IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	
Master Sergeant (E-8) **ALLAN L. ARMSTRONG,** United States Army, Appellant	)	USCA Dkt. No. 24-0002/AR
	)	Crim. App. Dkt. No. 20210644

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

Granted Issue

WHETHER THE MILITARY JUDGE'S DEPARTURE FROM IMPARTIALITY DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 866. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On 13 July, 18 October, and 7–10 December 2021, a panel with enlisted representation sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ]. (JA 3).[1] The panel sentenced appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for seven years, and a dishonorable discharge. (JA 92). The convening authority took no action on the adjudged sentence. (Convening Authority Action and Attachment). On 26 January 2022, the military judge entered judgment. (Judgment of the Court). The Army Court summarily affirmed the finding and sentence. *United States v. Armstrong*, ARMY 20210644, 2023 CCA LEXIS 340 (Army Ct. Crim. App. August 2, 2023).

Summary of Argument

The military judge did not abuse her discretion when she denied the defense motion for recusal, appropriately finding that she was neither actually nor impliedly biased. The military judge appropriately exercised her authority under R.C.M. 801 to exert control over the demeanor and decorum of the court room, and no "reasonable person . . . unfamiliar with the case observing the proceedings"

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[1] The panel acquitted appellant of one specification each of sexual assault and abusive sexual contact, in violation of Article 120, UCMJ. (JA 3).

would conclude that the military judge was biased. (JA 50–51). Therefore, the military judge did not err in denying appellant's motion for recusal under R.C.M. 902(a).[2] Further, even if this Court finds the military judge did abuse her discretion in denying appellant's recusal motion, reversal is not warranted because appellant has failed to satisfy any of the three prongs under *Liljeberg*. *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 862 (1988).

Statement of Facts

Appellant was charged with three specifications of sexual assault against two victims, including a sexual assault of Ms. ME on or about 30 September 2019. (JA 3). Appellant was represented by a civilian defense counsel and a trial defense counsel at his court-martial. (*See* JA 16, 20).

During the cross-examination of ME, trial counsel objected to civilian defense counsel's question based on Military Rule of Evidence [Mil. R. Evid.] 412. (JA 42). The military judge responded by stating,

> You're exceeding the—that was never *brought out on cross examination, Mr.—I'm sorry. Your name escapes me right now, although I'm looking right at you. Mr. Johnson. Joseph. Help me out here. What is your name? Jordan. Okay. I knew it stated with a "J." That was not* brought out on direct examination, Mr. Jordan.

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[2] The parties on the record use "recusal" interchangeably with "disqualification," as it relates to R.C.M. 902(a).

(JA 13, 42).[3] As civilian defense counsel attempted to recount what ME had testified to on direct examination, the military judge interrupted him, saying, "I'm not asking you for a debate. I'm saying that was not brought out, do we need to discuss this further? If we do, then I will send the court members to the deliberation room while we hash it out." (JA 42). The defense then requested an Article 39(a) session. (JA 42).

Once the panel members withdrew from the courtroom, civilian defense counsel and trial counsel argued their positions on the potential Mil. R. Evid 412 testimony of ME, which involved her reasons for not wanting to have sex with appellant. (JA 42–44). Civilian defense counsel affirmed to the military judge that he would follow her previous order and not exceed the scope. (JA 43). In response, the military judge said, "Okay. Mr. Jordan, thanks for allowing me to flounder when I couldn't remember your name. I'm taking you at your word that you're not going to ask the question that I specifically ruled on that you could not ask, that was specified in your 412 motion." (JA 44). Following up, the trial counsel asked the military judge to clarify the relevance of defense counsel's question, and civilian defense counsel offered to recite the questions he intended to ask ME. (JA 44). As defense counsel began, the military judge stated, "I would

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[3] The italicized language was not included in the transcript but is in the audio. No evidence suggests that this exclusion was anything more than a scrivener's error.

