IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

United States Appellant **v.** Major **David J. RUDOMETKIN** United States Army Appellee	*Amicus Curiae* Brief Crim. App. Dkt. No. 20180058 **USCA Dkt. No. 22-0105/AR**

Brief of the National Institute of Military Justice in Support of Appellee

James A. Young
Secretary
National Institute of Military Justice
1300 Crystal Dr. # 1601
Arlington, VA 22202
(703) 216-3769
jayoung3@icloud.com
USCAAF Bar No. 19942

Rachel E. VanLandingham
President,
National Institute of Military Justice
Professor of Law
Southwestern Law School
3050 Wilshire Blvd
Los Angeles, CA 90010
(213) 738-6864
rvanlandingham@swlaw.edu
USCAAF Bar No. 32852

Counsel for *Amicus Curiae*

April 15, 2022

INDEX OF BRIEF

TABLE OF AUTHORITIES

Cases

Supreme Court of the United States

U.S. Court of Appeals for the Armed Forces

U.S. Federal Circuit Courts of Appeals

Other

Constitution and Statutes

Rules and Regulations

Other Materials

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

INTEREST OF AMICUS

The National Institute of Military Justice (NIMJ) is a private non-profit organization, founded in 1991, dedicated to the fair administration of justice in the armed forces and improved public understanding of military justice. NIMJ's leadership includes former judge advocates, private practitioners, and legal scholars. The issues presented in this case strike at the heart of a military justice system that is not only fair and impartial but appears to be so.

CERTIFIED ISSUES

I. WHETHER THE ARMY COURT ERRED BY NOT PROPERLY CONSIDERING THE MILITARY JUDGE'S POST-TRIAL 39(A) PROCEEDINGS RELATING TO APPELLANT'S REQUEST FOR MISTRAL.

II. WHETHER THE MILITARY JUDGE CLEARLY ABUSED HIS DISCRETION WHEN HE DID NOT GRANT A MISTRIAL AND FOUND THAT RELIEF WAS NOT WARRANTED UNDER *LILJEBERG V. HEALTH SERVICES ACQUISITION CORP.*, 486 U.S. 847 (1988).

RELEVANCE OF THE BRIEF

Amicus argues: (1) The Army Court of Criminal Appeals (CCA) erred by reviewing the judicial disqualification issue for plain error; (2) This Court reviews the issue for an abuse of discretion; (3) The military judge abused his discretion by

failing to recuse himself; (4) The *Liljeberg* standard for determining prejudice is not applicable in criminal cases; (5) Appellant failed to establish that the military judge's failure to disqualify himself was harmless; (6) The doctrine of *stare decisis* does not inhibit the ability of this Court to overrule precedents in this case; and (7) This Court should affirm the CCA's decision to set aside the findings and sentence.

STATEMENT OF THE CASE

Amicus accepts the CCA's statement of the case.

THE LAW

An accused has a constitutional due process right to an impartial judge, but "matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumley v. Ohio*, 273 U.S. 510, 523 (1927); *see Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828 (1986). As this case involves the appearance of personal bias, it does not implicate the Due Process Clause of the Fifth Amendment to the Constitution. U.S. Const. Amend. V.

Nevertheless, unless an accused waives the right after full disclosure, "[a] military judge shall disqualify himself or her-

self in any proceeding in which that military judge's impartiality might reasonably be questioned." Rule for Courts-Martial (R.C.M.) 902(a), (e). The Rule is based on 28 U.S.C. § 455, which is based on Canon III of the *ABA Code of Judicial Conduct*. *Manual for Courts-Martial, United States*, Analysis of the Rules for Courts-Martial app. 21 at A21-50 (2016 ed.).

"[T]he validity of the military justice system and the integrity of the court-martial process depend on the impartiality of military judges in fact and appearance. Therefore, actual bias is not required; an appearance of bias is sufficient to disqualify a military judge." *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (cleaned up). The "test for identifying an appearance of bias is 'whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality *might* reasonably be questioned.'" *Id.* (quoting *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015)) (emphasis added).

ARGUMENT

1. The CCA erred in reviewing the judicial disqualification issue for plain error.

In reviewing the case, the CCA employed the plain error standard because Appellee had not raised the issue until ap-

peal. *United States v. Rudometkin*, No. ARMY 20180477, 2021 CCA LEXIS 596, at *9. (A. Ct. Crim. App. Nov. 9, 2021) (mem. op.). *Amicus* agrees with Appellant that this was error.

