IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 202100299
Thomas H. TAPP, Private First Class (E-2) U.S. Marine Corps Appellant	)	USCA Dkt. No. 23-0204/MC

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

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Issue Presented

WAS APPELLANT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JUDGE?

Statement of Statutory Jurisdiction

The Entry of Judgment includes a sentence of a dishonorable discharge and confinement for three years. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2020). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of violating a lawful general order and sexual assault, in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892, 920 (2016). The Members sentenced Appellant to confinement for three years, reduction to E-1, total forfeitures, and a dishonorable discharge. The Convening Authority took no action on the sentence, and the Military Judge entered the judgment into the Record.

On review, the lower court affirmed the findings and sentence. *United States v. Tapp*, 83 M.J. 600 (N-M. Ct. Crim. App. 2023).

Upon Appellant's Petition, this Court granted review. (Appellant Pet., June 16, 2023); *United States v. Tapp*, No. 23-0204/MC, 2023 CAAF LEXIS 680 (C.A.A.F. Sept. 26, 2023).

Statement of Facts

A. The United States charged Appellant with violating an order and sexual assault.

The United States charged Appellant with consuming alcohol underage and committing a sexual act on the Victim by penetrating her vulva with his penis without her consent. (J.A. 89.)

B. Lieutenant Colonel Norman was detailed as Military Judge and presided over trial. Appellant did not voir dire or move to disqualify him until after trial.

Lieutenant Colonel Poteet was detailed as the Military Judge for Appellant's arraignment. (J.A. 01.) Lieutenant Colonel Norman was detailed as the Military Judge for the trial; he presided over all sessions of the court-martial with the exception of the arraignment and post-trial Article 39(a). (J.A. 01, 1411–12.)

Appellant did not voir dire or move to disqualify Lieutenant Colonel Norman during trial, despite Lieutenant Colonel Norman inviting both parties to voir dire or challenge him. (JA. 1412.) Appellant did not move to disqualify Lieutenant Colonel Norman until after the court-martial adjourned. (JA. 1354.)

C. Lieutenant Colonel Norman denied several of Appellant's motions.

1. Lieutenant Colonel Norman denied Appellant's Motion to Compel an expert consultant.

Lieutenant Colonel Norman denied Appellant's Motion to Compel a specific expert consultant, finding Appellant failed to show "specifically why a gynecologist would be necessary in this case" or "why a forensic pathologist at all is needed or necessary in this case." (J.A. 107.)

[redacted]

[redacted]

3. Lieutenant Colonel Norman presided over voir dire for the Members and ruled on challenges.

After considering the liberal grant mandate, Lieutenant Colonel Norman denied two challenges made by Appellant. (J.A. 173, 178.)

For the first member challenge, Lieutenant Colonel Norman explained, "[He] told us that, his sister was raped or sexually assaulted when she was 'younger.' . . . He's not even sure of her age, when it happened. He described not being personally involved . . . in any way . . . . They had a minimal conversation about it, with very little detail. He's not sure exactly what happened in it." (J.A. 179.)

For the second member challenge, Lieutenant Colonel Norman explained, "His wife was a victim of this alleged sexual assault [nineteen] years ago, long before [he] even knew her, much less was even dating or now married to her. She was [thirteen] at the time, a child. They are married adults now. . . . There were no facts brought out what would make it closely related to the facts of this case." (J.A. 174.)

D. The Members found Appellant guilty and sentenced him.

The Members found Appellant guilty of both Charges and their sole Specifications. (J.A. 496.) The Members sentenced him to confinement for three years, reduction to E-1, total forfeitures, and a dishonorable discharge. (J.A. 497.)

E. Trial Counsel disclosed a post-trial ex parte communication between himself and Lieutenant Colonel Norman.

Trial Counsel disclosed that after sentencing and adjournment, Lieutenant Colonel Norman for around "thirty to forty minutes criticiz[ed] the sentence requested by the Government" and "the performance of Trial Counsel." (J.A. 1381.) Lieutenant Colonel Norman asked Trial Counsel if "there were 'worse' sexual assault cases th[a]n the instant case." (J.A. 1381.) Appellant, Trial Defense Counsel, and the Victim's Legal Counsel had exited the courtroom prior to Lieutenant Colonel Norman's critique of Trial Counsel. (J.A. 1381.)

F. Colonel Woodard was detailed as Military Judge post-trial, and denied Appellant's Motion to dismiss or declare a mistrial.

1. Appellant sought dismissal or a mistrial.

Appellant filed a Motion for mistrial or dismissal with prejudice, claiming that "while under the influence of improper bias, [Lieutenant Colonel Norman] made numerous crucial rulings against the Defense," his "egregious actions will encourage injustice in numerous other cases," and a reasonable member of the public would conclude he was not impartial. (J.A. 1359–62.)

2. Lieutenant Colonel Norman asserted his impartiality.

During a post-trial Article 39(a) session, Lieutenant Colonel Norman stated, "I've remained completely impartial throughout this trial and remain impartial now." (J.A. 502–03.) He explained, "[A]fter the court adjourned, I did have a conversation with the trial counsel, where I provided them direct, stern feedback. I addressed the trial counsel's sentencing presentation, including that they seemed to undervalue this case in their sentencing argument on behalf of their client." (J.A. 503.)

Lieutenant Colonel Norman then recused himself from further participation in the case. (J.A. 507.)

3. Colonel Woodard heard argument on Appellant's Motion.

a. The Court Reporter testified that Lieutenant Colonel Norman asked Trial Counsel about their sentence recommendation.

The Court Reporter testified that Lieutenant Colonel Norman asked Trial Counsel, "Why did you ask for [eleven] years?" (J.A. 585.) When asked if Lieutenant Colonel Norman said that Trial Counsel should have asked for more punishment, the Court Reporter responded, "Not verbally . . . [he] just kept on questioning towards why it was [eleven] years." (J.A. 585–86.) He testified that Lieutenant Colonel Norman said something like: "Why didn't you ask for the

maximum punishment?" (J.A. 586.) He said that Lieutenant Colonel Norman appeared upset with the sentence Appellant received. (J.A. 586.)

b. Trial Counsel testified that Lieutenant Colonel Norman chastised them.

The First Assistant Trial Counsel testified that Lieutenant Colonel Norman's post-adjournment conversation "felt like he was just chastising the trial counsel. It didn't sound like he agreed with what we asked for, for the sentence." (J.A. 591.) Lieutenant Colonel Norman never told trial counsel "to ask for a specific sentence." (J.A. 599, 610.)

The Second Assistant Trial Counsel testified that Lieutenant Colonel Norman never said he agreed with the eleven-year sentence recommendation. (J.A. 617.) But Lieutenant Colonel Norman said that going to trial with a self-imposed cap chills the incentive to enter into a plea deal. (J.A. 618.) The tone of the conversation was "[c]ritical." (J.A. 618.)

