IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
v.	)	
Major (O-4) **DAVID J. RUDOMETKIN,** United States Army, Appellee	)	ARMY 20180058 USCA Dkt. No. 22-0105/AR

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

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 CORP., 486 U.S. 847 (1988).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2019) [UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(2), UCMJ.

Statement of the Case

On February 2, 2018, A military judge sitting as a general court-martial convicted Appellee, contrary to his pleas, of three specifications of rape occurring prior to October 1, 2007, two specifications of aggravated sexual assault occurring between October 1, 2007, and June 27, 2012, one specification of assault consummated by battery, and three specifications of conduct unbecoming an officer and a gentleman, in violation of Articles 120, 128, and 133,[1] Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920, 928, and 933 (1996, 2006); (JA 110).[2] The military judge, Judge Richard Henry, sentenced appellant to confinement for twenty-five years and a dismissal. (JA 111).

Before the convening authority took action, this Court decided *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), *overruled by United States v. Briggs*, 592 U.S. __, 141 S. Ct. 467 (2020). On March 12, 2018, at Appellee's request, Judge Henry held a post-trial Article 39(a), UCMJ, session in which—pursuant to the then-controlling *Mangahas* decision—Judge Henry dismissed Specifications 1 and 2 of Charge I (rape), occurring in 1999 and 2000, respectively.[3] (JA 133).

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[1] Specifically, Appellee was charged with conduct unbecoming an officer and gentleman for acts of adultery. (JA 075).

[2] The military judge also found appellant not guilty of one specification of aggravated sexual assault and one specification of assault. (JA 110).

[3] In making this determination, Judge Henry rejected the Government's argument concerning the applicable date of the NDAA for fiscal year 2006—thereby granting Appellee's motion to dismiss and reassess the sentence. (JA 120–33).

Judge Henry denied Appellee's request for a mistrial as to sentencing, conducted a proceeding in revision regarding the sentence pursuant to Rule for Courts-Martial (R.C.M.) 1102, and reassessed the sentence; sentencing Appellee to confinement for seventeen years and a dismissal. (JA 137, 150). The convening authority approved the new sentence. (JA 061).

On June 22, 2018, Judge Jeffrey Nance held a second post-trial 39(a) session.[4] (JA 151). At this proceeding, Appellee gave notice that he planned to file a motion for mistrial on the basis of Judge Henry's alleged "bias and impropriety," necessitating his recusal from his case. (JA 154). Appellee filed a motion for mistrial on July 20, 2018. (JA 296). The government opposed the motion and responded on August 29, 2018. (JA 311).

On September 6, 2018, Judge Douglas Watkins held a third post-trial Article 39(a) session.[5] (JA 157). On September 28, 2018, Judge Watkins denied Appellee's motion for mistrial—assuming without deciding that Judge Henry should have recused himself, but finding that a mistrial was not required under *Liljeberg v. Health Srvs. Acquisition Corp.*, 486 U.S. 847 (1988)—and he issued a

[4] The primary purpose of the second post trial 39(a) session was to re-examine Appellee motion for mistrial based on *Mangahas*. (JA 156).
[5] Judge Nance retired in the time between the second and third post trial 39(a) session. (JA 163).

detailed and thorough nine-page ruling with the findings of fact and conclusions of law supporting his decision. (JA 317–18).

On February 4, 2020, the ACCA set aside the original action in this case, finding the staff judge advocate erroneously advised the convening authority regarding his ability to grant relief under Article 60, UCMJ. *United States v. Rudometkin*, ARMY 20180058 (Army Ct. Crim. App. Feb. 4, 2020) (order). On November 9, 2021, the ACCA set aside the findings and sentence and held:

> [A] reasonable member of the public would lose confidence in the judicial process where the presiding military judge fails to disclose that he is so intimately involved with the opposite-gendered spouse of a prosecutor in his jurisdiction that there is a belief he is engaging in an extra-marital affair while serving as a judge in a bench trial that involves similar charges of conduct unbecoming for engaging in openly adulterous relationships for which the military judge himself could have been charged.[6]

United States v. Rudometkin, ARMY 20180477, 2021 CCA LEXIS 596, at *18–19 (Army Ct. Crim. App. Nov. 9, 2021) (mem. op.).

