No. 15-673

In the Supreme Court of the United States

MICHAEL E. SULLIVAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that the military judge's erroneous exclusion of flag officers from the member pool at petitioner's court-martial was harmless error.

2. Whether a military judge must recuse himself when (1) he is in competition for military promotion with the defendant and the jurors, and (2) both the prosecution and defense request recusal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rules:

Statutes and rules—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-26a) is reported at 74 M.J. 448. The opinion of the United States Coast Guard Court of Criminal Appeals (Pet. App. 28a-53a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a) was entered on August 19, 2015. The petition for a writ of certiorari was filed on November 16, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a captain (O-6) in the United States Coast Guard, was convicted by general court-martial of wrongful use of cocaine, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. Pet. App. 2a. The court-martial acquit-

ted petitioner of conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ, 10 U.S.C. 933. Pet. App. 3a n.2. The court-martial sentenced petitioner to a $5000 fine and a reprimand. *Id.* at 29a. The United States Coast Guard Court of Criminal Appeals (CCA) affirmed. *Id.* at 30a. The United States Court of Appeals for the Armed Forces (CAAF) also affirmed. *Id.* at 20a.

1. In June 2008, petitioner tested positive for cocaine based on a random urinalysis test. Additional tests of petitioner's hair confirmed the presence of cocaine. Pet. App. 3a. Petitioner was ordered to stand trial by general court-martial. *Ibid.*

a. The Sixth Amendment right to a jury trial does not apply to courts-martial. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Rather, under Article 25 of the UCMJ, 10 U.S.C. 825, a military defendant may be tried by a panel consisting of court members drawn from the armed services. Commissioned officers are generally eligible to serve as members of the court-martial. 10 U.S.C. 825(a). "When it can be avoided," no military defendant "may be tried by a court-martial any member of which is junior to him in rank or grade." 10 U.S.C. 825(d)(1). The convening authority shall detail to the court-martial such members of the armed forces "as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. 825(d)(2).

Here, the convening authority selected the court-martial panel for petitioner's trial from a ten-person venire consisting entirely of captains (O-6) who had served in the Coast Guard for at least 27 years. Pet. App. 4a. Petitioner moved to dismiss the charges on

the ground that the lack of any flag officers in the court member pool violated Article 25.[1] The military judge denied the motion. *Ibid.* He explained that the convening authority (1) had been repeatedly advised on the court-member selection criteria under Article 25(d)(2); (2) had determined that flag officers were not available based on his personal experience and general knowledge of their duties and schedules; (3) had not inquired into the availability of any particular flag officer; and (4) had not attempted to stack the panel with captains, but wanted to select members who were qualified and available to serve as court members. *Ibid.* The military judge also found that the convening authority had not categorically excluded all flag officers from consideration as court-martial members. *Ibid.*

b. The government moved the military judge to recuse himself from the court-martial because of the judge's personal and professional relationships with a substantial number of the court-martial participants, including petitioner, counsel, and the convening authority. C.A. App. 275-283. Petitioner concurred in the motion for recusal, further noting that petitioner and the military judge were in the "same promotion zone" for selection as a flag officer. *Id.* at 284.

At a pretrial hearing, the military judge advised the parties that he had professional and social relationships with many of the potential court-martial participants. Pet. App. 37a-39a. The judge stated that although he and petitioner were technically both

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[1] A "flag officer" is an officer of the "Coast Guard serving in or having the grade of admiral [O-10], vice admiral [O-9], rear admiral [O-8], or rear admiral (lower half) [O-7]." 10 U.S.C. 101(b)(5); see Pet. App. 2a n.1.

eligible for promotion to rear admiral, he did not see himself as competing with petitioner in light of the judge's status as a judge advocate. *Id.* at 38a-39a.

In a written order, the military judge denied the motion. C.A. App. 380-390. The judge noted that the Coast Guard is a very small service. He noted that a large percentage of its commissioned officers attended the Coast Guard Academy and that at the time of petitioner's trial, the Coast Guard had one military judge certified to preside over general courts-martial. *Id.* at 381. The judge explained that he had served as the Chief Trial Judge of the Coast Guard, had attained the rank of captain, and had accumulated almost 28 years of commissioned service in the Coast Guard. Pet. App. 8a; C.A. App. 381.