The Lead Trial Counsel testified, "[M]y understanding of it was [Lieutenant Colonel Norman] was telling us how we could have argued for more confinement." (J.A. 636.) He understood Lieutenant Colonel Norman's comments "to be that he was critical of our sentencing arguments." (J.A. 643.) Lieutenant Colonel Norman said that the Defense team did not pay a price for their earlier decisions because of the confinement cap. (J.A. 647–48.)

4. Colonel Woodard denied Appellant's Motion.

Colonel Woodard denied Appellant's Motion, noting "the Court does not condone or approve of Lieutenant Colonel Norman's post-trial ex parte communications with trial counsel," but they did not place "in doubt this court-martial's legality, fairness, and impartiality." (J.A. 1423.) Colonel Woodard found Lieutenant Colonel Norman was "critical of all counsel throughout the trial process," that all matters raised were fully litigated even if raised late, that no findings of fact were clearly erroneous, and that the ex parte comments were made outside the presence of the Members. (J.A. 1424–25.)

Colonel Woodard also found that Appellant had not identified any specific injustice, that denial of relief would not result in injustice in other cases, and that the post-trial ex parte interaction "had no bearing on the merits of the proceedings, and occurred after the members had rendered their verdicts on findings and sentencing." (J.A. 1425–27.) He concluded that denying the Motion "would not upset public confidence in the judicial process." (J.A. 1427.)

G. The lower court affirmed the findings and sentence.

The Navy-Marine Corps Court of Criminal Appeals held "that [Lieutenant Colonel Norman's] comments after trial coupled with his comments during trial and his rulings do not display any bias against Appellant, deep seated or otherwise, or call into question his fairness." (J.A. 32.) Lieutenant Colonel Norman ensured

a fair trial "even if he was personally or professionally displeased" with Counsel's performance or aspects of sentencing. (J.A. 32.)

Argument

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JUDGE. COLONEL WOODARD DID NOT ABUSE HIS DISCRETION BY FINDING THAT LIEUTENANT COLONEL NORMAN'S RULINGS AND COMMENTS DID NOT INDICATE PERSONAL BIAS AGAINST APPELLANT, AND THAT VIEWED OBJECTIVELY, A REASONABLE PERSON KNOWING ALL THE FACTS AND CIRCUMSTANCES WOULD NOT REASONABLY QUESTION HIS IMPARTIALITY.

A. The standard of review is abuse of discretion.

Appellate courts review a military judge's disqualification ruling for an abuse of discretion. *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (citing *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015)).

"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." *Id*. (citation and quotation omitted).

B. A military judge shall be disqualified from any proceeding where he has a personal bias concerning a party or his impartiality might reasonably be questioned.

"An accused has a constitutional right to an impartial judge." *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001) (citations omitted). A military judge is presumed impartial. *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007).

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves action taken in conjunction with judicial proceedings." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001).

The two general grounds for judicial disqualification are actual and apparent bias. R.C.M. 902; *Quintanilla*, 56 M.J. at 45. "In short, R.C.M. 902 . . . requires consideration of disqualification under a two-step analysis. The first step asks whether disqualification is required under the specific circumstances listed in R.C.M. 902(b). If the answer to that question is no, the second step asks whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias." *Quintanilla*, 56 M.J. at 45. R.C.M. 902(a) defines apparent bias that requires a military judge to "disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." *See Quintanilla*, 56 M.J. at 45 (R.C.M. 902(a) applies the same standard as 28 U.S.C. §455(a)).

"In order to be disqualifying, any interest or bias must be personal, not judicial, in nature." *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000) (citation and quotation omitted). "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless

they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994) .

Appellate courts "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." *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015) (citation omitted); *see also United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982).

Even if disqualification is warranted under either actual or apparent bias, there must still be a determination whether a remedy is warranted. *Id*. at 80.

C. Colonel Woodard did not abuse his discretion by finding that Lieutenant Colonel Norman had no personal bias against Appellant, and that, viewed objectively, a reasonable person knowing all the facts and circumstances would not reasonably question his impartiality.

Although he did not "condone or approve" of the post-trial ex parte communications with the Trial Counsel, Colonel Woodard found that "neither [Lieutenant Colonel Norman's] post-trial ex parte comments nor his actions and rulings during trial, when taken as a whole in the context of this trial, placed in doubt this court-martial's legality, fairness, and impartiality." (J.A. 1423.) As explained below, Colonel Woodard did not abuse his discretion in finding neither actual bias under R.C.M. 902(b) nor apparent bias under R.C.M. 902(a).

In addition, Lieutenant Colonel Norman did not abuse his discretion by not sua sponte recusing himself during trial. When Lieutenant Colonel Norman

recused himself post-trial, he acted out of a "sense of prudence" as this Court suggested in *United States v. Sullivan*, 74 M.J. 448, 454 (C.A.A.F. 2015). *See also United States v. Wright*, 52 M.J. 136, 142 (C.A.A.F. 1999) (commending judge for full disclosure, sensitivity to public perceptions, and sound analysis as contributing to perception of fairness).

Contrary to Appellant's assertion, Lieutenant Colonel Norman's post-trial recusal is not an admission of bias. (Appellant Br. at 45.) Rather, he reiterated his impartiality, explained that he was recusing himself due to the personal nature of the allegations against him, and stated that he wished to ensure Appellant had confidence in the post-trial process. (J.A. 506–07.)

1. Lieutenant Colonel Norman's judicial rulings, admonishment of Trial Defense Counsel, and ex parte conversation with Trial Counsel are not indicative of actual or apparent bias.

In *Liteky*, the appellants challenged their convictions because the district judge failed to recuse himself under 28 U.S.C. §455(a), which requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id*. at 541, 543. The appellants argued the district judge displayed "impatience, disregard for the defense and animosity" towards one of the appellants during a previous trial by being critical of him, his counsel, and defense witnesses with admonishments and adverse rulings. *Id*. at 542–43. At the close of the prosecution's case, the appellants renewed the disqualification motion,

citing additional admonishments directed at the appellants. *Id*. at 543.

The Supreme Court held that none "of the grounds [the appellants] assert required disqualification." *Id*. at 556. Judicial rulings cannot constitute a valid basis for a bias or partiality motion except in the "rarest circumstances" where there is "evidence [of] the degree of favoritism or antagonism required." *Id*. at 555. In addition, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id*. at 555. "Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id*. Such remarks may support a bias or impartiality challenge "if they reveal an opinion that derives from an extrajudicial source, and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.*

In summary, the Supreme Court held that "judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses" were inadequate grounds for disqualification of a judge if they "neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal

antagonism that would render fair judgment impossible." *Id*. at 556. The Supreme Court explicitly established that "expressions of impatience, dissatisfaction, annoyance, and even anger" from judges who are "imperfect men and women" are not disqualifying. *Id*. at 555–56. Further, a "judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune" from disqualification. *Id*. at 556.