appreciate it if you kept your voice down, slightly. . . . That sounded like the volume escalated." (JA 45). Civilian defense counsel apologized and said it was unintentional, to which the military judge replied, "Good. I'm glad to hear. I was just concerned you were doing it on purpose. But I'm glad to hear that you did not mean that." (JA 45). Then, as defense counsel continued, the military judge asked him to stop, so that she could ask a clarifying question. (JA 46). Defense counsel challenged the military judge on her Mil. R. Evid. 412 ruling on the relevance of any inconsistency in ME's reasons for not wanting to engage in sex with appellant. (JA 46–47). As defense counsel continued to argue, the military judge said, "Mr. Jordan[,] stop," and the following exchange occurred:

> CDC: —those reasons came out.
>
> MJ: Mr. Jordan.
>
> CDC: On three different occasions or to three different entities. I have to make a record, Your Honor, if you're going to overrule me, I need to make a record.
>
> MJ: Keep your voice down. Don't talk over me talking. When I'm talking you shut up.
>
> CDC: And you remember my name, Your Honor.
>
> MJ: You are trying my patience right now. I didn't forget your name on purpose. I wasn't trying to be disrespectful to you, as you are currently trying to be to me. And I'm not going to tolerate it. That was an honest mistake on my part, forgetting your name. But you are the Defense Counsel and I'm the judge and I make the rulings. When

> I'm speaking, you shut your mouth. And do not, do you hear me, do not attempt to disrespect me that way again. Are we clear?
>
> CDC: Disrespect you—
>
> MJ: We're going to take a five minute recess and we're going to come back. You're going to gather yourself and you are going to conduct yourself in an appropriate manner.

(JA 47). After the parties returned from the 27-minute recess, military defense counsel asked for the military judge's recusal, "under R.C.M. 902(a), actual and implied bias against the defense team." (JA 48).

In support of the motion for recusal for actual bias, military defense counsel requested to elicit testimony from "a member of the audience," ultimately naming their expert consultant's executive assistant. (JA 48). Military defense counsel explained, "Your Honor, the reason I say that is because the standard for this motion is what a reasonable person would think. She's a reasonable member of the audience at this time." (JA 49). The military judge denied the request, stating the proposed witness "does not qualify as someone who is unconnected with the case." (JA 49). Defense counsel argued further in support of actual bias that "there has been a lot of talking over each other," and the military judge "indicated a bias towards Mr. Jordan, i.e. shut your mouth, shut up, those words." (JA 50). The

military judge found she was not "actually biased" against civilian defense counsel or the defense team and refused to recuse herself. (JA 50).

Turning to implied bias, military defense counsel reiterated the military judge's comments to civilian defense counsel, such as "shut up" and "shut your mouth." (JA 50). Military defense counsel described the exchange between civilian defense counsel and the military judge as "a pretty verbal, knockdown drag out fight." (JA 50). The military judge interrupted counsel by stating that he presented no context, and "taken out of context, I don't believe you are reasonably conveying what occurred." (JA 50–51). The military judge found that she was not impliedly biased and did not think a reasonable person who was unfamiliar with the case observing the proceedings would come to that conclusion. (JA 51).

Military defense counsel again asked to call a witness and the military judge initially denied the request, stating "No. I was here. I was present." (JA 51). Civilian defense counsel then argued that calling a witness was necessary to create a record on his client's behalf and preserve the issue for appellate review. (JA 51). After acquiescing that they would not call a member of the defense team, military defense counsel requested to call the bailiff, First Lieutenant (1LT) EK, which the military judge allowed. (JA 52).

First Lieutenant EK testified that he was present throughout the entire proceedings, heard the exchange between civilian defense counsel and the military

judge, was not attached to the defense team or prosecution, and that it was his first time ever in court. (JA 53–54). First Lieutenant EK stated that he heard civilian defense counsel speak over the military judge and heard the military judge tell civilian defense counsel to shut up. (JA 53–54). Referencing the incident where the military judge forgot civilian defense counsel's name, 1LT EK said that the military judge "said she was sorry and admitted to making a mistake." (JA 54). First Lieutenant EK stated that his perception was that if a judge tells you to stop talking, you should stop talking. (JA 54–55). The military judge denied defense motion for recusal. (JA 56).