The plain error standard is a punitive standard. It penalizes a party for failing to raise an issue at trial.

> If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited.…
>
> If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.
>
> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.

Puckett v. United States, 556 U.S. 129, 134 (2009) (quotation marks omitted) (citations omitted).

The plain error standard presupposes that the party knew or reasonably should have known the facts on which an objection could be based. *See United States v. Barrett,* 111 F.3d 947, 951 (D.C. Cir. 1997); *United States v. Brinkworth*, 68 F.3d 633 (2d Cir. 1995). Judge Henry was not broadcasting his relationship with a junior officer's wife, and the junior officer did not bring it to the attention of his superiors until after the completion of Appellee's court-martial. Judge Henry was not removed from the bench until April 2018, some two months after he had convicted Appellee of offenses similar to his own conduct unbecoming an officer and gentleman, in violation of Article 133, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 933. Appellee raised the issue at the first opportunity after he learned of the military judge's misconduct—at the post-trial hearing.

While counsel should be familiar with a judge's judicial record, he should not be required to investigate the military judge for possible personal misconduct. In fact, such an investigation would likely be characterized as harassment, rendering counsel subject to sanctions.

As Appellee raised the issue at the first opportunity after learning of Judge Henry's misconduct, it is inappropriate to penalize him by applying the plain error standard.

2. This Court reviews judicial disqualification issues for an abuse of discretion.

Appellant argues that the CCA should have reviewed the issue for a clear abuse of discretion—whether the military judge's action was "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." (Appellant's Brief at 19) Appellant contends that the CCA "circumvented" Judge Watkins' findings of fact and conclusions of law from the post-trial hearing, and Judge Watkins did not clearly abuse his discretion in denying the motion for mistrial because, after assuming error, he "properly applied the three *Liljeberg* factors and was not 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous' when he denied Appellee's motion." (Appellant's Brief at 16–17)

Like the federal circuit courts' interpretations of § 455(a), on which R.C.M. 902(a) is based, this Court long held that the appropriate standard for an appellate court to apply in reviewing R.C.M. 902(a) disqualification issues was an abuse of discretion that "is based on the reasonable person test: if a reasonable person would not question the judge's impartiality on the basis of the facts presented, then it is not an abuse of discretion for the judge to deny the motion for recusal." *United States v. Loving*, 41 M.J. 213, 253 (C.A.A.F. 1994)

(cleaned up) (citing 2 Childress and Davis, *Federal Standards of Review*, § 12.05 (2d ed. 1992)); *accord United States v. Martinez*, 70 M.J. 154, 158 (C.A.A.F. 2011); *United States v. Greatting*, 66 M.J. 226, 231 (C.A.A.F. 2008); *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A 1982).

In 2017, this Court began to muddle the appropriate standard of review (seemingly unintentionally). In *Sullivan*, within the space of two paragraphs, this Court cited both the reasonable person and the arbitrary, fanciful standards:

> Our review of a military judge's disqualification decision is for an abuse of discretion. *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008); *United States v. Quintanilla*, 56 M.J. 37, 77 (C.A.A.F. 2001). A military judge's ruling constitutes an abuse of discretion if it is "arbitrary, fanciful, clearly unreasonable or clearly erroneous," not if this Court merely would reach a different conclusion. *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013) (internal quotation marks and citation omitted).
>
> Appellant does not claim that the military judge in his case was actually biased, only that the military judge's presence raised an appearance of bias under Rule for Courts-Martial (R.C.M.) 902(a). We apply an objective standard for identifying an appearance of bias by asking whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned.

Id. at 453. The Court's conclusion, however, ignored the reasonable person test: "the military judge's disqualification decision was not 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *Id.* at 454.

In the most recent disqualification opinion, this Court again mentioned both standards, *Uribe*, 80 M.J. at 446, and again applied the more deferential arbitrary, fanciful abuse of discretion standard.

> In this case, applying this deferential standard of review, the military judge did not abuse his discretion in ruling on the disqualification motion. As described below, the military judge did not make any clearly erroneous findings of fact, did not misapprehend the law, and did not make unreasonable choices in applying the law to the facts.