The Supreme Court provided an example of disqualifying antagonism that arises from an extrajudicial source: a district judge saying in a World War I espionage case against German-American defendants that "[o]ne must have a very judicial mind, indeed, not [to be] prejudiced against German Americans . . . [their] hearts are reeking with disloyalty." *Liteky,* 510 U.S. at 555. This was an example of ethnic prejudice that had nothing to do with the judicial proceeding at hand.

a. Lieutenant Colonel Norman's judicial rulings were not indicative of actual or apparent bias: they did not reveal an "extrajudicial source" for bias and were not evidence of "deep-seated favoritism or antagonism that would render fair judgment impossible."

As the Supreme Court held in *Liteky*, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion" because "they cannot possibly show reliance upon an extrajudicial source" and "can only in the rarest circumstances evidence the degree of favoritism or antagonism required." 510 U.S. at 555. Judicial rulings "are proper grounds for appeal, not for recusal." *Id*.

Here, as in *Liteky*, Lieutenant Colonel Norman's rulings on the expert consultant, Mil. R. Evid. 412 evidence, and challenges to Members were part of the judicial proceeding at hand, based on evidence presented and determined by the appropriate legal standards. Such adverse rulings do not establish the type of judicial bias that demands disqualification. *Liteky*, 510 U.S. 555–56. Appellant cites no evidence of an "extrajudicial source" for the judicial rulings.

Lieutenant Colonel Norman's assessment of the complexity of the case were opinions derived from facts introduced during Appellant's trial. (Appellant's Br. at 46.) His comments on the evidence are "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings" that "do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id*. at 555.

Rather than showing deep-seated favoritism, Lieutenant Colonel Norman made numerous rulings in favor of Appellant and against the United States. (*See e.g.*, J.A. 94 (denying United States motion to have witness testify telephonically); J.A. 208 (sustaining Appellant's objection to question calling for speculation); J.A. 415 (same).)

Furthermore, disagreements over his rulings were "proper grounds for appeal, not for recusal." *Liteky*, 510 U.S. at 555. As the lower court held,

Lieutenant Colonel Norman adjudicated the case appropriately. The lower court thoroughly analyzed his rulings and found no abuse of discretion in either the denial of expert assistance, [redacted] or denial of challenges to Members. (J.A. 35.)

Appellant fails to show the judicial rulings, upheld on appeal, display "deep-seated and unequivocal antagonism that would render fair judgment impossible."

b. Lieutenant Colonel Norman's frustration with Appellant's late Motions or other violations of court rules is not indicative of actual or apparent bias. A judge's ordinary, even stern, efforts at courtroom administration are not grounds for recusal.

Pursuant to R.C.M. 801, a military judge is authorized to reasonably control court-martial proceedings, including setting timelines for motions and other court rules.

Here, Lieutenant Colonel Norman expressed dissatisfaction with Trial Defense Counsel for filing a Motion that was late under the trial management order. (J.A. 1440–65.) Even if Appellant's characterizations of Lieutenant Colonel Norman's comments are taken at face value, they are "opinions formed by the judge on the basis of . . . event[s] occurring in the course of the current proceedings." *Liteky*, 510 U.S. at 555.

Further, Appellant mischaracterizes several statements by Lieutenant Colonel Norman. Lieutenant Colonel Norman never expressed the desire to teach

Appellant's Trial Defense Counsel a "lesson" for raising a late Motion. Instead, he asked Trial Defense Counsel: "[W]hat assurances can you give me that the lesson is learned" about additional defense counsel being assigned and relying on that to raise issues after the court-ordered deadline. (Appellant Br. at 40; J.A. 1459–60.)

Lieutenant Colonel Norman was expressing reasonable "impatience, dissatisfaction, annoyance, and even anger" when he suggested "censure, contempt, reporting to state bar," which is not evidence of "actual bias." (Appellant Br. at 41); *see Liteky*, 510 U.S. at 555–56; (J.A. 1459.) That impatience also did nothing to adversely impact Appellant, since Lieutenant Colonel Norman ruled that "even though there's no good cause, the Court will take it up [the late Motion] as a substantive matter to protect their [sic] constitutional rights of the accused." (J.A. 1465.)

Lieutenant Colonel Norman's comments to Trial Defense Counsel were "ordinary admonishments" motivated by Trial Defense Counsels' practice of turning in late motions. *Liteky*, 510 U.S. at 555. Under the Supreme Court's precedent in *Liteky*, this is not "personal bias or prejudice concerning a party"—thus Appellant's claim of "actual bias" against Trial Defense Counsel must fail. (Appellant Br. at 41); R.C.M. 902(b)(1).

Notably, none of the admonishments of Trial Defense Counsel occurred in presence of the Members—with the arguable exception of Lieutenant Colonel

Norman counseling Trial Defense Counsel on how to properly refresh a witness' recollection. (Appellant's Br. at 51.) In *United States v. Foster*, this Court found no bias when a military judge made inappropriate comments about a defense expert outside the members' presence. 64 M.J. 331, 339 (C.A.A.F. 2007) (citing *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987) (upholding harsh comments outside presence of members to control proceedings)).

So too here. Like *Foster* and *Reynolds*, Lieutenant Colonel Norman expressed frustration with Counsel as part of his control of the proceedings, but did so outside the presence of the members.

Appellant selectively quotes from a 2,420-page Record to identify isolated incidents of Lieutenant Colonel Norman getting frustrated with Trial Defense Counsel—but there are also instances where he expresses frustration with Trial Counsel. (*See e.g.*, J.A. 117–18 (admonishing Trial Counsel for failure to provide Appellant with required uniform); J.A. 119–20 (Trial Counsel questioning witness)); (Appellant Br. at 49–51).

Lieutenant Colonel Norman's "ordinary admonishments" of both counsel show no "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Liteky*, 510 U.S. at 556; *see United States v. Leahr*, 73 M.J. 364, n.1 (C.A.A.F. 2014) (comments by military judge insinuating appellant was

guilty did not present "deep-seated favoritism or antagonism" after applying objective test for judicial impartiality).

c. Lieutenant Colonel Norman did not display "extra-judicial bias." Appellant did not challenge Lieutenant Colonel Norman's impartiality until after the trial.