Once the panel members had returned to the courtroom, the military judge issued the following instruction:

> Before I asked you to return to the deliberation room, I just want to mention that before you go out to decide on findings, I'm going to provide you general instructions. And one of the instructions that I give you at that time, I'm going to read to you now. Which is that you must disregard any comment or statement or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty. Since you alone have the responsibility to make that determination. I raised that with you now just because of the exchange that I had with Mr. Jordan, earlier. I honestly had a senior moment and could not, for the life of me, remember his name. And that was not attended [sic] as any disrespect or slight to Mr. Jordan or to Master Sergeant Armstrong's defense. And I just want you to bear that in mind.

(JA 62–63). Civilian defense counsel then resumed cross-examination of ME. While asking about the order of events after appellant sexually assaulted her, the following exchange occurred:

> CDC: So, [appellant] puts his prosthetic leg back on, correct?
>
> WIT: No. He sat on the edge of the bed and tried to pull me onto the bed again.
>
> CDC: Well, that's your testimony, right?
>
> WIT: You asked me what happened and I'm answering what happened.
>
> CDC: Right, well –
>
> WIT: So, if you have a question about something other than that, then you can ask that.
>
> MJ: Thank you for doing my job for me, [ME].
> Mr. Jordan. I'm sorry, I almost blanked again. If you would confine your cross-examination to questions of the witness rather than testifying yourself and engaging in argument.
>
> CDC: Yes, Your Honor.
> He did put his prosthetic leg back on, correct?
>
> WIT: At one point, yes.

(JA 85–88). Aside from these exchanges between the military judge and civilian defense counsel, appellant cites to no other portions of the record to support his recusal argument in his four-day trial, totaling 580 transcribed pages.

Standard of Review

Military courts review a military judge's disqualification decision for an abuse of discretion. *United States v. Quintanilla*, 56 M.J. 37, 77 (C.A.A.F. 2001); *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015). A military judge abuses her discretion when:

> (1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record, (2) the military judge uses incorrect legal principles (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) the military judge fails to consider important facts.

United States v. Rudometkin, 82 M.J. 396, 401 (C.A.A.F. 2022) (citations omitted). "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." *Sullivan*, 74 M.J. at 453 (quoting *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013)).

Law

"An accused has a constitutional right to an impartial judge." *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (quoting *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999). This neutrality ensures "that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed against him." *Marshall v.*

Jerico, Inc., 446 U.S. 238, 242 (1980). Accordingly, military judges "must avoid undue interference with the parties' presentations or appearance of partiality" when exercising reasonable control over the proceedings. Rule for Courts-Martial [R.C.M.] 801(a)(3) discussion. This requirement of impartiality does not mean that the military judge should act as "simply an umpire in a contest between the government and the accused." *Quintanilla*, 56 M.J. at 43 (citing *United States v. Kimble*, 49 C.M.R. 384, 386 (C.M.A. 1974). Military judges must also exercise control of the proceedings by ensuring "that the dignity and decorum of the proceedings are maintained" as "courts-martial should be conducted in an atmosphere which is conducive to calm and detached deliberation and determination of the issues presented and which reflects the seriousness of the proceedings." R.C.M. 801(a)(2) discussion. This court has analogized the military judge's role to walking on a tightrope, "exercising evenhanded control of the proceedings without veering, or appearing to veer, too far to one side or the other." *Quintanilla*, 56 M.J. at 43.

The validity of the military justice system and the integrity of the court-martial process "depend on the impartiality of military judges in facts and in appearance." *Hasan v. Gross*, 71 M.J. 416, 419 (C.A.A.F. 2012); *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021). R.C.M. 902(a) mandates that a military judge "shall disqualify himself or herself in any proceedings in which the military

judge's impartiality might be reasonably questioned." *Uribe*, 80 M.J. at 446. The test for identifying an appearance of bias is "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might be reasonably questioned." *Sullivan*, 74 M.J. at 453. This test is under an objective standard. *Id.*

When deciding whether the military judge should disqualify herself, R.C.M. 902(a) explicitly directs the military judge, not the parties or other judges, to make that determination. While a military judge "should broadly construe grounds for challenge," she "should not step down from a case unnecessarily." R.C.M. 902(d) discussion. A military judge "has as much obligation not to disqualify h[er]self when there is no reason to do so as [s]he does to disqualify h[er]self when the converse is true." *United States v. Kincheloe*, 14 M.J. 40, 50 n.14 (C.M.A. 1982) (internal quotation marks omitted) (quoting *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976)). "A party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *Quintanilla* at 44 2001). Accordingly, a strong presumption exists that a military judge is impartial. *Id.*

