IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Matthew A. Rogers Electrician's Mate Third Class (E-4) United States Coast Guard, Appellant.	)))))))))))	BRIEF ON BEHALF OF THE UNITED STATES Crim. App. No. 1391 USCA Dkt. No. 16-0006/CG

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

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I.

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE IMPLIED BIAS CHALLENGE AGAINST CDR K IN LIGHT OF HER VARIOUS PROFESSIONAL AND PERSONAL EXPERIENCE WITH SEXUAL ASSAULT.

II.

Statement of Statutory Jurisdiction

The Coast Guard Court of Criminal Appeals (CGCCA) reviewed this case under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

III.

Statement of the Case

Officer and enlisted members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of conspiracy to obstruct justice, in violation of Article 81, Uniform Code of Military Justice (UCMJ); one specification of making a false official statement, in violation of Article 107, UCMJ; two specifications of sexual assault, in violation of Article 120, UCMJ; and one specification of improper use of his military identification card, one specification of violating 18 U.S.C. § 499 by willfully allowing another person to have his military identification card, and three specifications of obstruction of

justice, all in violation of Article 134, UCMJ. The Members sentenced Appellant to confinement for ten years, reduction to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

On 8 July 2015, the CGCCA set aside the convictions of two specifications under Article 134 on their own motion, and affirmed the remaining findings and sentence. On 1 December 2015, this honorable Court granted Appellant's petition for review.

IV.

Statement of Facts

Appellant was an electrician's mate third class petty officer, stationed on the Coast Guard Cutter ALDER (WLB 216) in Duluth, Minnesota. J.A. at 108.

a. Evidence presented at trial

In August 2012, Appellant was sent on temporary duty to Portsmouth, Virginia for training. J.A. at 109. After a night of socializing at several establishments around Portsmouth, Appellant went to the Bier Garden, a bar across the street from his hotel. J.A. at 110-120.

The victim, MC, was having dinner with her husband at a home near the Bier Garden. J.A. at 164-65. After dinner, MC left her husband to play cards with

his friends. After playing cards, MC stopped at the Bier Garden on her way home. *Id.* at 135.

At trial, James Standin, a bar patron, testified that MC knocked a beer glass to the ground and then tumbled off her barstool. J.A. at 121. When Mr. Standin tried to help MC to her feet, she stepped on the hem of her skirt, causing the skirt to be pulled down around her ankles. MC then placed her buttocks in Mr. Standin's groin area and started moving her body back and forth. *Id.* at 123. Refusing to reciprocate, Mr. Standin struggled to keep MC upright because she was swaying back and forth and required assistance to stand on her own. *Id.*

While Mr. Standin was trying to keep MC under control and upright, Appellant walked up to him and told Mr. Standin that he knew MC. J.A. at 122, 125, 126. When Mr. Standin asked for MC's name, Appellant clarified that he did not know her name but that he knew her husband, although he could not provide her husband's name either. *Id.* at 125. In actuality, neither MC nor her husband had ever met Appellant, nor had her husband ever worked with him. *Id.* at 132.

Misty Graves, another bar patron, was worried that MC might have been on drugs and described her level of intoxication as a "ten." J.A. at 129. When Ms. Graves asked MC her name, all MC could respond was "twelve." *Id.* at 131. Ms. Graves also spoke with Appellant, who told her that he knew MC's husband because they worked together. *Id.* at 130.

In order to further convince patrons and bar staff of the truth of his story, Appellant handed over his government issued identification (ID) card to the bartender as a symbol of his trustworthiness. J.A. at 002. Because of Appellant's persistence and his willingness to leave his ID card behind, bar staff allowed him to take MC out of the bar. *Id.* The Bier Garden's surveillance video, shown at trial, captured what the witnesses described; MC's stumbling, Mr. Standin's efforts to help, and Appellant's discussion with him and subsequent departure with the severely intoxicated MC.

The following morning, MC awoke in Appellant's hotel room. She felt pain in her vagina and anus that she had not felt the night before. J.A. at 174. She did not remember giving consent to anyone to penetrate her. *Id.* at 175. After calling the authorities, she was taken to a local forensic examiner for a sexual assault examination. The examination revealed injuries and tears to MC's vagina and anus, which was consistent with hard digital penetration of the area for an extended period. *Id*. at 179-183.