In *United States v. Edwardo-Franco*, the Second Circuit held the appellant was entitled to a new trial due to the apparent bias of the trial judge. 885 F.2d 1002, 1010 (2nd Cir. 1989). The judge made multiple disparaging comments about Colombians and immigrants during sentencing, and the appellant was a Colombian native. *Id*. at 1005. The court held that where "there is an indication of extra-judicial bias, each questionable adverse ruling by the trial judge tends to magnify the appearance of injustice." *Id* at 1006.

Here, Appellant inaptly applies the "extra-judicial bias" principle from *Edwardo-Franco* and *Liteky* by pointing to "ordinary admonishments" and adverse rulings, without presenting any evidence of the "extra-judicial bias" present in *Edwardo-Franco* and referenced in *Liteky*. (Appellant Br. at 45–51); *see Edwardo-Franco*, 885 F.2d at 1005 (anti-Columbian sentiments); *see also Liteky*, 510 U.S. at 555 (anti-German sentiment).

Without evidence of existing "extra-judicial bias" that has nothing to do with the judicial proceedings, Lieutenant Colonel Norman's comments and rulings fall within the "judicial rulings, routine trial administration efforts, and ordinary

admonishments (whether or not legally supportable) to counsel and to witnesses" that are inadequate for disqualifying a judge. *Liteky*, 510 U.S. at 556.

Appellant offers no evidence of an "extra-judicial bias" held by Lieutenant Colonel Norman that, when combined with his adverse rulings, would arguably "magnify the appearance of injustice." (Appellant Br. at 45–49); *see Edwardo-Franco*, 885 F.2d at 1006. Without that, Appellant's reliance on *Edwardo-Franco* is inapt, and Lieutenant Colonel Norman's adverse decisions were nothing more than judicial rulings, which "alone almost never constitute a valid basis for a bias or partiality motion." (Appellant Br. at 45); *see Liteky*, 510 U.S. at 555.

Notably, Appellant did not challenge the impartiality of Lieutenant Colonel Norman's judicial rulings or admonishments until after the trial proceedings. This suggests that the rulings and admonishments themselves did not strike Appellant as cause to question Lieutenant Colonel Norman's impartiality. *See Burton*, 52 M.J. at 226 (failure to challenge judge's impartiality during proceedings creates inference appellant believed judge was impartial).

d. Lieutenant Colonel Norman's ex parte communications to Trial Counsel regarding sentencing were not indicative of actual or apparent bias because the feedback did not reveal an "extrajudicial source" for bias and the comments themselves were not evidence of "deep-seated favoritism or antagonism that would render fair judgment impossible."

i. The ex parte communication was inappropriate, but is not evidence of "deep-seated favoritism or antagonism."

"Ex parte contact with counsel does not necessitate recusal under RCM 902(a), particularly if the record shows that the communication did not involve substantive issues or evidence favoritism for one side." *United States v. Quintanilla*, 56 M.J. 37, 79 (C.A.A.F. 2001). By contrast, an ex parte communication "which might have the effect or give the appearance of granting undue advantage to one party cannot be condoned." *Id.* (quoting *United States v. Wilkerson*, 1 M.J. 56, 57 n.1 (C.M.A. 1975) (internal quotation marks omitted).

However, the ultimate question is whether Lieutenant Colonel Norman's ex parte comments disqualified him when the *Liteky* test is applied. *Liteky*, 510 U.S. at 555–56. The Supreme Court held that "judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses" are inadequate grounds for disqualification of a judge if they "neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal

antagonism that would render fair judgment impossible." *Id*. at 556; *accord Quintanilla*, 56 M.J. at 44.

Appellant does not point to an "extrajudicial source" of bias by Lieutenant Colonel Norman; nor does he show that Lieutenant Colonel Norman's *ex parte* comments are themselves proof of "deep-seated and unequivocal antagonism that would render fair judgment impossible." (Appellant Br. at 41–42); *Liteky*, 510 U.S. at 556. Lieutenant Colonel Norman, in an *ex parte* communication with Trial Counsel, spent "thirty to forty minutes criticizing the sentence requested by the Government" and "the performance of Trial Counsel." (J.A. 1381.)

In *Greatting*, this Court ruled that the military judge abused his discretion by not recusing himself. *United States v. Greatting*, 66 M.J. 226, 230 (C.A.A.F. 2008). In an ex parte communication, the military judge "provided case-specific criticism to the convening authority's [staff judge advocate] that the convening authority had sold [a companion case] 'too low.'" *Id*. at 231. He made these comments before clemency issues were resolved, possibly before the pretrial agreement in the appellant's case was finalized, and subsequently assigned himself to the appellant's case. *Id*.

The Court held that the ex parte communication with the staff judge advocate would lead a reasonable person to conclude that the military judge's impartiality might reasonably be questioned. *Id*. at 231. This Court and the lower

court have found similarly where judges made pre-trial, out-of-court statements that were explicit admissions of "deep-seated favoritism or antagonism" and specific to the appellant's case.[1]

Unlike *Greatting*, Lieutenant Colonel Norman's ex parte comments to Trial Counsel were made after the judicial proceeding concluded, and did not indicate "deep-seated favoritism or antagonism" amounting to prejudgment of the case and facts. (J.A. 1381–82); *see Greatting*, 66 M.J. at 231.

He admonished Trial Counsel for the government's sentencing argument, and criticized a supposed failure to subject Appellant to a "trial penalty" by pushing for a more severe punishment. (J.A. 1381.) Lieutenant Colonel Norman did not, however, make any specific suggestion that Appellant should have been given a harsher sentence. (J.A. 599, 610, 617–18, 636, 643, 647–48). These facts do not make this case a "proceeding in which [the] military judge's impartiality might reasonably be questioned." R.C.M. 902(a).

In *McIlwain*, by contrast, the military judge acknowledged that the providence inquiry for a previous case had implicated the appellant. 66 M.J. at

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[1] *See United States v. McIlwain*, 66 M.J. 312 (C.A.A.F. 2008); *see also United States v. Kish*, 201100404, 2014 CCA LEXIS 358 (N-M. Ct. Crim. App. June 17, 2014) (military judge adopted persona of hard-charging prosecutor in case and in out-of-court statements); *see also United States v. Bremer*, 72 M.J. 624 (N-M. Ct. Crim App. 2013) (military judge conceded out-of-court comments were from prospective of hard-charging trial counsel seeking justice); *infra* Section C.2.c.

313. She also stated that she had made decisions "in terms of witness credibility" that "would suggest to an impartial person looking in that I can't be impartial in this case." *Id.* Since this candid acknowledgement came at the beginning of trial, before the judge "ruled on evidence, asked questions, responded to member questions, or determined instructions," she was disqualified and abused her discretion by continuing to sit on the case. *Id.* at 314.