The military judge rejected petitioner's argument that he should recuse himself because he and petitioner were in competition for promotion to O-7. C.A. App. 384. The judge explained that although recusal is mandatory when a judge has an interest that could be "substantially affected" by the outcome of the proceeding, see Court-Martial R. 902(b), here "it is clear that the very small, if any, statistical improvement in the military judge's chances for promotion should [petitioner] be convicted is not, under any non-frivolous scenario, substantial." C.A. App. 384.[2]

The military judge further concluded that his impartiality could not reasonably be questioned, and thus that recusal was not required under Court-

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[2] Court-Martial Rule 902(b) provides that a military judge "shall * * * disqualify himself" where the judge has "an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding." Court-Martial R. 902(b)(5)(B).

Martial Rule 902(a). C.A. App. 384-389.[3] The judge emphasized that when viewed in context, his prior personal and professional contacts with petitioner, counsel, and potential witnesses would not lead a reasonable person to question his impartiality in the case. *Id.* at 385-386. He also noted that petitioner would not be considered for promotion while the charges were pending. *Id.* at 388. The judge stated that he "is not, under any remotely possible scenario, in direct competition for promotion with [petitioner]." *Ibid.* Elsewhere in the opinion, the judge noted that his own next assignment likely would be retirement from active duty, as he would reach his mandatory retirement age in 2011. *Id.* at 381, 387 n.8. The judge reaffirmed that he would be impartial toward petitioner and noted that he had already granted some of petitioner's pretrial motions. *Id.* at 388.

After denying the motion to disqualify himself, the military judge informed the parties that he had tried to obtain a substitute judge from another service of the armed forces, but no other judge was available to serve at the scheduled date of petitioner's trial. Pet. App. 25a n.2, 40a.

c. At trial, petitioner was found guilty of the wrongful use of cocaine, in violation of Article 112a of the UCMJ, 10 U.S.C. 912a, and he was acquitted of conduct unbecoming an officer and a gentleman, in violation of Article 133 of the UCMJ, 10 U.S.C. 933. Pet. App. 2a-3a & n.2. Petitioner was sentenced to a

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[3] Rule for Courts-Martial 902(a) provides that a military judge "shall disqualify himself * * * in any proceeding in which that military judge's impartiality might reasonably be questioned." Court-Martial R. 902(a).

$5000 fine and a reprimand on the cocaine count. *Id.* at 29a.

2. Following the conviction, the Acting Judge Advocate General referred petitioner's case to the CCA for review under Article 69(d) of the UCMJ, 10 U.S.C 869(d). The CCA affirmed in an unreported decision. Pet. App. 28a-53a.

As relevant here, the CCA first ruled that the convening authority had violated Article 25 by categorically excluding all flag officers from serving as court members at petitioner's court-martial. Pet. App. 33a. The CCA nonetheless upheld the conviction after concluding that the government had established that the error was harmless. *Id.* at 33a-36a. The CCA explained that the evidence showed that the convening authority "knew and applied the Article 25 statutory criteria when selecting members for this case" and that no evidence indicated that the authority had tried to pack the court-martial in order to favor the prosecution or to obtain a severe sentence. *Id.* at 33a. Rather, the CCA concluded, the convening authority had excluded flag officers for "benign" reasons, including his general expectation that flag officers would be unavailable to serve. *Ibid.* It further held that "the panel by which [petitioner] was tried was fair and impartial." *Id.* at 34a. The CCA also rejected as "speculative" petitioner's argument that the court members might have viewed themselves in competition with petitioner for promotion to flag officer, and thus that they may have been motivated to remove a potential rival from consideration by convicting petitioner. *Id.* at 35a; see *id.* at 34a-35a.

The CCA also ruled that the military judge did not abuse his discretion by declining to recuse himself

from the trial based on his associations and friendships with many of the participants. Pet. App. 37a-42a. The CCA noted petitioner's concession that the judge's professional relationships "did not result in actual bias or prejudice," and it further concluded, "viewing the situation objectively, that none of the military judge's professional relationships would cause his impartiality to reasonably be questioned." *Id.* at 41a. It went on to determine that the judge's social relationships with petitioner, his wife, and counsel likewise did not give rise to a mandatory duty to recuse. *Id.* at 41a-42a.