After several interrogations by civilian police detectives, where Appellant changed his story multiple times, Appellant finally admitted to Coast Guard Investigative Service that he did remember leaving the bar with MC and that he had digitally penetrated her "hard." J.A. at 160-61. He also confessed that he had taken MC from the bar with the intent to engage in sexual acts with her. *Id.* at 162.

He told the agent that he had lied to the Portsmouth police because he was scared "because she was a lot drunker than [he] was." *Id.* at 163. Appellant also wrote a statement describing substantially the same story that he eventually told the agent. *Id.* at 219.

b. CDR K's *voir dire*

The military judge commenced general *voir dire*, followed by trial counsel and defense counsel's general voir dire. J.A. at 031-052. The military judge opened individual *voir dire*, inquiring further into CDR K's responses. *Id.* at 054-59. CDR K revealed that her primary duty was the Leadership, Diversity, and Inclusion Officer on the staff of the Commander, Coast Guard Atlantic Area. J.A. at 054-55. One of her collateral duties involved writing a new sexual assault response and prevention (SAPR) operational plan, which would require, in part, that operational commands ensure there is proper lighting in berthing areas. *Id.* at 055. CDR K was neither a sexual assault response coordinator nor a victim advocate, and she did not personally interact with sexual assault victims. *Id.* CDR K expressed concern that commanders may feel pressured to refer charges against an accused when there is not sufficient information, or would pursue a higher level of charges than is warranted, because "they're trying to be extra careful" due to media pressure. *Id.* at 057. CDR K also disclosed that she had an older brother who was twice convicted for child molestation against his young daughter and step-daughter. J.A. at 057-58.

She acknowledged that she had seen the kind of damage a sexual assault allegation can do to a family, whether it was true or not, and it was something she took extremely seriously. *Id.* While stationed at Coast Guard Sector San Francisco, CDR K supervised a member who had been accused of sexual assault but later was cleared of wrongdoing. *Id.* at 057, 060-61. She stated that she believed there needed to be compassion on both sides of the issue of sexual assault and that she had a "very unbiased view." *Id.* at 057.

During defense counsel's individual *voir dire* (J.A. 059-071), CDR K stated that she had served as a member of a general court-martial in February 2012, where the panel convicted the accused of sexual assault. CDR K stated that the prior case did not change her perspective on the military justice process or her views on the issue of sexual assault. *Id.* at 064-65.

CDR K further expressed disappointment over the movie "The Invisible War" because it was very one-sided and disconcerting. She thought that "they didn't present the whole story," and she would rather have had all the facts rather than the biased view that the movie portrayed. J.A. at 060-61. Defense counsel asked whether "it's possible for someone to have consensual sex and then just be so intoxicated that they can't remember." CDR K opined that according to information she received from a sexual assault class, her understanding was that "if you are so drunk that you can't remember giving consent, then you are too drunk

to give consent." J.A. at 065. However, CDR K agreed that it would not be difficult for her to change this belief and would follow the law if instructed otherwise. *Id.*

CDR K volunteered that she did not think a member should automatically be discharged from the Coast Guard when convicted of sexual assault. She stated that she "could probably be one of the most fair [sic] people" because she always wanted to see everything before she made a decision. *Id.* at 068-71. CDR K also stated that she believed false claims of sexual assault are rare, based on statistics contained in periodicals and other media sources. J.A. at 062. However, during trial counsel's individual *voir dire* (J.A. 071-073), CDR K affirmed that she would be able to disregard those statistics and look at the facts of the current case to render a verdict. She also stated that she would be able to disregard her understanding of substantial incapacitation and consent and follow the law, as instructed, regarding the ability of a drunk person to consent to sexual activity. *Id.* at 073.