Id. at 451. *Amicus* has failed to find any current federal circuit court of appeals decision granting such deference to the military judge's ruling on his own disqualification, under 28 U.S.C. § 455(a).

Although judicial opinions suggest "abuse of discretion" is a standard of review, it is more akin to a family of standards. The term is used to indicate that the judge has some discretion in the ruling and, therefore, the appellate court will afford the decision some deference. The level of deference it affords, however, depends upon the specific question at issue. 2 Steven Alan Childress and Martha S. Davis, *Federal Standards of Review* § 11.01 (4th ed. 2010); Harry T. Edwards and Linda A. Elliott, *Federal Courts Standards of Review: Appellate Court Review of District Court Decisions and Agency Actions* 67 (2007).

In both *Sullivan* and *Uribe*, the Court failed to recognize that the abuse of discretion standard is not one standard. Instead of citing to one of the previous decisions defining an abuse of discretion in judicial disqualification cases, this Court applied the arbitrary, fanciful standard from *Brown*, which concerned the military judge's control of the mode of witness interrogation. In addition to decisions regarding the control of the mode of witness interrogation, appellate courts apply the "arbitrary, fanciful, clearly unreasonable, or clearly erroneous" standard in reviewing a judge's rulings on the admission or suppression of evidence. *See, e.g.*, *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018). This broad grant of deference makes sense for evidentiary issues, for the judge must assess the credibility and demeanor of witnesses and, if he finds the evidence relevant, must determine whether its "probative value is substantially outweighed by a danger of … unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Military Rule of Evidence 403; s*ee also United States v. Hennis*, 79 M.J. 370, 383 (C.A.A.F. 2020) (on defense requests for expert assistance). These are questions better suited to the trial judge, so his decision is entitled to considerable deference.

A military judge has even greater discretion in denying a motion for a continuance. In such cases, a judge abuses his discretion "where [his] reasons or rulings … are clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice; it does not imply an improper motive, willful purpose, or intentional wrong." *United States v. Weisbeck* , 50 M.J. 461, 464 (C.A.A.F. 1999) (cleaned up).

This Court has specifically acknowledged differences in the application of the abuse of discretion standard for even subtle differences in an issue: "Although our standard of review is abuse of discretion for challenges based on actual bias as well as those based on implied bias [of court members], we give less deference to the military judge when implied bias is involved." *United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997); *accord United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998).

Before *Sullivan*, a military judge's decision on his own disqualification was given, as it should be, almost no deference by reviewing courts. That made sense, as the military judge's decision rested on his answer to one question: whether a reasonable person would conclude that the military judge's impartiality might reasonably be questioned.

> Once the trial judge has answered the question affirmatively, however, he must recuse himself; *that is not discretionary*. Conversely, if he answers the question negatively, he may not recuse himself. Thus, when the reviewing court refers to the trial court's discretion, it reviews the process of evaluation used by the trial judge to determine whether the facts place him within the statutory ambit.…

2 Childress and Davis, *supra*, § 12.05 (4th ed. 2010) (emphasis added).

Consequently, when deciding whether a military judge abused his discretion in refusing to disqualify, the reviewing court applied the very same reasonable person test as did the trial court. *Loving*, 41 M.J. at 253; *see United States v. Cordova*, 806 F.3d 1085, 1092 (D.C. Cir. 2015); *see also United States v. Wedd*, 93 F.3d 104, 114 (2d Cir. 2021); *United States v. Perkins*, 787 F.3d 1329, 1342 (11th Cir. 2015) (all reviewing for an abuse of discretion by applying the reasonable person test).

Compared to the reasonable person test, the "arbitrary, fanciful, clearly unreasonable, or clearly erroneous" definition grants the judge great deference on his disqualification ruling despite the fact that R.C.M. 902(a) correctly demands that this ruling be given very narrow deference. It makes no sense to grant the military judge's ruling great deference when the question at issue is whether a reasonable person knowing all the circumstances would conclude that the very

same military judge's impartiality might reasonably be questioned. The trial judge is not typically tasked in this situation with making findings of fact and rulings based on his assessment of the demeanor and credibility of witnesses, making greater deference appropriate. Instead, the trial court is in no greater position to rule on this issue than is the appellate court.

This Court should jettison the broad deference it provided military judges' disqualification rulings under *Sullivan* and *Uribe* and restore, as the sole test for abuse of discretion review in judicial disqualification cases, the appropriately narrow standard: whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned.