On November 30, 2021, Appellant requested *en banc* reconsideration. (JA 052). On December 9, 2021, the ACCA denied Appellant's request for

[6] The "similar charges" language used by the ACCA is solely limited to Appellee's convictions for one charge and three specifications of conduct unbecoming an officer and gentlemen under Article 133, UCMJ. *Rudometkin*, 2021 CCA LEXIS 596, at *18–19.

reconsideration. (JA 052) In accordance with Article 67(a)(2), UCMJ, The Judge Advocate General of the Army certified these issues to this Court.

Statement of Facts

A. Appellee had sexual relationships with three women while married to JH, which formed the basis for his convictions of conduct unbecoming an officer and gentleman.

At the conclusion of the March 12, 2018 post-trial 39(a), UCMJ session, Appellee remained convicted of one specification of rape, two specifications of aggravated sexual assault, one specification of assault consummated by a battery, and three specifications of conduct unbecoming an officer and a gentleman, in violation of Articles 120, 128, and 133, UCMJ. (JA 137, 150). The specification of rape involved LM, Appellee's first wife. (JA 079–80). Appellee was convicted of raping LM at their shared home in Delaware in 2007. (JA 081, 082–85). The specifications of aggravated sexual contact involved JH, Appellee's second wife. (JA 090, 091–92, 093). Appellee was convicted of sexually assaulting JH at a hotel in the spring of 2011 and during a camping trip in the fall of that same year. (JA 090, 091–92, 093).

Appellee's convictions for conduct unbecoming an officer and gentleman, in violation of Article 133, UCMJ, were for acts of adultery. (JA 075, 110). Appellee and JH were married from 2009 to 2016. (JA 090). LL had a sexual relationship with Appellee from December 2013 to April 2014. (JA 094–95).

Appellee falsely told LL that he was currently divorced. (JA 095–96). CL had a sexual relationship with Appellee from July 2014 to December 2014. (JA 102–03). On one instance, while having sex, Appellee "punched [CL] in the face, twice" with a closed fist. (JA 054).

In early 2015, Appellee resumed a sexual relationship with his first wife, LM, for "a week or so." (JA 086, 089). During this extramarital affair, Appellee became focused on having LM absorb his urine—which he referred to as his "essence"—both orally and anally. (JA 088–89). Appellee testified at his trial, and during his testimony Appellee acknowledged engaging in sexual relationships with LM, CL, and LL while married to JH. (JA 105–09).

B. Prior to and after Appellee's trial, Judge Henry had an improper relationship with the wife of a military justice attorney stationed at a different Army installation.[7]

Captain (CPT) AC became a prosecutor at Fort Benning in the summer of 2016 and began practicing in front of Judge Henry, the military judge there.[8] (JA 323). At a Halloween party in 2016 for members of the JAG Corps community, CPT AC's wife, Mrs. KC, spent most of the evening talking with Judge Henry and

[7] These facts constitute a brief summary of the relationship between Judge Henry and Mrs. KC. Judge Watkins made extensive findings of fact concerning their relationship in his ruling denying Appellee's motion for a mistrial. (JA 324–27).
[8] Captain AC served as a prosecutor at Fort Benning for approximately twenty months. (JA 166). He became a defense counsel at Fort Benning Trial Defense Service around January 2018. (JA 166).

his wife, Mrs. SH. (JA 168; 323). Mrs. KC knew the Henrys because she and Mrs. SH worked as special education teachers at the same school district. (JA 167). Mrs. KC invited the Henrys over for dinner in the fall of 2017, but after consulting with his supervisors, CPT AC did not attend. (JA 169; 323).

On January 30, 2018, Appellee's trial took place at Redstone Arsenal.[9] (JA 324). Captain AC played no role in Appellee's court-martial—the case was referred to trial and tried in a jurisdiction in which CPT AC was not assigned. (JA 324). Appellee requested trial before a military judge alone. (JA 077–78). On February 2, 2018, Judge Henry entered findings and adjudged a sentence of twenty-five years' confinement and a dismissal. (JA 110–11).

