court exercised substantial discretion by weighing the probative value and prejudicial effect of the questioning and by allowing the questioning to proceed.

So two discretionary rulings distinguish this case from *Williams*. The pre-trial and trial rulings in *Williams* were routine, granted in favor of both parties, uncontested on appeal, and not overly prejudicial to the defendant. *See* *Williams, 949 F.3d at 1064*. The two discretionary rulings in this case were non-routine, decided in favor of the government, and challenged on appeal. Notably, both rulings in this case significantly aided the prosecution. In the first, the district court permitted the prosecutor to introduce evidence that Orr stored drug-dealing paraphernalia and "several thousand dollars['] worth of drugs" in his apartment. As a result of the second, Orr was not only impeached on his felony conviction but the jury was presented with evidence that he was convicted of dealing drugs. Because this case centered on circumstantial evidence and credibility determinations, both decisions prejudiced Orr. With these discretionary decisions in mind, **[*20]** we turn to the *Liljeberg* factors.

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[1] Because the district court only briefly addressed the prejudicial effect of the prosecutor's questioning, it is difficult to conclusively determine whether the district court applied the stricter balancing test contained in *Rule 609(a)(1)(B)* or more lenient balancing test in *Rule 403*.

The first *Liljeberg* factor requires us to consider "the risk of injustice to the parties." *Liljeberg, 486 U.S. at 864*. We start with the potential injustice Orr may suffer if we upheld his conviction. The record suggests that upholding Orr's conviction would create a tangible risk of unfairness to him. Because of the discretionary calls described above, it is possible the district court's personal biases influenced the outcome in this case. *See Atwood, 941 F.3d at 885*. For the first factor, though, we must also consider the risk of injustice to the government if a new trial is granted. Retrying this case would likely require the government to "spend valuable time and money ... thereby diverting resources from other cases." *Williams, 949 F.3d at 1065*. Even so, the risk of injustice to the government is directly related to the complexity of the trial. *See United States v. Cerceda, 172 F.3d 806, 815 (11th Cir. 1999)* (en banc) (per curiam) ("[T]he government would face great hardship if forced to conduct a new trial [] because of the complexity of the case (a 78 count, complex white-collar prosecution the trial of which lasted two-and-a-half months)."). We conclude that the risk of injustice to the government in this matter is relatively slight due to the straightforwardness and brevity **[*21]** of the prosecution's case. Orr faced one charge, and the trial lasted only two days. On these facts, the risk of injustice Orr faces if we do not vacate his conviction is greater than the risk of injustice the government faces if we upheld Orr's conviction. So the first *Liljeberg* factor favors Orr.

Under the second *Liljeberg* factor, we look to "the risk that the denial of relief will produce injustice in other cases." *Liljeberg, 486 U.S. at 864*. The parties in this case raise the same arguments as in *Williams. 949 F.3d at 1065*. The government contends no further action is necessary to induce other judges to exercise caution in their communications because Judge Bruce was thoroughly investigated, those results were adopted by the Judicial Council, he was publicly reprimanded, and he has implemented new practices to prevent similar issues in the future. Orr, on the other hand, argues these facts are not enough to ensure judges exercise more caution in the future and that further action must be taken. In *Williams*, we balanced these arguments and decided that the second *Liljeberg* factor counsels against awarding relief. *949 F.3d at 1065*. *But see Atwood, 941 F.3d at 885* (finding the second *Liljeberg* factor counsels in favor of resentencing). Because no reason is provided as to **[*22]** why the *Williams* decision was erroneous on this point, we conclude this factor favors upholding Orr's conviction.

The third *Liljeberg* factor requires us to consider "the risk of undermining the public's confidence in the judicial process." *Liljeberg, 486 U.S. at 864*. Like the defendant in *Williams*, Orr was found guilty by a jury of his peers. Although in *Williams* we decided that the jury finding the defendant guilty was "significant," we envisioned "a case where a judge has substantial discretion and his rulings have a significant impact on the outcome, thus undermining the public confidence in the judicial process." *949 F.3d at 1065*. Such a case is now before us. Judge Bruce exercised substantial discretion by admitting evidence of Orr's drug dealing and by permitting the prosecutor to cross-examine Orr on his felony conviction for dealing drugs. These evidentiary decisions were particularly consequential because they bolstered the prosecution's case, which rested on circumstantial evidence and credibility calls. Given these discretionary rulings, upholding Orr's conviction may damage the public's confidence in the impartiality of the judiciary. For these reasons, the final *Liljeberg* factor favors vacating Orr's conviction. **[*23]**

The first and third *Liljeberg* factors support vacating Orr's conviction, so we cannot conclude the error in Judge Bruce not disqualifying himself from the case was harmless. Accordingly, we vacate his conviction.[2]

III.

For these reasons, we AFFIRM the district court's suppression ruling, VACATE Orr's conviction and sentence, and REMAND for further proceedings before a district judge other than Judge Bruce.

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[2] Because we remand for a new trial, we need not address Orr's other two arguments that the district court erred by admitting the drug evidence under *Federal Rule of Evidence 404(b)* and by allowing the prosecution to cross-examine him on his prior felony conviction.