Argument

The military judge did not abuse her discretion when she found that she was not "actually biased." She also did not abuse her discretion when she found that a

"reasonable person who is unfamiliar with the case observing the proceedings" would not conclude that she was "impliedly" biased. (JA 50–51). Therefore, the military judge did not err in denying appellant's motion for recusal under R.C.M. 902(a).[4]

A. Not an abuse of discretion.

The military judge did not abuse her discretion when she denied the defense motion for recusal. Appellant has failed to show that the military judge's findings of fact were clearly erroneous, that the military judge's decision was influenced by an erroneous view of the law, or that the military judge's decision was outside the range of choices reasonably arising from the applicable facts and the law. *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

1. The military judge's findings of fact were not clearly erroneous, nor did she fail to consider important facts.

The military judge permitted defense counsel to present evidence for their motion for recusal, including the testimony of a third-party, the bailiff. (JA 52, 54). The military judge did not dispute any facts beyond stating that defense presented "no context" to the military judge telling defense counsel to stop talking and that she did not believe that defense counsel was "reasonably conveying what

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[4] The parties on the record use "recusal" interchangeably with "disqualification," as it relates to R.C.M. 902(a).

occurred." (JA 51). Additionally, appellant does not claim that the military judge made any findings of fact that were clearly erroneous. Thus, the military judge's findings of fact, in this case, provide no basis for concluding that she abused her discretion in denying the disqualification motion.

2. An erroneous view of the law did not influence the military judge's decision.

The military judge is presumed to know and follow the law, absent clear evidence to the contrary. *United States v. Rodriguez*, 60 M.J. 87, 90 (C.A.A.F. 2004). The military judge demonstrated her understanding of the pertinent principles of law throughout defense counsel's motion for her recusal. (JA 48–56). First, she acknowledged that the motion fell under RCM 902(a) yet considered it for both actual and implied bias. (JA 48). After she found that she was not "actually biased," she also found that she was not "impliedly" biased, and "a reasonable person who is unfamiliar with the case observing the proceedings" would not conclude that she was biased. (JA 50–51).

Next, the military judge permitted defense counsel to put "a reasonable person who is unfamiliar with the case" on the stand. (JA 51–52). Initially, defense counsel requested to have the "executive assistant" for the defense expert consultant testify in support of the motion. (JA 49). However, the military judge correctly found, and military defense counsel agreed, that the executive assistant

for the defense was "not unconnected" to the case. (JA 49, 52). Defense then decided to call one of the bailiffs, 1LT EK. (JA 51–52). While 1LT EK acknowledged that the military judge had told the civilian defense counsel to "shut up," he also acknowledged that "if the judge tells you, like, stop, you're supposed to stop, in a real court. (JA 54). . (JA 56).

Appellant now implies that the military judge invented this unconnected rule when the military judge denied defense counsel's request to put the assistant for the defense expert on the stand. (Appellant's Br. 7). "[The military judge] cited no rule or caselaw to support her denial of this defense witness." (Appellant's Br. 7). R.C.M. 902(d)(2) permits counsel "to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter." However, the discussion that follows the rule adds:

> Nothing in this rule prohibits the military judge from reasonably limiting the presentation of evidence, the scope of questioning, and argument on the subject as to ensure that only matters material to the central issue of the military judge's possible disqualification are considered, thereby preventing the proceedings from becoming a forum for unfounded opinion, speculation or innuendo.

R.C.M. 902(d)(2) discussion. The military judge applied this rule by allowing defense counsel to offer a "reasonable person from the audience" in support of their motion, but not permitting someone on the defense team, who is presumably

biased in favor of the defense team. (JA 51–52). Therefore, the military judge's view of the law provides no basis for concluding that she abused her discretion in denying the disqualification motion.