In *Kish*, a military judge "adopted the persona of a hard-charging prosecutor" and made extrajudicial statements after appellant's trial communicating "a general impression that he believed trial counsel were underperforming, insufficiently zealous, or deficient in preparation of their cases." (J.A. 47.) With those "comments as backdrop," the court was alarmed by the judge's decision to "commandeer" the examination of a key witness by asking her a total of 234 questions. (J.A. 47.) These included an "exhaustive and frequently inane" discursion into an incident of uncharged sexual misconduct. (J.A. 47.) "It would thus appear that the military judge became a second prosecutor to show trial counsel how it should be done," thus creating an appearance of impartiality. (J.A. 47) (internal quotation marks omitted).

Unlike *McIlwain*, in this case the Military Judge's conduct prior to and during the trial attracted neither voir dire nor a recusal motion. It was only after the trial, when Lieutenant Colonel Norman could no longer affect Appellant's due

process rights, that his conduct came into question. And unlike *Kish*, here there was no unusual behavior by Lieutenant Colonel Norman during the trial itself. Aside from the post-trial comments, the only conduct that Appellant now objects to are Lieutenant Colonel Norman's adverse decisions and occasional criticisms, which fall clearly into the category of "judicial rulings, routine trial administration efforts, and ordinary admonishments." *Liteky*, 510 U.S. at 555.

ii. Lieutenant Colonel Norman's comments on the severity of the offense were opinions formed on the basis of facts introduced in the course of the current proceedings.

In *Liteky*, the Supreme Court noted, "The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person." 510 U.S. at 550-51. The Supreme Court continued, "But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings." *Id*. at 551.

Here, Lieutenant Colonel Norman asked Trial Counsel if "there were 'worse' sexual assault cases th[a]n the instant case." (J.A. 1381.) He then listed the aggravating facts of this case and criticized Trial Counsel for not mentioning them during their sentencing argument. (J.A. 587.)

As in *Liteky*, Lieutenant Colonel Norman's assessment of the aggravating

facts of this case were based on evidence admitted at trial. Even if Lieutenant Colonel Norman believed Appellant to be a "thoroughly reprehensible person" based on the evidence admitted at trial, that is not grounds for recusal. *Liteky*, 510 U.S. at 550–51. Nor is it grounds, as Appellant suggests, to retroactively apply a presumption of bias to all of Lieutenant Colonel Norman's rulings and admonishments throughout the trial, when in fact they were part of his duty to properly preside over court proceedings under R.C.M. 801. Comments about appellant's crime were "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings," which are not grounds for recusal. *Liteky*, 510 U.S. 550–51.

At worst, the Record shows that Lieutenant Colonel Norman became convinced during the trial that Appellant's crime was a reprehensible one. He then criticized Trial Counsel's failure to use that aggravating evidence and push for a harsher sentence. His ex parte comments were unwise, but they do not suggest a "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Liteky*, 510 U.S. at 556.

iii. Lieutenant Colonel Norman's comments on sentencing philosophy and pretrial negotiations did not evince a personal bias or deep-seated antagonism against Appellant.

Lieutenant Colonel Norman discussed sentencing and pretrial negotiations with Trial Counsel in the post-trial ex parte communication. The Record reflects

he "stated that when Trial Counsel 'caps' the sentence by asking for less than the maximum amount of confinement, the Defense have no incentive to avoid contested trials." (J.A. 1382; Appellant Br. at 42.)

In *United States v. Burton*, this Court found no bias when a military judge in a bench trial harshly questioned a staff sergeant who took the stand during sentencing after being convicted for cocaine use. 52 M.J. 223, 226 (C.A.A.F. 2000). The questions "reflected his judicial sentencing philosophy and not any personal bias against appellant." 52 M.J. 223, 226 (C.A.A.F. 2000). Being a "tough judge" is not grounds for disqualification. *Id*.

As in *Burton*, Lieutenant Colonel Norman's decision to express a general philosophy on sentencing and pretrial negotiations—even a tough philosophy—does not evince personal bias against Appellant. That is particularly true because, unlike *Burton*, Lieutenant Colonel Norman did not serve as the sentencing authority and his comments came after adjournment.

Appellant's attempt to link the ex parte communications to Lieutenant Colonel Norman's pre-trial comments fails because, as described above, the "lesson" Lieutenant Colonel Norman referred to was about Defense Service Offices assigning new counsel to try to raise late issues. *Supra* Section C.2.a; (Appellant Br. at 42.) There was no "connection" between these comments that can establish he "held his biased view against the Defense through the entire court-

martial." (Appellant Br. at 42.)

Since no evidence shows that Lieutenant Colonel Norman's views of sentencing resulted in him prejudging the facts or outcome, Appellant's due process rights were not impacted. *See Franklin v. McCaughtry*, 398 F. 3d 955, 962 (5th Cir. 2005) ("We are not saying that due process would be offended if a judge presiding over a case expressed a general opinion regarding a law at issue in a case before him or her. The problem arises when the judge has prejudged the facts or the outcome of the dispute before her.") (citation omitted).

Lieutenant Colonel Norman's comments about Trial Counsel's sentencing practice did not display "deep-seated and unequivocal antagonism that would render fair judgment impossible"—particularly because he was not the sentencing authority, and the comments were made after the Members decided on the sentence. (J.A. 497); *Liteky*, 510 U.S. at 556.

e. Lieutenant Colonel Norman's assertion of impartiality carries great weight and was not unduly self-serving.

A military judge's assertion of impartiality carries great weight. *United States v. Kratzenberg*, 20 M.J. 670, 672 (A.F.C.M.R. 1985). "[D]espite an objective standard, the judge's statements concerning his intentions and the matters upon which he will rely are not irrelevant to the inquiry." *Wright*, 52 M.J. at 141.

This Court in *McIlwain* placed significant weight on the military judges' self-assessment of her impartiality, holding that she erred by refusing to recuse

herself even after acknowledging that her participation in a companion case "would suggest to an impartial person looking in that [she] can't be impartial in this case." *McIlwain*, 66 M.J. at 313, 314. "That she sat on companion cases does not, without more, mandate recusal." But after the judge "announced that her participation 'would suggest to an impartial person looking in that I can't be impartial in this case,' such a person would question her impartiality." *Id*. at 314.

In *United States v. Norfleet*, the court found no bias where the military judge was part of the same legal services command as the convening authority and the defendant. 53 M.J. 262, 270 (C.A.A.F. 2000). The *Norfleet* court emphasized that "where the military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has a 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 R.C.M. 902(a) are fully met." *Id*. Full disclosure and "his reasonable disavowal of any impact on his decision making, obviated any requirement for disqualification under R.C.M. 902(a)." *Id*. at 269.