In February and March of 2018, the relationship between Mrs. KC and Judge Henry "ramped up." (JA 179). Around that timeframe, Mrs. KC experienced panic attacks. (JA 214). To help with these panic attacks, Judge Henry ate "with her in public as an experiment." (JA 324). Judge Henry also allowed Mrs. KC to use the Fort Benning courthouse to study for her master's degree because the library had limited hours. (JA 176, 324).

On March 12, 2018, during a post-trial Article 39(a) session, Judge Henry dismissed two specifications of rape pursuant to *Mangahas*, conducted a

[9] Appellee's charges were preferred and referred at Redstone Arsenal as well. (JA 053).

proceeding in revision, and revised the confinement portion of appellant's sentence from twenty-five years to seventeen years.[10] (JA 133, 137–38, 150).

On April 4, 2018, CPT AC confronted Mrs. KC about her relationship with Judge Henry.[11] (JA 178, 194). After "consulting with friends, mentors, and his state bar's ethics hotline," CPT AC made a formal complaint about Judge Henry's improper relationship with Mrs. KC on April 6, 2018. (JA 326). An investigation pursuant to Army Regulation 15-6 found the existence of an improper relationship between Judge Henry and Mrs. KC.[12] (JA 326).

C. Appellee filed a post-trial motion for a mistrial after learning of Judge Henry's improper relationship.

On September 6, 2018, Judge Douglas Watkins conducted an Article 39(a) session to explore whether Judge Henry's participation in the court-martial necessitated granting Appellee's request for a mistrial. (JA 157). Judge Watkins provided both parties the chance to voir dire him; Appellee asked him six questions concerning Judge Henry and the investigation into his misconduct. (JA 158–61). Appellee did not challenge Judge Watkins. (JA 162).

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[10] In its argument, the Government asked that Appellee be sentenced to twenty years' confinement. (JA 142).

[11] Captain AC confronted Mrs. KC because he had both personal and professional concerns about their relationship. (JA 326). Specifically, CPT AC was concerned about his duties as a defense counsel at Fort Benning and appearing before Judge Henry. (JA 326).

[12] Both the AR 15-6 investigation and Judge Watkins failed to find that Judge Henry committed adultery. (JA 327).

This post-trial 39(a), UCMJ session was exhaustive—it took place over the course of 4 hours and 45 minutes, its contents span 138 pages of the record, and both parties extensively briefed the mistrial issue. (JA 157–295). Importantly, during the course of this hearing, Appellee called CPT AC and presented argument on his motion for mistrial. (JA 165–295). On September 28, 2018, Judge Watkins issued his ruling—Judge Watkins performed the analysis under the test announced by the Supreme Court in *Liljeberg v. Health Srvs. Acquisition Corp.*, 486 U.S. 847 (1988),[13] and found there was "little risk" of injustice to the parties in this case, the denial of relief would not cause injustice in other cases, and the denial of relief would not undermine public confidence in the judicial process. (JA 329–30). Specifically, concerning the third prong of *Liljeberg*, Judge Watkins found:

> [M]embers of the public understand that judges are not without fault, and given the lack [of] a nexus between the [C's], and the accused, a reasonable member of the public, knowing all the facts and the circumstances, to include not only this unique relationship, but the sentence, sentence reduction, and the crux of the case as well, would not lose confidence in the justice system.

(JA 330).

[13] Judge Watkins found that "[i]t is not for this court to decide whether [Judge] Henry is fit for serve as a military judge. Nor is it necessary to decide whether [Judge] Henry should have recused himself in this case." (JA 328–29).

Summary of Argument

The ACCA erred in applying a plain error standard of review to the question of whether Judge Henry was required to recuse himself, and in so doing, it improperly bypassed Judge Watkins's ruling on Appellee's post-trial motion for mistrial. This Court's precedent required the ACCA to grant the appropriate deference to Judge Watkins's ruling and determine whether he clearly abused his discretion when he determined a mistrial was not warranted. The ACCA's failure to consider the post-trial proceedings also ignores this Court's precedent and guidance concerning the third *Liljeberg* factor. Specifically, by not considering the post-trial remedial measures the Army took in Appellee's trial, the ACCA did not conduct a proper analysis of whether reversal was warranted to restore the public's confidence in the military justice system.