c. The Military Judge's Ruling

At trial, defense counsel challenged all but one member, including CDR K. They challenged CDR K for actual and implied bias, pointing to her strong feelings on the issue of sexual assault, her exposure to "voluminous amounts of material about sexual assault," and her current assignment. The defense also pointed to her

statement that she expected people to take accountability for their mistakes as further evidence of her bias. J.A. at 082-83. Trial counsel responded that CDR K had compassion for both sides, understood the damage that a false accusation could have on a member, and thought "The Invisible War" was too one-sided. *Id.* at 083-84. The government also pointed to CDR K's affirmation that she could and would follow the military judge's instructions and the law before deciding the case, and that she could separate her collateral duties in preventing sexual assault with her role of deciding the facts of this specific case. *Id.*

In support of her finding of no implied bias, the military judge ruled that "CDR K's entire statements, taken in context, would not leave a reasonable member of the public" to doubt whether CDR K would be fair or impartial. (J.A. at XX (184)). "I listened to her entire answers, also from both counsel. She had every opportunity to say that she would not consider my instruction, especially based on the alcohol consumption. She did not state that." *Id.* The military judge also placed the implied bias standard on the record:

> Implied bias exists when, despite a credible disclaimer, most people in the same position as the court member would be prejudiced. In determining whether implied bias is present, I look at the totality of the circumstances. Implied bias is viewed objectively through the eyes of the public. Implied bias exists if the objective observer would have substantial doubt about the fairness of the accused's court-martial panel. In close cases, military judges are enjoined to liberally grant defense challenges for cause. This liberal grant mandate does not apply to government challenges for cause.

Id. at 074.

d. The Coast Guard Court of Criminal Appeals Opinion

The Coast Guard court denied both claims of actual and implied bias. The court reviewed the implied bias challenge "pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review." J.A. at 003. The court found that "[t]he military judge explained the law as she would apply it, at the outset of the session devoted to challenges. She addressed both implied and actual bias in denying the challenge for cause against CDR K." Giving the military judge proper deference, the court found "no error in her ruling." *Id.* at 006 (internal citations omitted). Specifically, the court rejected the claim that CDR K was biased "based upon [her] duty to draft a sexual assault prevention plan and her concomitant knowledge about sexual assault." *Id.* at 005. "CDR K was not involved in response; her prevention role was performed at the policy level, not the street level. We do not see actual or implied bias flowing from her role and knowledge of sexual assault." *Id.* Additionally, the court held that CDR K "stated unequivocally, before being asked, that she would follow the law given to her regarding intoxication and capacity to consent to sex." *Id.*

Appellant petitioned this Court, alleging only that the military judge erred by denying a challenge for cause against CDR K for implied bias.

V.

Summary of the Argument

Appellant fails to meet his burden of showing implied bias by establishing that the public would perceive his trial as unfair, or that most people in CDR K's position would be biased. CDR K expressed a willingness to hear the evidence and follow the military judge's instructions on the law. Her answers during *voir dire,* taken in context and viewed under the totality of the circumstances, would not leave a reasonable member of the public to doubt her impartiality. The record shows that CDR K understood and appreciated the role of a court member, including her obligation to apply the law as instructed upon by the military judge and her obligation to remain fair and impartial. CDR K indicated she would be able to keep an open mind regarding a verdict until all the evidence was presented and would follow the military judge's instructions on the law. While she personally knew people who had been victims, as well as those who had been accused and acquitted of sexual assault, nothing in her answers demonstrated a bias towards one side or another, such that a reasonable member of the public would believe her to be unfair. The law requires only that a reasonable member of the public find a potential member to be fair and unbiased, not that the member of the public believes the potential member to be totally naïve and inexperienced in the matters embraced by the trial.

Because the military judge properly considered the challenge for bias, recognized her duty to liberally grant defense challenges, and placed her reasoning on the record, the military judge should be afforded deference accordingly. The military judge had the opportunity to observe the demeanor of CDR K during her voir dire, along with the substance of her answers, and was able to use that knowledge in making the assessment of whether her answers indicated implied bias. Thus, the military judge properly denied the defense challenge for cause against CDR K, both on actual and implied bias. As the issue granted discusses only implied bias, this brief focuses only on that aspect of the ruling.

VI.