Here, as in *Norfleet*, Lieutenant Colonel Norman stated at a post-trial 39(a) session that "I've remained completely impartial throughout this trial and remain impartial now." (J.A. 502–03.) This was in response to Appellant's Motion for appropriate relief under R.C.M. 902. (J.A. 1354–63); *see McIlwain*, 66 M.J. at

313. Since this Court in *McIlwain* gave weight to a military judge's self-assessment of her impartiality, it should decline Appellant's invitation to dismiss Lieutenant Colonel Norman's statement as a "self-serving unsworn statement" underlining "the necessity of his recusal." (Appellant Br. at 45); *see McIlwain*, 66 M.J. at 314.

Appellant's relies on *United States v. Bremer*, 72 M.J. 624 (N-M. Ct. Crim. App. 2013), but the facts there are distinguishable. There, a military judge whose impartiality was questioned "opened the hearing with a prepared series of pronouncements that cover six single-spaced pages of transcript[.]" *Id.* at 626. Although he "purported to accept responsibility" for his comments at a training event, he was "defensive and transparently critical of two junior judge advocates" before launching into a "lengthy description of a trial counsel's errors" during a recent case. *Id.* at 627. He insisted his comments had been "play-acting" and arranged for a senior judge advocate to "give what amounted to a character defense[.]" *Id.* He allowed trial counsel to ask a witness whether she agreed that the judge had "a brilliant legal mind" and whether she was "astounded by his ability to cite case law from memory." *Id.* It was this "uncommon" set of facts that led the court to conclude that the judge's "attempt to fill the record with enough facts to dispel the appearance of bias only made him look more self-interested." *Id.* at 628.

Here, by contrast, Lieutenant Colonel Norman made a statement at the post-trial hearing that put on the Record what he remembered saying and what he meant by it. (J.A. at 502–07.) He insisted that he had been impartial throughout the trial, and then recused himself so another judge could hear Appellant's Motion. (J.A. at 502–03, 506–07.) Absent were the bizarre measures cited in *Bremer*—by comparison, Lieutenant Colonel Norman simply put his reasoning on the Record in full knowledge that another judge would make the ultimate decision. Even Appellant acknowledges that Lieutenant Colonel Norman's statement "is helpful in evaluating the issue of bias as it corroborates much of what the other witnesses said[.]" (Appellant's Br. at 61.)

Appellant claims that Lieutenant Colonel Norman's recusal from ruling on the post-trial Motion is itself proof of bias. But that cannot be the case. If a military judge notices an appearance of bias issue, relying on another military judge's assessment could prevent military judges from stepping down unnecessarily and avoid the reversible errors this Court ruled on in *McIlwain*. (Appellant Br. at 45); *see McIlwain*, 66 M.J. at 314; *see United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000).

Lieutenant Colonel Norman's statements at a post-trial 39(a) session about his impartiality were part of "judicial rulings" and "routine trial administration efforts." *Liteky*, 510 U.S. at 556 . Since there is nothing about those on-the-

Record statements that shows a "deep-seated favoritism or antagonism that would make fair judgment impossible," they are not a proper basis for disqualification. (J.A. 502-503.); *see McIlwain*, 66 M.J. at 314; *see Liteky*, 510 U.S. at 555.

2. Colonel Woodard did not abuse his discretion by finding: (1) he had no personal bias against Appellant; and (2) when viewed objectively, a reasonable person knowing all the facts and circumstances would not reasonably question his impartiality.

In *Uribe*, this Court noted that professional relationships are the norm between judge advocates and "the proper focus of our inquiry is whether the relationship between a military judge and a party raises *special* concerns, whether the relationship was *so close or unusual* as to be problematic, and/or whether the association *exceeds* what might *reasonably be expected* in light of the normal associational activities of an ordinary military judge." 80 M.J. at 447 (citations and quotations omitted) (emphasis in original).

At the post-trial hearing, Appellant moved for Colonel Woodard to recuse himself based on his prior professional relationship with Lieutenant Colonel Norman. However, unlike in *Uribe*, where the trial counsel attended the military judge's bachelor party and wedding, no special concerns exist here. "Mere suspicion or conjecture will not suffice." *Kincheloe*, 14 M.J. at 50. There was nothing unusual with the professional relationship between Colonel Woodard and Lieutenant Colonel Norman. *See also United States v. Martinez*, 70 M.J. 154, 158-59 (C.A.A.F. 2011) (apparent bias when judge's supervisor visits chambers during

deliberations).

Notably, Appellant declined to re-raise this argument in his current appeal.

D. Colonel Woodard did not abuse his discretion. Appellant identifies no clearly erroneous Findings of Fact, Colonel Woodard applied the correct law, and his conclusions were within the range of reasonable choices.

1. Each of Colonel Woodard's Findings of Fact were supported by the Record. Appellant fails to prove otherwise.

"A finding of fact is clearly erroneous when there is no evidence to support the finding or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Harrington*, 81 M.J. 184, 189 (C.A.A.F. 2021). Appellant asserts a total of ten erroneous Findings of Fact by Colonel Woodard; these are addressed in turn.

First, the Finding that "Lieutenant Colonel Norman never stated that the trial counsel should have asked for more than the [eleven] years of confinement" was not clearly erroneous. (Appellant Br. at 52; J.A. 1415.) Assistant Trial Counsel testified Lieutenant Colonel Norman never told them "to ask for a specific sentence" and did not tell them they should have asked for more confinement. (J.A. 610, 643.) This is not a situation where there is "no evidence to support" the Finding; rather, Appellant simply disagrees about how certain testimony should be

interpreted. *See Harrington*, 81 M.J. at 189. Such disagreement is not sufficient to show an abuse of discretion when a Finding is supported by the Record. *Id.*

Second, Appellant similarly disagrees with the Finding that "Lieutenant Colonel Norman never stated or suggested that any accused or specifically the accused in this case, [Appellant], should pay a price." (Appellant Br. at 53; J.A. 1414-15.) Appellant insists this contradicts an earlier Finding, but ignores the difference between a price to be paid by Trial Defense Counsel and a price to be paid by Appellant himself. The earlier Finding was that "Lieutenant Colonel Norman referenced the *defense counsel* paying a price for their earlier actions at trial. (Appellant Br. at 53; J.A. 1415) (emphasis added).

Lieutenant Colonel Norman discussed the "price" defense counsel might pay—including "censure, contempt, reporting to state bars." (J.A. 1459.) None of these "prices" have anything to do with Appellant himself. Furthermore, although Lieutenant Colonel Norman admonished Trial Counsel for their sentencing practices, the Record supports the Finding that Lieutenant Colonel Norman never suggested that *Appellant*—who had already been sentenced—should be punished that practice.