3. The military judge abused his discretion by failing to *sua sponte* disqualify himself.

In this case, Judge Watkins made findings of fact regarding the emotional relationship between Judge Henry and the junior officer's wife. Judge Watkins found it unnecessary to determine whether Judge Henry was required to recuse himself because he determined that Appellee was not entitled to relief under the three *Liljeberg* factors, even assuming he was disqualified.

Given that Judge Watkins saw and heard the witnesses, this Court should defer to his findings of fact. But his determination that, despite Judge Henry's misconduct, the public "would not lose confidence in the justice system" (Appellant's Brief at 9) deserves no deference for two reasons: (1) the *Liljeberg* factors he employed to reach his decision do not apply to criminal cases, as discussed below; and (2) an appellate court is in as good a position as the hearing judge to determine whether the facts demonstrate that the judge's impartiality might reasonably be questioned; indeed, appellate courts typically make such decisions.

In this case, Judge Henry not only presided over the trial but was responsible for determining Appellee's guilt and the appropriate sentence. He was required to assess the credibility of witnesses and decide whether the prosecution had established the elements of the offenses beyond reasonable doubt. After finding Appellee guilty, Judge Henry necessarily had to evaluate those offenses, the sentencing evidence, as well as the permutations and combinations of possible sentences, to determine an appropriate sentence.

A reasonable person, knowing all the facts and circumstances, might reasonably question the military judge's impartiality given the judge's similar misconduct. The CCA

correctly ruled that Judge Henry erred by failing to disqualify himself.

4. The *Liljeberg* standard for determining prejudice is inapplicable in criminal cases.

"[N]ot every judicial disqualification error requires reversal." *United States v. McIlwain*, 66 M.J. 312, 315 (C.A.A.F. 2008). An appellate court must review the judge's erroneous refusal to disqualify himself for harmlessness. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2018) ("A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."); *see also Uribe*, 80 M.J. at 449.

In *Liljeberg v. Health Servs. Acquisition Corp.*, the Supreme Court noted that the federal disqualification statute, 28 U.S.C. § 455, "neither prescribes nor prohibits any particular remedy for a violation of that duty." 486 U.S. 847, 862 (1988). The Court recognized that Federal Rule of Civil Procedure (Fed. R. Civ. P.) 60(b)(6), "grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just.'" *Id.* Action under that Rule "should only be applied in 'extraordinary circum-

stances.'" *Id.* at 863–64 (quoting *Ackermann v. United States*, 340 U.S. 193 (1950)).

In determining whether a refusal to disqualify error was an extraordinary circumstance worthy of vacatur, the Supreme Court listed three factors for an appellate court to consider:

> 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. We must continuously bear in mind that, to perform its high function in the best way justice must satisfy the appearance of justice.

Id. at 864. These *Liljeberg* factors are rather vague, and the Supreme Court has provided no guidance regarding their application. Since at least 2001, this Court has applied the Supreme Court's three-factor *Liljeberg* test in military judicial disqualification cases. *See United States v. Butcher*, 56 M.J. 87, 91 (C.A.A.F. 2001).

Recently, this Court's explanation of the first factor has transformed from a balancing of equities—the *risk of injustice* to the parties—to placing a burden on the accused to establish that he personally suffered an injustice from the judge's failure to disqualify. In *United States v. Martinez*, this Court found the first *Liljeberg* factor weighed against the appellant because "the record does not support nor has

Martinez identified any specific injustice that he personally suffered under the circumstances." 70 M.J. 154, 159 (C.A.A.F. 2011). In its most recent disqualification case, this Court substituted the *Martinez* finding on the first factor for the factor itself, claiming that the first *Liljeberg* factor "examines if there is 'any specific injustice that [the accused] personally suffered.'" *Uribe*, 80 M.J. at 449 (quoting *Martinez*, 70 M.J. at 159).

In *Uribe*, this Court likewise concluded there was no risk of prejudice because the military judge, who should have disqualified himself,

> did not exhibit personal bias on his part. And he did not rule uniformly in the Government's favor as he also sustained Appellant's objections. Appellant did not challenge most of Judge Rosenow's adverse rulings on appeal, and in regard to the one adverse ruling that Appellant did challenge, the CCA determined that this issue was "nonmeritorious."