Applying the correct standard of review, Judge Watkins did not clearly abuse his discretion when he denied Appellee's post-trial motion for mistrial. Captain AC was not involved in Appellee's court-martial in any capacity, nor was he even assigned at the location where the trial took place—the entirety of the proceedings took place at a different jurisdiction that was more than 200 miles from Fort Benning and in a different state. Therefore, there was no risk of injustice in Appellee's case that could only be solved by the drastic remedy of a mistrial. Judge Watkins properly applied the three *Liljeberg* factors and was not "arbitrary,

fanciful, clearly unreasonable, or clearly erroneous" when he denied Appellee's motion.

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.

Standard of Review

This Court reviews application of the plain error doctrine *de novo*, as a question of law. *United States v. Koh,* 54 M.J. 63, 65 (C.A.A.F. 2000).

Law and Argument

A. As a threshold matter, the United States does not concede that Judge Henry was required to recuse himself.

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) (emphasis added). "There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle . . . ." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). "A judge should be disqualified only if it appears that he or she harbors an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside when judging the dispute." *Liteky v. United States*, 510 U.S. 540, 557 (1995) (Kennedy, J., concurring).

While Appellant does not concede that Judge Henry should have recused himself, this Court need not reach this conclusion, or even undergo this analysis to decide this case in Appellant's favor. As Judge Watkins noted, this Court's decision in *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001), allowed him to assume Judge Henry should have recused himself and undertake the required *Liljeberg* analysis to determine if a remedy was required.[14] *Butcher,* 56 M.J. at 92; (JA 328–29).

B. The ACCA erred by failing to consider Judge Watkins's ruling during his post-trial Article 39(a) session.

When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling, "[this Court] typically [has] pierced through that intermediate level" and examined the military judge's ruling. *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006) (quoting *United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996). This Court then determines whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling.[15] *Id.*

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[14] '"The United States neither expects nor asks this Court to put its stamp of approval' on the military judge's actions, and we shall not do so." *Butcher*, 56 M.J. at 92.

[15] In *Siroky*, this Court examined how the Supreme Court reviews an intermediate appellate court's review of a trial court's decision. *Siroky,* 44 M.J. at 399. This Court found that the Supreme Court most often "[goes through] the Court of Appeals decision in order to re-review the trial court . . . and determine from that whether the Court of Appeals review was right or wrong." *Id.* (citing Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.Dak.L.Rev. 468, 482–83 (1988).

Here, the ACCA's decision and analysis failed to account for Judge Watkins's September 28, 2018 findings of fact and conclusions of law on Appellee's motion for a mistrial. (JA 323). The ACCA briefly acknowledged in a footnote that it considered viewing Appellee's challenge through the lens of abuse of discretion. *Rudometkin,* 2021 CCA LEXIS 596, at *9 n.6. In this footnote, the ACCA even referenced this Court's decision in *Butcher*, 56 M.J. 87 (C.A.A.F 2001), but it mistakenly applied *Butcher's* mandate when it said that because recusal was raised for the first time post-trial, it would view the challenge as if it were raised for the first time on appeal. *Rudometkin,* 2021 CCA LEXIS 596, at *9 n.6; *compare Butcher*, 56 M.J. at 89–90 (applying an abuse of discretion standard where the disqualification issue was raised after the close of evidence).

Here, as in *Butcher*, Appellee learned of Judge Henry's improper behavior after the close of evidence. *Butcher,* 56 M.J. at 89.[16] Also, in both cases the military judge conducted post-trial Article 39(a), UCMJ hearings where evidence and arguments were given on the mistrial issue, and both decisions were made months after the trial adjourned. *Id.* Here, like *Butcher*, Appellee made a motion for mistrial as soon as he learned of Judge Henry's improper behavior, which was

[16] In *Butcher*, the defense counsel learned of the military judge's improper behavior before the panel returned its findings. *Butcher,* 56 M.J. at 89. Also, similarly, the military judge held a post-trial 39(a) session and ruled on the need for recusal four months after the Appellant's court-martial adjourned. *Id.*

before the convening authority took action in the case and before the case had been sent to a service court for appellate review. *Id.* The ACCA—in making a conclusory statement that it considered applying an abuse of discretion standard—gave zero deference to Judge Watkins's ruling, ignored the exhaustive post-trial 39(a) session that encompassed over 100 pages of the record, and merely concluded that reversal was warranted. The ACCA did all of this while not providing a reason for ignoring the post-trial Article 39(a) session in this case.