3. The CAAF affirmed petitioner's conviction. First, the court unanimously upheld the CCA's conclusion that the convening authority's exclusion of flag officers from the court-martial panel was harmless error.[4] Pet. App. 3a-8a. The CAAF noted that the government did not dispute the CCA's holding that the convening authority had violated Article 25 of the UCMJ. *Id.* at 5a. Nonetheless, the CAAF emphasized that the court-martial panel members were qualified to sit on the court-martial under Article 25, that the record showed that the members carefully considered petitioner's case, and that the convening authority's decision to exclude the flag officers was based on their perceived lack of availability, not on any desire to stack the panel against petitioner. *Id.* at 4a-6a. The court thus rejected petitioner's argument that the exclusion of flag officers "created an appearance of unfairness." *Id.* at 5a.

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[4] The UCMJ provides that a court-martial's finding or sentence "may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Art. 59(a), UCMJ, 10 U.S.C. 859(a).

As to harmlessness, the CAAF reiterated that the convening authority's "motivation in excluding the flag officers was based on his belief that they would be unavailable to actually serve on the court-martial." Pet. App. 6a-7a. It also again noted that the members of the court-martial were all qualified under Article 25. *Id.* at 7a. The CAAF stressed that the court-martial members were unbiased, as demonstrated by (1) their assertions during *voir dire* that they would be impartial; (2) their active participation in posing unbiased questions during the court-martial; (3) their deliberation over three days before rendering a verdict; (4) their decision to acquit petitioner on the conduct-unbecoming charge; and (5) their imposition of a lenient sentence. *Ibid.* The CAAF also rejected as "speculative" petitioner's argument that the court members were biased because they were in the same promotion pool as petitioner. *Id.* at 7a n.5.

Second, the CAAF ruled (in a portion of the opinion joined by four of the five judges) that the military judge did not abuse his discretion by declining to recuse himself because of an appearance of impartiality. Pet. App. 8a-20a. Among other considerations, the court emphasized that (1) the military judge stated that he would be impartial despite his associations with court-martial participants; (2) petitioner had failed to identify "any conduct by the military judge which tends to demonstrate that he inappropriately influenced the panel in this case"; (3) the judge's resolution of pretrial motions revealed no bias; and (4) the judge's personal and professional relationships with the participants in the trial were candidly disclosed and would not have led a "reasonable person familiar with all the circumstances" to reasonably question the

judge's impartiality. *Id.* at 15a-18a. On the last point, the court noted that most of the military judge's contacts were "professional and routine in nature" and were the "natural consequence" of the judge's lengthy service in the "relatively small" Coast Guard. *Id.* at 16a-17a.

The CAAF went on to reject petitioner's argument that an appearance of bias was created by the fact that petitioner and the military judge were both captains subject to promotion and were in competition for a coveted flag slot. Pet. App. 18a. The court noted the military judge's disclaimer of any potential conflict and his statement that, "as a judge advocate, he would not be in competition for the same promotion as [petitioner] who was not a judge advocate." *Ibid.* The court stated that "[w]e agree with the military judge that this potential promotion conflict was 'illusory' and did not create an appearance of bias." *Ibid.* The court acknowledged that the government and defense had both asked the military judge to recuse himself, but it concluded that, in light of the circumstances, this consideration did not establish that the military judge had abused its discretion by declining the request. *Id.* at 18a-19a.

Judge Erdmann dissented on the recusal issue. Pet. App. 20a-26a. In his view, the judge's extensive contacts with many of the court-martial participants—together with the fact that the judge was part of the same promotion pool as petitioner—raised an appearance of bias that required the judge to recuse himself. *Id.* at 21a.

ARGUMENT

Petitioner asks (Pet. i) this Court to grant certiorari to address (1) whether the CAAF erred in ruling

that the decision to exclude flag officers from the court-martial member pool was harmless, and (2) whether a military judge "[m]ust" recuse himself when he is in competition for promotion with the defendant and the jurors, and the prosecution and defendant both seek recusal. Neither issue warrants further review.