80 M.J. at 449–50. Therefore, Staff Sergeant Uribe was not entitled to relief.

There are at least three glaring problems with this jurisprudence. First, the three *Liljeberg* factors were formulated for civil cases, which under Fed. R. Civ. P. 60(b)(6), required extraordinary circumstances to warrant vacatur. That Rule does not apply to criminal cases. Setting aside the findings and sentence of a court-martial do not require "ex-

traordinary circumstances." Instead, the issue is whether the error—the military judge's failure to disqualify himself—"materially prejudice[d] the substantial rights of the accused." Article 59(a), UCMJ.

Second, applying the *Liljeberg* factors unlawfully shifts the burden from the Government—to show the military judge's error in refusing to disqualify was harmless—to the accused—to establish that the military judge's failure to disqualify himself caused him an injustice. Generally, "if an appellant demonstrates that a ruling by the military judge was in error, the burden then shifts to the government to demonstrate that the error was harmless." *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (citing *United States v. Pollard*, 38 M.J. 41, 52 (C.M.A. 1993)); *see United States v. Olano*, 507 U.S. 725, 734 (1993).

Third, to require the accused to establish how he personally suffered a specific injustice, in addition to demonstrating that the military judge should have disqualified himself, severely undermines the purpose of R.C.M. 902(a), which is "to promote public confidence in the integrity of the judicial process." *Uribe*, 80 M.J. at 446 (citations omitted). Such a requirement also moots the question of whether the military judge was obligated to disqualify himself. If the appellant

must demonstrate that he suffered an additional injustice above and beyond that the military judge should have disqualified himself, the appellate court could simply analyze whether the military judge committed prejudicial errors in his rulings. If the accused suffered no prejudice from the military judge's other errors, the appellant cannot prevail. If, on the other hand, the accused suffered prejudice from one of the military judge's other rulings, then the appellant is entitled to relief, not because the military judge's impartiality might reasonably be questioned but because of the prejudice from the other erroneous ruling. This cannot be the test.

Typically, appellate courts examine the judicial error and the record of trial to determine whether the *Government* established the error was harmless—that the accused received a fair, although perhaps not a perfect, trial. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). But the harmless error doctrine demands more in judicial disqualification cases: the Government must establish not only that Appellant received a fair trial despite the error but that he also received a trial that is perceived as fair by the reasonable person. To hold otherwise would eviscerate R.C.M. 902(a).

As the three-part *Liljeberg* test for civil cases is inapropriate for criminal cases, any failure of the CCA to consider

Judge Watkins' findings on those factors is irrelevant. Given that the *Liljeberg* test is irrelevant, one consideration alone should guide this Court's assessment of the harmlessness of the error—whether "the error materially prejudice[d] the substantial rights of the accused." This consideration is straightforward: Did the Government establish that the military judge's rulings posed no *risk* of injustice to the accused? This determination requires an examination of the military judge's discretionary rulings and the demeanor and credibility determinations necessary to make those rulings—not to determine whether the military judge erred, but to assess the amount of discretion the judge exercised during the court-martial. The greater the discretion and the more important the credibility determinations, the less likely the Government will be able to establish harmlessness. *See McIlwain*, 66 M.J. at 313 ("Every time she ruled on evidence, asked questions, responded to member questions, or determined instructions, the military judge exercised her discretion, a discretion that she admitted an impartial person would conclude had not been exercised in an impartial manner.").

5. Appellant failed to establish that the military judge's failure to disqualify himself was harmless.

Without access to the record of trial, *Amicus* would normally be hesitant to take a position on whether Appellee should be granted a new trial. Without the record, it is difficult to determine whether the military judge's rulings posed a risk of injustice to the accused. In this case, however, *Amicus* has no hesitation. As Judge Henry was the trier of fact, he was called upon to assess the credibility of witnesses and the strength of evidence against Appellee, and to determine whether the Government had met its burden of establishing Appellee's guilt beyond a reasonable doubt. Furthermore, he was required to consider all the possible permutations and combinations in determining an appropriate sentence. The Government failed to establish there was no risk of injustice.