As a result, the ACCA circumvented Judge Watkins's findings of fact and conclusions of law and instead only focused on Judge Henry's decision to not recuse himself *sua sponte*. In doing so, the ACCA did not consider the entire record or accord the proper deference owed to Judge Watkins's post-trial proceedings and subsequent findings of fact and conclusions of law. *See Uribe*, 80 M.J. at 446; *Butcher,* 56 M.J. at 90. This Court can take no comfort in the conclusory statement that the ACCA would have reached the same conclusion had they considered the case under an abuse of discretion standard. *Rudometkin,* 2021 CCA LEXIS 596, at *9 n.6. Instead, this Court should "pierce" the ACCA's decision and examine Judge Watkins's ruling and the entirety of the post-trial actions taken in this case. *Shelton*, 64 M.J. at 37 (quoting *Siroky*, 44 M.J. at 399).

C. The ACCA erred when it did not consider the remedial measures taken by the Army when it held that the third prong of *Liljeberg* required reversal.

"[N]ot every judicial disqualification requires reversal," and this court "ha[s] . . . adopted the standards announced by the Supreme Court in *Liljeberg* to determine whether a military judge's conduct warrants that remedy to vindicate public confidence in the military justice system." *United States v. Martinez*, 70 M.J. 154, 158 (C.A.A.F. 2011). "In furtherance of that purpose, the Supreme Court held that in determining whether a judgment should be vacated 'it is appropriate 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.'" *Id.* at 159 (quoting *Liljeberg*, 486 U.S. at 864).

"[T]he remedy analysis concerning the public confidence in the military justice system *must necessarily include a review of all the post-trial actions* to evaluate how the public would review any response the military takes to a disqualification finding." *Martinez,* 70 M.J. at 160 (emphasis added). An examination of post-trial actions is necessary because the "remedy analysis [under the third factor] involves the public confidence in the military justice system in the context of how that system responds once it has been determined that a military judge was disqualified under R.C.M. 902(a) and should have been recused." *Id.*

The ACCA erred by not only applying the incorrect standard of review and disregarding Judge Watkins' post-trial 39(a) session, but of equal importance, it also erred by not considering the post-trial actions the Army took in Appellee's case as part of its analysis pursuant to *Liljeberg Health Services Corp.*, 486 U.S. 847 (1988). Here, a reasonable member of the public would not lose confidence in the military justice system because of the extensive remedial measures taken after the trial concluded. First, at a post-trial Article 39(a), UCMJ session, Judge Henry—whom Appellee argues should have been disqualified—dismissed two rape convictions and reduced Appellee's sentence by eight years. (JA 150). Further, once the Army learned of Judge Henry's actions, an independent military judge—whom Appellee did not challenge—was detailed to examine whether disqualification was warranted, and if so, what was the proper remedy. (JA 157–62). Judge Watkins considered the briefs from the parties, heard extensive testimony from CPT AC, and examined arguments from the parties, but he still denied Appellee's motion for mistrial. (JA 137, 150, 157–61, 165–215, 225–93, 323). Judge Watkins found that "given the lack [of] a nexus between the [Cs] and the accused, a reasonable member of the public, knowing all the facts and circumstances, to include not only his unique relationship, but the sentence, sentence reduction, and crux of the case as well, would not lose confidence in the justice system." (JA 330).

Assuming arguendo this Court finds the ACCA owed Judge Watkins's decision no analysis, let alone any deference, it erred in its analysis of the third *Liljeberg* factor.[17] The ACCA did not reference—or even consider—how the Army responded once it learned of Judge Henry's actions and removed him from the bench. *See Martinez,* 70 M.J. at 160 ("In the remedy analysis we do not limit our review to facts relevant to recusal, but rather review 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."). The Army appointed an independent military judge who received motions, held a post-trial Article 39(a) session, heard roughly fifty pages of testimony from CPT AC and arguments made by Appellee, and rendered a thorough, detailed, and factually correct nine-page ruling on this issue. (JA 157–295). These actions quelled any concerns about public confidence in the military justice system.