3. The military judge's decision was reasonable given the facts and law.

Citing R.C.M. 902(a), defense motioned to recuse the military judge for implied bias. (R. at 48). Appellant argues that the military judge "repeatedly interrupted defense to prevent them from giving an explanation or making a record of what they wanted to say." (Appellant's Br. 14–15). However, nothing appellant cited from the record supported that the military judge intended or, in fact, prevented them from making a record. (Appellant's Br. 15; JA at 35, 36, 42–43, 45–47, 50–51, 57, 86). On the contrary, the record shows that the military judge allowed defense to present their case. Early in the proceedings, the military judge interrupted defense counsel to ask if he wanted a specific hearing on the issue of recusal and granted them that hearing. (JA 35). Later, the military judge allowed defense counsel to clarify their position on a ruling when she stated, "Okay. I'm sorry, go ahead." (JA 36). Civilian defense counsel then interrupted the military judge on multiple occasions and appeared to raise his voice. (JA 43–45). In an attempt to exercise control over her courtroom, the military judge instructed civilian defense counsel: "Keep your voice down. Don't talk over me when I'm talking. When I'm talking you shut up." (JA 47). In response, civilian defense

counsel countered, "And you remember my name, Your Honor." (JA 47). The military judge then explained, "I didn't forget your name on purpose. I wasn't trying to be disrespectful to you, as you are currently trying to be to me." (JA 47).

Nothing in this exchange between the military judge and civilian defense counsel supports appellant's assertion that the military judge prevented them from making a record. To the contrary, the military judge complied with Rule for Courts-Martial 801 by exercising reasonable control over the proceedings and ensuring dignity and decorum were maintained. R.C.M. 801(a)(2–3). More importantly, after initially denying the defense request for a witness, the military judge entertained further argument from civilian defense counsel. (JA 51). Upon reconsideration, the military judge allowed the defense to call 1LT EK, "a member of the audience . . . not . . . connected with the defense team." (JA 52).

Regarding implied bias, appellant argues that a reasonable person would question the military judge's impartiality. (JA 48). Suggesting "tempers can certainly get high" in a courtroom, the trial defense counsel argued, "if the judge is telling defense counsel to again shut up, shut your mouth, that would imply that there is already some animus . . . effectively a pretty verbal, knockdown drag out fight." (JA 50). In response, the military judge correctly found that trial defense counsel took her comments out of context and that he was not "reasonably conveying what occurred." (JA 50–51). She found that "a reasonable person who

is unfamiliar with the case observing the proceedings" would not find her impliedly biased. (JA 51).

The military judge permitted defense counsel to call "a member of the audience," not "connected with the defense team," to testify in support of their recusal motion, and they identified the bailiff, 1LT EK. (JA 52). As one may expect with most laypeople, 1LT EK had no prior courtroom experience other than what he had seen on television. (JA 54). However, 1LT EK's testimony did not support defense counsel's allegations of bias. While 1LT EK acknowledged that he heard the military judge speak over the civilian defense counsel and tell him to shut up, he stated that he also heard the civilian defense counsel speak over the military judge. "The judge was saying stop, [and civilian defense counsel] kept going." (JA 53). (JA 53–54). First Lieutenant EK believed that "if the judge tells you, like, stop, you're supposed to stop, in a real court. . . . If the judge is the final decision maker and [says stop], then I would stop." (JA 54–55). First Lieutenant EK also witnessed the military judge forgetting civilian defense counsel's name, but testified, "she said she was sorry and admitted to making a mistake." (JA 54). Defense counsel offered no other evidence after 1LT EK's testimony and presented no further argument after 1LT EK, a layperson with no real courtroom experience outside of television, testified in a manner that supported the military judge's finding that she was not "impliedly" biased. *See Wright*, 52 M.J. at 141

("[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. While this Court is not bound by 1LT EK's testimony, the Court should find it is a fair reflection of what occurred. The military judge reasonably concluded that her interaction with defense counsel would not have caused the members of the public to reasonably question her impartiality at the court-martial. Accordingly, the military judge did not abuse her discretion, and this court should affirm appellant's conviction and sentence.