1. Petitioner challenges (Pet. 10-19) the CAAF's conclusion that the convening authority's error in excluding flag officers from the jury pool was harmless. He argues (1) that such a violation of Article 25(d)(2) of the UCMJ is a structural error that is not subject to harmless-error review, and (2) that the court's fact-bound harmlessness determination was erroneous. He is mistaken as to both contentions.

a. Article 59(a) of the UCMJ sets forth the harmless-error rule that applies to courts-martial. 10 U.S.C. 859(a). It states that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." *Ibid.* That rule is similar to the harmless-error rule applicable to civilian criminal trials under Rule 52(a) of the Federal Rules of Criminal Procedures, which likewise makes clear that an error requires reversal of a criminal conviction only if it affects the defendant's "substantial rights." To determine whether "substantial rights" are affected, the reviewing court must examine the district court record "to determine whether the error was prejudicial," *i.e.*, whether it "affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993).

Congress has recognized that the CAAF is the "primary interpreter or military law." S. Rep. No. 53, 98th Cong., 1st Sess. 10 (1983) (Senate Report) (discussing CAAF's predecessor). The CAAF applies Article 59(a)'s harmless-error rule to violations of Article 25 of the UCMJ, which sets forth the criteria the convening authority must employ when identifying potential members of a court-martial. See, *e.g.*, *United States* v. *Bartlett*, 66 M.J. 426, 430-431 (C.A.A.F. 2008). Petitioner challenges that approach and appears to argue (Pet. 11-12) that any violation of Article 25(d)(2)—which requires the convening authority to detail those members who "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament"—is a structural error that is not subject to harmless error review. 10 U.S.C. 825(d)(2).

Petitioner is incorrect. This Court has confined structural errors to "a very limited class of cases." *Johnson* v. *United States*, 520 U.S. 461, 468 (1997); accord *Washington* v. *Recuenco*, 548 U.S. 212, 218 (2006) ("rare cases"). Structural errors are those that affect the "framework within which the trial proceeds," such that it is often "difficult to assess the effect of the error." *United States* v. *Marcus*, 560 U.S. 258, 263 (2010) (brackets, citations, and internal quotation marks omitted). Even "most constitutional errors can be harmless," and "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to

harmless-error analysis." *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (brackets and citations omitted).[5]

A violation of Article 25(d)(2) is not within—or analogous to—the narrow category of structural errors recognized by this Court. Nor is it especially "difficult to assess the effect" of an Article 25(d)(2) error on the fairness of the trial. *Marcus*, 560 U.S. at 263 (brackets, citation, and internal quotation marks omitted). When the convening authority violates Article 25(d)(2) by systematically choosing members in a manner that is likely to result in a panel that is biased against the defendant, the government will be unable to show that the error was harmless for purposes of Article 59(a), 10 U.S.C. 859(a). But when the Article 25(d)(2) violation is undertaken for benign reasons—and no reason exists to believe that the panel is biased—the error is properly considered harmless. That is precisely what happened here. See Pet. App. 6a-8a.

b. Petitioner also challenges (Pet. 15-19) the district court's fact-bound application of the harmless-error standard in this case. First, he contends (Pet. 16-17) that the CAAF erroneously considered factors such as (1) whether the convening authority was "among the authorized convening authorities"; (2) whether he

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[5] Structural errors include complete deprivation of the right to counsel at trial, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); trial before a judge who was not impartial, *Tumey* v. *Ohio*, 273 U.S. 510 (1927); denial of self-representation at trial, *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); denial of a public trial, *Waller* v. *Georgia*, 467 U.S. 39 (1984); racial discrimination in the selection of a grand jury, *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); giving a defective reasonable-doubt instruction, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993); and denial of the right to representation by counsel of choice, *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

was "properly advised of the statutory factors"; (3) whether he "personally decided who should sit on the panel"; (4) whether he "acted out of an improper motive such as stacking the panel to the accused's detriment; (5) whether the panel was "well-balanced across gender, racial, staff, command and branch lines"; (6) whether the panel members satisfied the criteria set forth in Article 25; and (7) whether the panel members actually performed their duties in a fair and unbiased manner. But all of those are valid considerations when assessing whether the convening authority's improper exclusion of flag officers from the court-martial was unfair or otherwise prejudicial to the defendant. The CAAF did not err by considering the totality of circumstances when assessing prejudice in this case.

Petitioner also contends that the CAAF erred by describing the court-martial members as "fully qualified" at one place in its opinion, instead of applying the statutory term "best qualified." Pet. 16 (emphasis omitted). But elsewhere in its opinion, the CAAF stated that the court members "met the Article 25, UCMJ, criteria." Pet. App. 7a. That statement showed that the CAAF applied the "best qualified" standard in evaluating the court members' qualifications. The CAAF's isolated use of the term "fully qualified" is insignificant and reveals no error in that court's harmlessness analysis.