The ACCA did not consider any of these remedial steps in its analysis, but merely concluded—without any analysis—that it "reviewed the entire record and subsequent appellate proceedings." *Rudometkin,* 2021 CCA LEXIS 596, at *16. In doing so, the ACCA incorrectly relied solely on the purported similarity between Judge Henry's improper relationship and Appellee's adulterous conduct

[17] The ACCA did not analyze the first two *Liljeberg* factors, *Rudometkin*, 2021 CCA LEXIS 596, at *16, and neither of them provide a basis for reversal in this case.

that formed the basis of Appellee's convictions for conduct unbecoming an officer and a gentleman.[18] *Rudometkin,* 2021 CCA LEXIS 596, at *18–19; *compare United States v. Anderson*, 72 M.J. 762 (Army Ct. Crim. App. 2020) (affirming a court-martial that Judge Henry presided over during the relevant timeframe where the court-martial occurred at Fort Rucker, an installation approximately 100 miles from Fort Benning, and CPT AC was not involved or even assigned to the same jurisdiction); *United States v. Campbell*, ARMY 20180107, 2020 CCA LEXIS 74 (Army Ct. Crim. App. 6 Mar. 2020) (mem. op.) (same). Thus, the ACCA erred by failing to consider anything that occurred after Appellee's trial or the numerous facts showing a lack of nexus between Judge Henry's misconduct and Appellee's court-martial.

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 CORP., 486 U.S. 847 (1988).

[18] Judge Watkins specifically declined to find that Judge Henry had committed adultery, stating that the record did not support a finding that Judge Henry had committed this type of misconduct even under a preponderance standard. (JA 327). This conduct is specifically distinguishable from Appellee's convictions for conduct unbecoming an officer and a gentleman. Appellee was convicted of committing adultery with three different women while married to JH. Appellee's adulterous affair with his first wife, LM, became focused on having LM absorb his urine both orally and anally. (JA 088–89). Appellee was also convicted of punching one of the women, Ms. CL, while he was having sexual intercourse with her (JA 102–03). No reasonable member of the public would view Judge Henry's actions as similar to Appellee's.

Standard of Review

A military judge's determination on a mistrial will not be reversed absent clear evidence of an abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003); *see also United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). A military judge abuses his discretion when he: (1) predicates his ruling on findings of fact that are not supported by the evidence of record; (2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) fails to consider important facts. *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citing *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010); *United States v. Solomon*, 72 M.J. 176, 180–81 (C.A.A.F. 2013)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks omitted).

Law

A military judge may declare a mistrial when "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). Indeed, a "mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee for a fair trial." *Diaz*, 59 M.J. at 90.

Mistrials are "reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice." *United States v. Vazquez*, 72 M.J. 13, 19 n.5 (C.A.A.F. 2013) (quoting *United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991)). "The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons . . . ." R.C.M. 915(a), discussion. A military judge has "considerable latitude in determining when to grant a mistrial." *United States v. Seward,* 49 M.J. 369, 371 (C.A.A.F. 1998).

Argument

Appellee timely and properly filed a post-trial motion for mistrial. *See* R.C.M. 803 ("A military judge who has been detailed to the court-martial may, under Article 39(a), after service of charges, call the court-martial into session without the presence of members. Such session may be held before or after assembly of the court-martial, and when authorized under these rules, after adjournment and before action by the convening authority."). Because this proceeding was properly held, the analysis and proper standard of review on appellate review becomes whether Judge Watkins clearly abused his discretion when denying Appellee's motion. *Ashby*, 68 M.J. at 122; see also *Shelton*, 64 M.J. at 37 (finding that this Court pierces the intermediate appellate court to review the

military judge's actions when determining whether the Court of Criminal Appeals erred); *Siroky*, 44 M.J. at 399 (same). The record shows he did not.