B. Even if this court finds that the military judge abused her discretion, reversal is not warranted.

When a military judge abuses her discretion in denying a recusal motion, this court examines "whether, under *Liljeberg*, reversal is warranted." *Martinez*, 70 M.J. at 159. In *Liljeberg*, the Supreme Court considered three factors to make that determination. *Liljeberg* at 862. Factor one examines if there is "any specific injustice that the appellant personally suffered." *Martinez*, 70 M.J. at 159. Factor two examines whether granting relief would "encourage a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose when discovered." *Liljeberg*, 486 U.S. at 868. Finally, factor three uses an objective standard by determining whether "the circumstances of a case will risk undermining the public's confidence in the military justice system." *Martinez*, 70

M.J. at 159. Because not every judicial disqualification requires reversal, the *Liljeberg* standard determines whether a military judge's conduct warrants that remedy to vindicate public confidence in the military justice system." *Uribe*, 80 M.J. at 449. Appellant argues that all three factors of *Liljeberg* warrant reversal in his case; his arguments are without merit. (Appellant's Br. 17–21).

1. The military judge's refusal to recuse herself did not cause an injustice to appellant.

Appellant argues that "the military judge's conduct demeaned . . . defense counsel in front of witnesses and panel members," and this "resulted in injustice to Appellant." (Appellant's Br. 17–18). However, appellant fails to identify any specific injustice he suffered at the hands of the military judge. Appellant claims that the prohibition on calling Ms. Langley deprived him of beneficial testimony on the motion for recusal. (Appellant's Br. 18).

At the time of appellant's court-martial, Ms. Langley was the Director of Forensic Psychiatry for an organization that routinely provided expert witnesses for military trials. (JA 29). Ms. Langley was working as an "executive assistant," for an expert witness listed by the defense, she was effectively a part of the defense team. (JA 49). As such, she had a vested interest in the outcome of the case.[5] It is

[5] This Court should give very little to no weight to the affidavits submitted by appellant's defense team. Appellant's counsel failed to adequately develop the record on the points raised in his appellate affidavits. Further, these affidavits offer

understandable that a military judge would not want to open the door to every party participant and interested witness to weigh in on her impartiality. The R.C.M. 902(d)(2) discussion contemplates this issue and allows restriction of testimony.

No error materially prejudiced appellant's substantial rights. *See Marcavage v. Bd. of Trs. of Temple Univ. of the Commonwealth Sys. of Higher Educ*., 232 F. App'x 79, 84 (3d Cir. 2007) (finding no risk of injustice when the trial judge's rulings "were all correct" and there was "no prejudice . . . as a result of these rulings."). Besides the recusal motion, appellant did not challenge any of the military judge's adverse findings on appeal. (Appellant's Br.). The military judge's participation was limited to instructions and evidentiary rulings because a panel convicted and sentenced appellant. *See United States v. Butcher*, 56 M.J. 87, 92 (C.A.A.F. 2001). (JA 91).

2. Granting relief would not encourage a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose when discovered.

Though appellant claims not to concede the second *Liljeberg* factor, he relegated it to a footnote and asks this court to consider a brief pending at the

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nothing more than the personal feelings of members of the defense team who had an interest in the outcome of the case. They do little to illustrate how a reasonable person would perceive the military judge's neutrality.

Army Court in a different case, with a different set of facts. (Appellant's Br. 19). As those facts and that appellant, are not currently before this Court, such a request is inappropriate to resolving this case. *See United States v. Jessie*, 79 M.J. 437, 441 (C.A.A.F. 2020). As appellant has elected not to pursue the second factor further, it is "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." *Butcher,* 56 M.J. at 93; *Uribe*, 80 M.J. at 450. Should this court find that the military judge abused her discretion by failing to recuse herself, that conclusion alone would cause military judges in the future to be appropriately mindful of their obligations under R.C.M. 902. *See Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 171 (3d Cir. 2004) ("[O]ur determination that a violation of [the recusal statute] occurred will provide virtually the same encouragement to other judges and litigants as would a remand.").