6. The doctrine of *stare decisis* does not inhibit the ability of this Court to overrule precedents in this case.

Under the doctrine of *stare decisis*, "special justification" must be shown for the Court to overrule its prior precedents. *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018). The Court determines whether "special justification" was established by analyzing four factors: "whether the prior decision is unworkable or poorly reasoned; any intervening

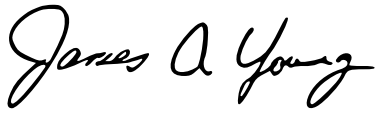
events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Id.* (quoting *United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015)); *accord United States v. Dinger*, 77 M.J. 447, 452 (C.A.A.F. 2018). "We have overruled prior decisions where the necessity and propriety of doing so has been established." *Dinger*, 77 M.J. at 452 (quoting *Hurst v. Florida*, 577 U.S. 92, 102 (2016) (cleaned up)). This is such a case.

The recent decisions at issue here—the appropriate abuse of discretion standard for assessing judicial disqualifications and the analysis of prejudice under *Liljeberg*—were not poorly reasoned; they were not reasoned at all. No explanation was provided for adopting a different abuse of discretion standard, and the Court failed to recognize that *Liljeberg* was a civil, not criminal, case, thus requiring a different prejudice analysis. *Amicus* knows of no intervening events and suspects servicemembers would expect the Court to apply both the reasonable person standard and the risk of injustice test proposed above. Finally, the proposed changes bear no risk of undermining public confidence in the law. It is unlikely that the public would consider it appropriate to grant great deference to a judge's decision whether or not to disqualify himself, and would find it unimaginable that the

accused would have to establish that the error was harmful, rather than requiring the government to shoulder the burden of establishing the error's harmlessness. Under these circumstances, the doctrine of *stare decisis* does not inhibit this Court from adopting the changes proposed in this brief.

7. This Court should affirm the CCA's decision to set aside the findings and sentence.

The military judge erred by failing to disqualify himself, and Government/Appellant failed to establish that the error was harmless. This Court should affirm the CCA's decision to set aside all the guilty findings and the sentence and permit a new trial.



James A. Young
Secretary
National Institute of Military Justice
1300 Crystal Dr. # 1601
Arlington, VA 22202
(703) 216-3769
jayoung3@icloud.com
USCAAF Bar No. 19942

Rachel E. VanLandingham
President,
National Institute of Military Justice
Professor of Law
Southwestern Law School
3050 Wilshire Blvd
Los Angeles, CA 90010
(213) 738-6864
rvanlandingham@swlaw.edu
USCAAF Bar No. 32852

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

(1) No party's counsel authored this brief in whole or in part;

(2) No party or party's counsel contributed money that was intended to fund preparing or submitting this brief;

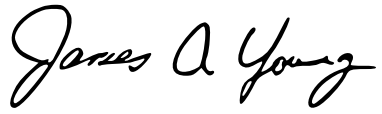
(3) Although Mr. Cave, counsel for Appellee, is a member and a director of NIMJ, he specifically recused himself from, and did not participate in, any discussions with or decisions made by NIMJ with regard to this case.

James A. Young
Secretary
National Institute of
Military Justice
1300 Crystal Dr. # 1601
Arlington, VA 22202
(703) 216-3769
jayoung3@icloud.com
USCAAF Bar No. 19942

CERTIFICATE OF COMPLIANCE

(1) I certify that this *amicus* brief complies with the maximum length authorized by **C.A.A.F. R. 26(d)** as it contains 4,742 words, including the Statement of Authorship and Financial Contributions but not including front matter, the certificate of compliance, and the certificate of filing and service.

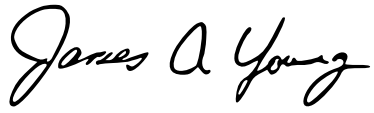
(2) This brief complies with the typeface and typestyle requirements of **C.A.A.F. R. 37(a)** because it was prepared using a proportional, 14-point font, Century Schoolbook, with margins of at least one inch.



James A. Young
Secretary
National Institute of
Military Justice
1300 Crystal Dr. # 1601
Arlington, VA 22202
(703) 216-3769
jayoung3@icloud.com
USCAAF Bar No. 19942

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means on April 15, 2022, to the Clerk of the Court; Government Counsel (dustin.l.morgan15.mil@army.mil) (Appellant), and Counsel for Appellee, Mr. Philip D. Cave (mljucmj@court-martial.com).



James A. Young
Secretary
National Institute of
Military Justice
1300 Crystal Dr. # 1601
Arlington, VA 22202
(703) 216-3769
jayoung3@icloud.com
USCAAF Bar No. 19942