Where a military judge takes or denies judicial action in an area within his or her discretion, "such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error in judgment in the conclusion it reached upon a weighing of relevant factors." *United States v. Dooley*, 61 M.J. 258, 262 (C.A.A.F. 2005) (citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)). The abuse of discretion standard, "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Dooley*, 61 M.J. at 262.

A. A mistrial is not appropriate because of CPT AC's lack of connection to Appellee's court-martial.

After considering all the evidence and argument presented by the parties, Judge Watkins found there was no risk of injustice to Appellee.[19] (JA 329). Specifically, he found:

> [T]here is no evidence of partiality or bias in this case. CPT [AC] was never a member of the accused's defense team. There is no connection to the relationship between LTC Henry and Mrs. [KC] to the accused, other than a general similarity between some charged conduct. The record is devoid of any personal animosity between Judge

[19] The ACCA agreed with this, stating that they could not find any rulings or decisions that spring from Judge Henry's failure to recuse himself. *Rudometkin,* 2021 CCA LEXIS 596, at *16.

> Henry and the accused or antagonism or favoritism toward counsel.

Id. This lack of connection makes clear that this is not a situation where the "military judge must intervene to prevent a miscarriage of justice." *Vazquez*, 72 M.J. at 19 n.5; *compare Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012) (finding that the military judge's rulings, taken as a whole, could lead an objective observer to conclude the military judge was not impartial); *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001) (finding that the accused was prejudiced when the military judge got into a confrontation over a witness's testimony, did not disclose all the facts on the record, and had an ex parte conversation with the trial counsel).

The ACCA's prior decisions concerning Judge Henry illustrate this. In the two cases where the ACCA reversed and found that CPT AC's involvement in these cases created the possibility that the public would lose confidence in the system, CPT AC had a direct role in both courts-martial. *See United States v. Springer*, 79 M.J. 756, 760 (Army Ct. Crim. App. 2020) (en banc) (setting aside a Fort Benning conviction over which LTC Henry presided and CPT AC served as trial counsel); *United States v. Lopez*, ARMY 20170386, 2020 CCA LEXIS 161 (Army Ct. Crim. App. May 11, 2020) (en banc) (mem. op.) (same). In both *Springer* and *Lopez*, CPT AC served as a counsel on the case and was assigned to the same office of the staff judge advocate (OSJA) as the prosecutors on the case,

and the courts-martial occurred on the installation where CPT AC was assigned. *See Springer*, 79 M.J. at 760; *Lopez*, 2020 CCA LEXIS 161, at *39.

In contrast, ACCA affirmed the findings in two cases where CPT AC was not involved in the case or assigned to same OSJA and jurisdiction as the prosecutors in the case, and the court-martial occurred at an installation approximately 100 miles from where CPT AC was stationed. *See United States v. Anderson*, 72 M.J. 762 (Army Ct. Crim. App. 2020) (affirming where the court-martial occurred at Fort Rucker, an installation approximately 100 miles from Fort Benning); *United States v. Campbell*, ARMY 20180107, 2020 CCA LEXIS 74 (Army Ct. Crim. App. 6 Mar. 2020) (mem. op.) (same).

Appellee's case is more analogous to the cases that the ACCA affirmed. His trial occurred at an installation over 200 miles from Fort Benning, and CPT AC was not involved in the trial in any manner or assigned to the same OSJA as the prosecutors. (JA 324). Thus, where there was nothing in the record that cast doubt upon the fairness of the proceedings, Judge Watkins correctly determined that the drastic remedy of a mistrial was improper because Judge Henry's improper relationship with an uninvolved defense counsel's wife at a different installation had no bearing on Appellee's court martial.[20] *See Vazquez*, 72 M.J. at 19 n.5

[20] As Judge Watkins found, "The record is devoid of any personal animosity between [Judge] Henry and the accused or antagonism or favoritism toward counsel." (JA 329); *compare Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012).

(holding mistrial are "reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice").

B. Judge Watkins did not clearly abuse his discretion when he denied Appellee's motion for a mistrial.

After conducting an extensive post-trial Article 39(a) session, Judge Watkins issued a thorough, nine-page ruling denying Appellee's motion for mistrial. (JA 323). In this ruling, Judge Watkins relied on facts supported by the record, applied the correct law, was reasonable in his application of the facts to the law, and did not omit any important facts; thus, he did not abuse his discretion. *Commisso*, 76 M.J. at 321.