Third, the Finding that "at no point . . . did any counsel believe given the nature of the conversation—objective feedback and criticism of their performance, they should attempt to end the conversation" was supported by the Record and not

clearly erroneous. (J.A. 1416; Appellant Br. at 54.) Lead Trial Counsel testified, "I took it as him trying to give us, you know, objective feedback." (R. 640.) This is, at most, a difference of opinion between Appellant and Colonel Woodard about how to weigh and interpret testimony. Colonel Woodard did not abuse his discretion.

Fourth, the Finding that Lieutenant Colonel Norman "did not focus on the accused" is supported by Trial Counsels' initial disclosure of the *ex parte* communication. (Appellant Br. at 54, 56; J.A. 1424.) Trial Counsel's disclosure outlines how Lieutenant Colonel Norman was critical of the "performance of Trial Counsel" and "actions taken by the Defense in this case." (J.A. 1381.) These were critiques of the attorneys, not Appellant. Even if some of Lieutenant Colonel Norman's criticisms referenced Appellant's case as an example, it does not follow that their *focus* was on Appellant. There is evidence in the Record to support this Finding. (Appellant Br. at 56; J.A. 1424); *Harrington*, 81 M.J. at 189.

Fifth, the Finding that "Lieutenant Colonel Norman did not express an[y] displeasure or disagreement with the adjudged sentence. He made no comment on the sentence actually adjudged by the members" is directly supported by testimony from Trial Counsel. (J.A. 1415; Appellant Br. at 56.) Appellant correctly cites the court reporter's statement that "[i]t did appear that he seemed upset about [three] years," but this was speculation by the court reporter commenting on how

Lieutenant Colonel Norman *appeared*. (Appellant Br. at 56.) By contrast, the Second Assistant Trial Counsel testified Lieutenant Colonel Norman "did not *state* whether" he agreed with the sentence recommendation of eleven years or not. (Appellant Br. at 56; J.A. 586, 617) (emphasis added).

[redacted]

Seventh, the Finding that Lieutenant Colonel Norman "did not exhibit favoritism for one side over the other" is directly supportable by admonishments he made to Trial Counsel, including for Appellant being out of regulations for appearance in court and for Trial Counsel's questioning of a witness. (Appellant Br. at 57–58; J.A. 117–20, 1425.) Lieutenant Colonel Norman also made numerous rulings in favor of Appellant and against the United States. (*See e.g.*, J.A. 94 (denying United States motion to have a witness testify telephonically); J.A. 208 (sustaining Appellant's objection to question calling for speculation);

J.A. 415 (same).) Appellant's argument that "there is no evidence to support the finding" is contradicted by the Record. *Harrington*, 81 M.J. at 189.

Eighth, the Finding that "the Government's case was strong and included Appellant's recorded admission" is supported by ample evidence. The United States provided eyewitness testimony from the Victim, Appellant's co-assailant, evidence of the Victim's injuries, and expert testimony interpreting those injuries. (J.A. 203, 244–47, 250, 255, 258–59, 263, 269, 315, 327–28, 367–68, 373–74, 389.) This evidence supported Colonel Woodard's Finding that "the Government's case was strong;" Appellant's differing opinion on that point does not make an abuse of discretion. (Appellant Br. at 58–59); *see Harrington*, 81 M.J. at 189. The Finding that there was a "recorded admission" is also accurate, since Appellant did make a recorded statement admitting to sexual contact with the Victim. (J.A. 1285, 1293–94.) Contrary to Appellant's claims, Colonel Woodard never found that this "recorded admission" amounted to an "admission of guilt." (J.A. 1426; Appellant Br. at 59.)

Ninth, the Findings that "[a]ll that remained for Lieutenant Colonel Norman to do in the trial was to issue the Statement of Trial Results and make Entry of Judgment" and that the *ex parte* conversation "occurred after the members had rendered their verdicts on findings and sentence" are accurate. Appellant does not even assert that they are unsupported by the Record. (Appellant Br. at 59–62); *see*

Harrington, 81 M.J. at 189. Appellant tries to connect these objective observations, which speak to why the *ex parte* communication had no effect on the verdict, to comments Lieutenant Colonel Norman made about the Trial Defense Counsel paying a "price." (Appellant Br. at 59–60). The connection is unclear, but it is evident that Colonel Woodard did not abuse his discretion in making these Findings of Fact.

Finally, Appellant asserts that Colonel Woodard was over-reliant on Lieutenant Colonel Norman's "self-serving unsworn statement" and ignored "other conflicting evidence." (Appellant's Br. at 61). Since each of the Findings of Fact was supported by the Record, as explained above, this is less an abuse of discretion claim and more an argument about how the evidence should be weighed. Appellant also claims that Lieutenant Colonel Norman received "special treatment," and implies that Colonel Woodard himself was biased. (Appellant's Br. at 60.) This ignores the facts, since the unusual conduct of the hearing was largely due to Trial Defense Counsel's decision to file a professional responsibility complaint against Lieutenant Colonel Norman. (J.A. at 663.)

2. Colonel Woodard applied the correct law, and his conclusions were within the range of reasonable choices.

Appellant does not assert Colonel Woodard applied incorrect law. (Appellant Br. at 52–62.) Colonel Woodard reviewed the Record for actual bias and apparent bias, as required by R.C.M. 902. (J.A. 1418–20.)

E. The *Liljeberg* factors weigh against reversal. Colonel Woodard did not abuse his discretion finding Appellant's trial did not warrant reversal.[2]

A "military judge's determination on a mistrial will not be reversed absent clear evidence of an abuse of discretion." *United States v. Rudometkin*, 82 M.J. 396, 400 (C.A.A.F. 2022) (citation omitted).

"[N]ot every judicial disqualification requires reversal . . . ." *Uribe*, 80 M.J. at 449 (quoting *Martinez*, 70 M.J. at 158). Thus, courts must apply the factors outlined in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), "to determine whether a military judge's conduct warrants that remedy to vindicate public confidence in the military justice system." *Martinez,* 70 M.J. at 158. The three *Liljeberg* factors are: (1) is there "any specific injustice that [the appellant] personally suffered"; (2) would granting relief "encourag[e] a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered"; and (3) whether objectively the circumstances

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[2] The United States maintains its position that the application of the *Liljeberg* factors is inconsistent with Article 59(a). *See United States v. Upshaw*, 81 M.J. 71, 79 (C.A.A.F. 2021) (Maggs, J., dissenting) (summarizing argument). However, the United States recognizes this Court's precedent. *See, e.g.*, *United States v. Davis*, 76 M.J. 224, 228 (C.A.A.F. 2017) ("It is this Court's prerogative to overrule its own decisions." (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989))), which directs the application of *Liljeberg*, *see, e.g.*, *Martinez*, 70 M.J. at 159.