3. The military judge's refusal to recuse did not undermine the public's confidence in military justice.

Appellant argues that the military judge departed from impartiality in a way that undermines public confidence in the military justice system and therefore requires reversal under the third part of the *Liljeberg* test. (Appellant's Br. 19). Upon examination of the entire proceedings, the third factor favors affirming the court-martial findings and sentence. In *Quintanilla*, this court turned to the

American Bar Association Model Code of Judicial Conduct for guidance on proper conduct in criminal trials. *Quintanilla*, 56 M.J. at 42. The *Quintanilla* court recognized the importance of judicial patience, dignity, and courteous conduct. *Id*. However, it also recognized the aspirational nature of this code, and that violators typically did not face judicial disqualification or reversal:

> Such standards generally are regarded as principles to which judges should aspire and are enforced primarily through disciplinary action and advisory opinions, rather than through disqualification in particular cases. (citation omitted). In many jurisdictions, particularly in the federal courts, actions that violate codes of conduct do not necessarily provide a basis either for disqualification of a judge or reversal of a judgment unless otherwise required by applicable law.

Id. at 42–43.

Although the *Quintanilla* court set aside the findings and sentence related to the judicial misconduct, the case involved allegations that the military judge assaulted a witness and made *ex parte* communications. *See id*. These allegations arose after the military judge decided to act as a bailiff and confront a witness in the hallway for disrupting the proceedings. *Id*. at 49–52. In appellant's case, differing from *Quintanilla*, the military judge made only a few interruptions to keep defense counsel within the bounds of her ruling, largely outside the presence of the members. (JA 58).

Next, the panel acquitted appellant of one specification of sexual assault and

one specification of abusive sexual contact. (JA 91). This gives assurance that an objective observer would still have confidence in the military justice system. *Uribe*, 80 M.J. at 450; *cf. United States v. Elzy*, 25 M.J. 416, 419 (C.M.A. 1988)(explaining there was no prejudice to appellant from military judge's failure to recuse himself where "the military judge acquitted appellant of one of the charges.").

Appellant points to an incident when the military judge temporarily forgot civilian defense counsel's name in front of the panel members. (Appellant's Br. 20). Appellant alleges that the military judge's demeanor chilled their presentation in front of the panel members. (Appellant's Br. 22). However, 1LT EK, who was present for the entire exchange and entirely unfamiliar with courtroom settings aside from what he had seen on television, showed that this was highly unlikely as the military judge "said she was sorry and admitted to making a mistake." (JA 54). In further support of this argument, appellant cites mostly to incidents that occurred outside the presence of the panel members, making this chilling effect even more unlikely. (Appellant's Br. 22) (JA 20, 29–31).

The military judge nonetheless instructed the panel members upon their return to the courtroom that they "must disregard any comment or statement or expression made by [her] during the course of the trial that might seem to indicate any opinion on [her] part as to whether the accused is guilty or not guilty,"

reinforcing to the panel that they alone bore "the responsibility of making that determination." (JA 62). She specifically explained that she gave that instruction at that juncture of the trial "because of the exchange" that had occurred with civilian defense counsel prior to the Article 39(a) session, chalking her poor memory up to "a senior moment" rather than "any disrespect or slight to [civilian defense counsel or appellant's] defense." (JA 62). Thus, any concerns about the military judge's impartiality did not pose a risk of an injustice to appellant.

Accordingly, the public's confidence in the military justice system would not be undermined. *Martinez*, 70 M.J. at 160. On the other hand, a decision to reverse the findings and sentence would increase the risk that the public would lose faith in the judicial system. *See Uribe*, 80 M.J. at 450 (finding that, after the court of criminal appeals found no merit in appellant's challenges to the court-martial proceedings and that the sentence was legally correct and appropriate under Article 66(c), UCMJ, (2012), "a decision to affirm the findings and sentence under these circumstances would not upset public confidence in the judicial process. To the contrary, a decision to reverse the findings and sentence would increase the risk 'that the public will lose faith in the judicial system.'" (quoting *United States v. Cerceda*, 172 F.3d 806, 815 (11th Cir. 1999)). Under these circumstances, the *Liljeberg* factors do not support reversal, and therefore, appellant is not entitled to relief.

Conclusion

WHEREFORE, the government respectfully requests This Honorable Court affirm the findings and sentence.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains 5,800 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 February 12, 2024.

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