Petitioner further suggests (Pet. 18-19) that the CAAF's decision is part of a larger pattern under which the CAAF applies harmless-error review to uphold convictions despite serious Article 25(d)(2) violations. But petitioner has not established any error in the CAAF's harmlessness analysis in this case, and he makes no serious effort to demonstrate

any such error in other decisions. Accordingly, he has not shown any pattern of impropriety in the CAAF's application of the governing legal standard.

In short, petitioner cannot establish any error in the CAAF's harmlessness determination. And even if he could, this Court's review of that fact-bound determination would be unwarranted. See *Pope* v. *Illinois*, 481 U.S. 497, 504 (1987) (noting that Court exercises its authority "to decide whether, on the facts of a given case, a constitutional error was harmless" only "sparingly").

2. Petitioner also contends (Pet. 18-19) that the military judge abused his discretion by not recusing himself because his alleged competition with petitioner for promotion to flag grade created an appearance of impropriety. He appears to ask this Court to establish a bright-line rule that recusal is *mandatory* whenever (1) the judge is in competition for military promotion with the defendant and jurors, and (2) the prosecution and defense both seek recusal. See Pet. i (framing question presented as whether a military judge "[m]ust" recuse himself in such circumstances). That issue merits no further review.

a. Court-Martial Rule 902(a) provides that a military judge "shall disqualify himself * * * in any proceeding in which that military judge's impartiality might reasonably be questioned." Rule 902(a) substantially mirrors the federal appearance-of-impartiality statute, 28 U.S.C. 455(a).[6] Court-Martial Rule 902(b)(1) further provides that recusal is mandatory when the

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[6] Section 455(a) states that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a).

judge "has a personal bias or prejudice concerning a party." Neither Rule 902(a) or (b) establishes a bright-line, mandatory duty of recusal in the circumstances presented here, where the military judge and petitioner were both Coast Guard captains theoretically eligible for promotion.

Petitioner implies that the fact that he and the military judge were both members of the "single active duty promotion list" necessarily created an appearance of bias, presumably because the military judge would (in theory) have an incentive to favor petitioner's conviction in order to eliminate a potential rival. Pet. 19 (citation omitted). But as the CAAF emphasized, the "potential promotion conflict" was "illusory"—and "did not create an appearance of bias"—because petitioner was not a judge advocate. Pet. App. 18a. The court's commonsense recognition that the Coast Guard was unlikely to be conducting a direct head-to-head competition between petitioner and the judge when deciding which Coast Guard captains to promote was not improper or otherwise an abuse of discretion.

Other circumstances support the CAAF's ruling that the military judge did not abuse his discretion in finding no actual or apparent bias. As the military judge pointed out, he had candidly disclosed his professional and social relationships with participants in the court-martial, and he ruled in petitioner's favor on various pre-trial motions. C.A. App. 388. The judge also emphasized that he was close to reaching mandatory retirement and that his next professional transition would "almost certainly be [to] retirement from active duty." *Id.* at 387 n.8; see *id.* at 381.

The CAAF sits atop the system of military justice and has specialized expertise in applying principles of fairness and due process in the military context. As the discussion above makes clear, the CAAF's determination that the military judge did not abuse his discretion in continuing to preside over the trial was entirely reasonable. No reason exists for this Court to second-guess the CAAF's application of settled principles to the facts of this case. See generally Senate Report 10 (noting that grant of certiorari jurisdiction over cases decided by CAAF's predecessor was "not intend[ed] to displace [that court] as the primary interpreter of military law").

b. Petitioner also asserts (Pet. 19) that the CAAF's analysis of the recusal issue "cannot be reconciled" with *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988). There, this Court noted that courts must apply an "objective test" in determining whether a judge's impartiality "might reasonably be questioned" under the civilian court recusal statute, 28 U.S.C. 455(a). *Liljeberg*, 486 U.S. at 858 & n.7 But the CAAF expressly applied an objective standard in rejecting petitioner's recusal claim under Court-Martial Rule 902(a). See Pet. App. 14a. ("We apply an objective standard for identifying an appearance of bias by asking whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned."). The CAAF's decision therefore does not conflict with *Liljeberg*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
THOMAS E. BOOTH
Attorney

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