"will risk undermining the public's confidence in the military justice system." *Id.* (quoting *Liljeberg*, 486 U.S. at 868.)

1. Nothing in the Record suggests Appellant suffered "any specific injustice" from Lieutenant Colonel Norman's participation in his court-martial.

In *Uribe*, the plurality noted the "[a]ppellant has not identified any specific injustice he suffered at the hand of this military judge," and "the mere fact that the military judge adversely ruled on some of [a]ppellant's motions and objections does not necessarily demonstrate any risk of prejudice." 80 M.J. at 449; *see also Marcavage v. Bd. of Trs. of Temple Univ. of the Commonwealth Sys. of Higher Educ.*, 232 F. App'x 79, 84 (3d Cir. 2007) (noting trial judge's rulings "were all correct" and there was "no prejudice . . . as a result of these rulings").

Here, as in as in *Uribe*, Appellant has not "identified any specific injustice he suffered at the hands" of Lieutenant Colonel Norman." *See* 80 M.J. at 449; (Appellant Br. at 64–65). The mere fact that Lieutenant Colonel Norman adversely ruled on some of Appellant's Motions "does not necessarily demonstrate any risk of prejudice." *See Uribe*, 80 M.J. at 449. Lieutenant Colonel Norman did not abuse his discretion in any of his rulings, including those raised again on appeal. After a thorough review, the lower court ruled that Lieutenant Colonel Norman did not abuse his discretion for [redacted]

[redacted] denying Appellant's request for a specific expert consultant, or denying Appellant's challenge to two Members. (J.A. 11, 16, 20.)

Nor did Lieutenant Colonel Norman "rule uniformly in the Government's favor." *See Uribe*, 80 M.J. at 449–50; (J.A. 1426). Rather, he made numerous rulings in favor of Appellant and against the United States. *See, e.g.*, (J.A. 94 (denying United States motion to have a witness testify telephonically); J.A. 208 (sustaining Appellant's objection to question calling for speculation); J.A. 415 (same)).

Appellant only argues that certain "rulings *could* have gone in Appellant's favor." (Appellant Br. at 65.) A mere disagreement with Lieutenant Colonel Norman's rulings, which fall squarely within his discretion as Military Judge, is not an argument that Appellant suffered an injustice. Thus, this factor weighs against reversal because Appellant fails to identify "any specific injustice." *Uribe*, 80 M.J. at 449.

2. <u>There is no risk of injustice in other cases</u>.

In *Butcher*, the judge played tennis with the trial counsel and attended a social event at his home during trial. 56 M.J. at 89. Based on the court's "collective experience" and "review of thousands of records of trial," it was "not necessary to reverse the results of the present trial in order to ensure that military judges exercise the appropriate degree of discretion in the future." *Id.* at 92–93.

The court also noted "the Government ha[d] not asked [the Court] to endorse the military judge's conduct." *Butcher*, 56 M.J. at 93.

As in *Butcher*, Colonel Woodard did "not condone or approve of Lieutenant Colonel Norman's post-trial ex parte communications with the trial counsel." (J.A. 1423); *see Butcher*, 56 M.J. at 93. Military judges are "highly sensitive" to the problems that can be posed by ex parte communications and reversing Colonel Woodard's ruling is not "necessary" to ensure "military judges exercise the appropriate degree of discretion in the future." *See id*.

Furthermore, Appellant incorrectly characterizes the communication, arguing Lieutenant Colonel Norman urged the trial counsel to "make an appellant sorry for exercising their rights not just here, but in every case." (Appellant Br. at 66.) Lieutenant Colonel Norman explained that "zealous advocacy on sentencing supports effective pretrial negotiations. In most systems, the accused gets some sentencing benefit for an early pretrial agreement. This encourages efficiency and cost savings." (J.A. 503.) Lieutenant Colonel Norman advised Trial Counsel that "when government undervalues a case in sentencing . . . it acts like a self-imposed cap on the sentence without the benefit . . . to the government of a plea agreement." (R. 503–04.) These are observations about the nuances of plea negotiations—not a denigration of Appellant's right to plead not guilty.

Consequently, Colonel Woodard did not abuse his discretion by finding the second factor—the need to dissuade future judges—weighed against reversal.

3. There is no risk of undermining the public's confidence in the integrity of the judicial system, and courts rarely reverse based on this factor alone.

The third *Liljeberg* factor is broader than R.C.M. 902(a). *Martinez*, 70 M.J. at 160. This Court reviews "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." *Id.* This Court may also consider "how [the military justice] system respond[ed] once it has been determined that a military judge was disqualified under R.C.M. 902(a) and should have been recused." *Id.*

The Court of Appeals for the Armed Forces generally invokes the third *Liljeberg* factor to reverse only when specific prejudice exists. For example, in *United States v. Witt*, 75 M.J. 380 (C.A.A.F. 2016), the loss in public confidence due to disqualified judges participating in reconsideration was linked to specific prejudice—re-imposition of a vacated death sentence. *Id.* at 384. In *United States v. McIlwain*, 66 M.J. 312 (C.A.A.F. 2008), the loss in public confidence from the judge's refusal to recuse was linked to specific prejudice from "making a number of decisions, any one of which could affect the member's decision as to guilt or innocence, or with regard to the sentence." *Id.* at 314–15 & n.2.

In *Rudometkin*, the appellant—convicted of adultery—discovered post-trial that the military judge was involved in an inappropriate relationship. 82 M.J. at 397–98. He filed a post-trial motion seeking a mistrial. *Id.* A new military judge was appointed, and the motion was denied. *Id.* at 397–99. The court found the second military judge did not abuse his discretion declining to declare a mistrial. *Id.* at 402. The court noted that despite the "general similarity between some [of the] charged conduct," the third *Liljeberg* factor favored no mistrial because "fully informed members" would agree it was "very unlikely that injustices will occur in other cases." *Id.* at 402.

Here, as in *Rudometkin*, Colonel Woodard did not abuse his discretion by declining to dismiss the case or declare a mistrial. The claimed bias here—a belief in harsh punishments—was less directly tied to the case than in *Rudometkin*, where the military judge was committing adultery while deciding whether to find the appellant guilty of the same offense. And unlike the military judge in *Rudometkin*, who determined the appellant's guilt and sentenced him, Appellant was tried and sentenced by the Members—further obviating any perceived unfairness.

In sum, because Lieutenant Colonel Norman's participation did not "risk undermining the public's confidence in the military justice system" under *Liljeberg*, no "clear evidence" exists that Colonel Woodard abused his discretion

by declining to dismiss the case or declare a mistrial. *See Rudometkin*, 82 M.J. at 401.

Conclusion

The United States respectfully requests that this Court affirm the lower court's decision.

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