The facts contained in Judge Watkins's ruling were developed after an almost five-hour post-trial Article 39(a) session that spanned almost 140 pages of transcript—to include CPT AC's critical testimony. (JA 157–295). From this Article 39(a) session, Judge Watkins made thorough findings of fact that spanned almost five pages in his ruling. (JA 323–27). These facts are not clearly erroneous because they are aptly supported by the record. *See United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007) (reasoning factual findings are not clearly erroneous where they are "amply supported by the record").

The military judge properly assumed, without deciding, that Judge Henry should have recused himself, and he correctly analyzed whether Judge Henry's failure to do so required reversal under the standards set forth by the Supreme

Court in *Liljeberg.* (JA 328–29); *see Butcher,* 56 M.J. at 91 ("assum[ing], without deciding, that the military judge should have recused himself and ask[ing] whether his failure to do so require[d] reversal under . . . *Liljeberg*").[21] In finding that members of the public would not lose confidence in the military justice system, Judge Watkins relied on the principle that "members of the public understand that judges are not without fault," (JA 330), a proposition supported by this Court's precedent. *See Butcher,* 56 M.J. at 91 (quoting *United States v. Norfleet,* 53 M.J. 262, 269–70 (C.A.A.F. 2000)) ("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.[22] *Id.* This is especially true where there is a "lack of nexus between [CPT AC] and the accused." (JA 330); *see also Liljeberg*, 486 U.S. at 862 (arguing that there need not be a "draconian" remedy for every violation requiring recusal).

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[21] In his ruling denying Appellee's request for mistrial, Judge Watkins cites this Court's opinion in *Butcher* and stating: "Nor is it necessary to decide whether [Judge] Henry should have recused himself in this case."

[22] Although Judge Henry's conduct goes beyond attending a party and playing tennis with a trial counsel, *see Butcher*, 56 M.J. at 89, this general principle applies in this case.

Nothing about Judge Watkins's decision was "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *McElhaney*, 54 M.J. at 130. Accordingly, the decision denying Appellee's motion for mistrial must be affirmed and ACCA's decision reversed.

C. If this Court finds Judge Watkins clearly abused his discretion, the proper remedy is to grant a mistrial solely to the convictions for conduct unbecoming an officer and gentleman.

This Court has endorsed the practice of limiting a mistrial to the charges and specifications affected by errors within a trial. *See United States v. Carter*, 79 M.J. 478, 482–83 (C.A.A.F. 2020) (affirming the military judge's decision to limit the mistrial to only affected specification on the charge sheet); *see also Commisso*, 76 M.J. at 321 (finding that before ruling on a mistrial motion, or determining what type of remedial relief to give, if any, a military judge must "adequately investigate" the material issues, and "consider important facts"); R.C.M. 915 ("A mistrial may be declared as to some or all charges . . . ."). Notably, this Court has also severed charges and specifications where it found the military judge was partial or disqualified only on specific issues. *See Quintanilla*, 56 M.J. at 85 (setting aside the charges and specifications where the military judge's partiality could reasonably be questioned).

Here, if this Court agrees with the ACCA and finds that Judge Henry's non-sexual relationship with Mrs. KC are similar to Appellee's convictions for three

specifications of conduct unbecoming an officer and a gentleman, the proper remedy is to set aside the findings solely for those three specifications. This was the ACCA's sole concern—as they said, they could not find any adverse rulings related to Judge Henry's failure to recuse himself. *Rudometkin,* 2021 CCA LEXIS 596, at *16. If there was an error, this focused remedy solves it in a way that restores the public trust. To reverse the entire findings and sentence—which involve convictions for rape and aggravated sexual assault—would have the opposite intended effect: this action would undermine the public trust and confidence in the military justice system. *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."). If reversal is warranted, it is warranted solely in regard to the limited area where Judge Henry's partiality could be questioned.

Conclusion

The United States respectfully requests that this Honorable Court reverse the judgment of the Army Court.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **6,580** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on March 7, 2022.

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