IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	REPLY 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 MISTRIAL.

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).

Statement of the Case

On February 3, 2022, the United States filed a certificate for review with this court. It filed its brief in support of that certificate on March 7, 2022. Appellee responded on April 6, 2022. The United States' reply follows.

Argument

A. *Butcher* allows this Court to assume recusal and analyze the case solely on prejudice.

Appellee argues that the "United States refuses to concede that Judge Henry was required to recuse himself." (Appellee's Br. 8). However, the United States was clear in its brief—it does not concede that Judge Henry should have recused himself because this Court can assume recusal was warranted and undertake the required analysis under *Liljeberg v. Health Srvs. Acquisition Corp.*, 486 U.S. 847 (1988), to determine if a remedy is required. *United States v. Butcher*, 56 M.J. 87, 92 (C.A.A.F. 2001); (Appellant's Br. 12). As Appellant noted in its brief: '"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; (Appellant's Br. 12, n.14). Thus, Appellant is not asking this Court, nor is it required, to find that Judge Henry should not have been recused; rather, it is asking the Court to apply the correct legal framework and find Judge Watkins did not abuse his discretion when applying the very test it announced in *Butcher.*

B. Appellee's case was not in the "appeal process"—the abuse of discretion standard mandated by *Butcher* applies.

Appellee's case was not in the "appeal process," as Appellee suggests in his brief. (Appellee's Br. 12). The Rules for Courts-Martial (R.C.M.) applicable at

the time of Appellee's trial[1] gave the military judge ample authority to hold the post-trial Article 39(a), UCMJ sessions in this case.[2] "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."[3] R.C.M. 803. "An Article 39(a) session under this rule may be called, upon motion of either party or *sua sponte* by the military judge, for the purpose of inquiring into, and, when appropriate, resolving any matter that arises after trial and that substantially affects the legal sufficiency of any findings of guilty or the sentence." R.C.M. 1102(b)(2). Because Appellee's case was still properly before Judge Watkins, the Army Court of Criminal Appeals owed deference to any decision by Judge Watkins. Consequently, the Army Court erred in its application

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[1] Appellee's charge sheet was referred to a general court-martial on October 17, 2016. (JA 053–56). Accordingly, the rules in effect on the date of referral are found in the 2016 *Manual for Courts-Martial, United States*, and they apply here.

[2] Appellee benefitted from the very same application of these rules on March 12, 2018, when Judge Henry held a post-trial Article 39(a), UCMJ, session, dismissed two specifications of rape that Appellee was previously found guilty of, and reassessed Appellee's sentence from twenty-five to seventeen years' confinement. (JA 133, 137, 150).

[3] The convening authority took original action on Appellee's case sometime after the Staff Judge Advocate's erroneous post-trial recommendation on November 8, 2019. (JA 050). The convening authority took final, correct action, on November 2, 2020. (JA 061–63). Judge Watkins held the applicable post-trial Article 39(a), UCMJ, session on September 6, 2018. (JA 157).

of *Butcher* and its non-consideration of Judge Watkins's findings of fact and consideration of law.

Appellee claims that the Government "misreads Butcher's application." (Appellee's Br. 13). This is not the case, in *Butcher*, the defense counsel learned of the military judge's improper behavior during deliberations, before the panel returned its findings. *Butcher,* 56 M.J. at 89. The parties held an Article 39(a), UCMJ session during the panel deliberations, and the military judge subsequently denied the motion seeking his disqualification. *Id*. Importantly for the present case, the military judge in *Butcher* held a subsequent post-trial Article 39(a), UCMJ session *four months* after the panel announced its findings and the Appellant was sentenced—after both parties were given the opportunity to fully brief the issue. *Id.* at 90. As this Court stated, the military judge's decision, even if conducted after the sentence is adjudged, is reviewed for an abuse of discretion. *Id.*

Appellee's case is similar to the Appellant's in *Butcher*—it is subject to the discretion of a military judge who is owed deference on appeal. There is no reason for this Court to deviate from its precedent as suggested by Appellee and create a new rule that would dictate an issue is "on appeal" if not raised before adjournment—especially when to do so would directly contradict *Butcher* and the applicable R.C.M.s at the time of Appellee's court-martial proceedings.

C. Appellee's request that this Court apply a "heightened sensitivity to prejudice" is contradicted by applicable law—*Liljeberg* provides the proper framework for analysis.

Appellee twice suggests that this Court should apply "heightened sensitivity" to the prejudice analysis when determining whether reversal is required under. (Appellee's Br. 6, 26). Appellee provides no support for this seemingly new standard—citing no military or federal cases. That is because this Court, and federal caselaw, has been clear: "not 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. Uribe,* 80 M.J. 442, 449 (C.A.A.F. 2021); *United States v. Martinez*, 70 M.J. 154, 158 (C.A.A.F. 2011); *Butcher*, 56 M.J. at 92.

Appellee justifies this suggested new approach by stating, "*Liljeberg* was a civil suit, but the Appellee's trial was a criminal proceeding where his liberty and not merely his money was at stake." (Appellee's Br. 6). As indicated above, this Court's precedent does not support this approach. Federal caselaw shows the same principle—*Liljeberg* is the standard for evaluating prejudice when judicial disqualification was necessary, even in criminal trials. *See United States v. Orr,* 969 F.3d 732, 738 (7th Cir. 2020) (applying *Liljeberg* to a federal criminal trial); *United States v. Cerceda,* 172 F.3d 806, 812 (11th Cir. 1999) (same); *United States*

v. Jordan, 49 F.3d 152, 155 (5th Cir. 1995) (applying the same disqualification rule to civil and criminal trials and applying *Liljeberg* to test for prejudice).

In applying the *Liljeberg* analysis, this Court has been clear: "[W]e 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." *Martinez,* 70 M.J. at 160.[4]

This Court should apply its precedent and the standards established in *Butcher, Martinez,* and *Uribe* to this case, and nothing more. This application will show that the Army Court of Criminal Appeals erred by: not according Judge Watkins's ruling the deference it was owed; not considering the post-trial remedial actions the Army took to remediate any perceived unfairness; and not reviewing the denial of Appellee's request for a mistrial.

[4] To the extent this court considers Appellee's reference to LTC Henry's letter to his state bar, (Appellee's Br. 11–12, 16–19), as "other facts relevant to the *Liljeberg* test," this court should consider the letter *in toto.* Appellee strongly suggests the public would be confused by LTC Henry's letter which harms public perception. (Appellee's Br. 16–19). However, the letter is clear that LTC Henry was temporarily suspended during the investigation, officially reprimanded by TJAG, then removed as a military judge. (JA 333–334).

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 **1,505** 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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April 18, 2022

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 April 18, 2022.

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