Argument

THE MILITARY JUDGE DID NOT ERR IN DECLINING TO REMOVE CDR K FOR IMPLIED BIAS. CDR K'S RESPONSES DURING *VOIR DIRE* DEMONSTRATED THAT SHE COULD BE FAIR AND IMPARTIAL, AND APPELLANT HAS FAILED TO DEMONSTRATE HOW EMPANELLING HER CONTRIBUTED TO THE APPEARANCE OF AN UNFAIR TRIAL.

Standard of Review

Although the military judge receives less deference in the case of implied bias than in the case of actual bias, this Court reviews implied bias under a standard "more deferential than *de novo*." *United States v. Castillo*, 74 M.J. 39, 42 (C.A.A.F. 2015) (citations omitted). A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on

review than one that does not. *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007). This Court does not "expect record dissertations but, rather, a clear signal that the military judge applied the right law." *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002). The burden of establishing grounds for a challenge for cause is on the party making the challenge. Rule for Courts-Martial 912(f)(3).

Discussion

A. Standard for Implied Bias Challenge

Rule for Courts-Martial (RCM) 912(f)(1)(N) requires the excusal of a member whenever he or she should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." "This rule provides for challenges to court members based on actual or implied bias." *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (internal quotations and citations omitted). Other than the listed positions in RCM 912(f)(1)(C)-(J), a panel member is not categorically disqualified based on his or her duty position or military specialty. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996).

The objective test for implied bias views the circumstances "through the eyes of the public, focusing on the perception or appearance of fairness." *Clay*, 64 M.J. at 276 (internal quotations and citation omitted). The test asks "whether, despite a disclaimer of bias, most people in the same position as the court member would be prejudiced." *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006)

(citations omitted). This Court determines "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high" to allow the verdict to stand. *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008).

"In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances." *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004). Appellant bears the burden of establishing that grounds for an implied bias challenge existed. *Downing*, 56 M.J. at 422. "[W]here there is no finding of actual bias, implied bias must be independently established." *Clay*, 64 M.J. at 277.

B. The military judge did not err in denying the implied bias challenge against CDR K.

"[W]hat might appear a close case on a cold appellate record, might not appear so close when presented from the vantage point of a military judge observing members in person . . . ." *Clay*, 64 M.J. at 277. "The military judge is in the best position to judge the sincerity and truthfulness of the challenged member's responses on *voir dire*." *United States v.Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997). A member's "tone, content, and sincerity" are important in making an informed ruling on an implied bias challenge. *Townsend*, 65 M.J. at 467. "An inflexible member is disqualified; a tough member is not." *United States v. Schlamer*, 52 M.J. 80, 92 (C.A.A.F. 1999) (finding no implied bias for member who had tough views on sentencing but showed no inflexibility in her responses).

As the Coast Guard court correctly held, "[w]e see no error in [the military judge's] ruling" as she "addressed both implied and actual bias in denying the challenge for cause" against CDR K. (J.A. at 006). CDR K's open and honest answers, though opinionated, did not reveal inflexibility to the law or Appellant's case. On the contrary, her answers to the questions clearly indicated that she was thoughtful, fair, and willing to impartially review the evidence presented and follow the military judge's instructions.

In exercising her duties during *voir dire*, the military judge first described the test for implied bias and the liberal grant mandate, fully explaining its use, and stating that the legal standard for implied bias and the liberal grant mandate "applies to all my rulings on challenges for cause." J.A. at 074. She specifically cited the liberal grant mandate when granting the challenge against another member that she felt was a "close call." *Id.* at 098-99. In doing so, she clearly demonstrated her understanding and application of the liberal grant mandate. She considered the challenge to CDR K with respect to implied bias, recognized her duty to apply the liberal grant mandate, demonstrated that she would in fact apply it when she felt necessary, and explained her reasons for keeping CDR K on the panel. J.A. at 085.

Appellant claims that "the military judge recited the test for implied bias, yet she failed to apply it appropriately." Appellant's Br. at 8. Apparently, the

inappropriate application was declining to grant the defense challenge, as the military judge explicitly stated that "I believe that her entire statements, taken in context, would not leave a reasonable member of the public doubt as to the fairness of her impartiality." J.A. at 085. The military judge's actions during *voir dire*, a process which can never be fully replicated in a cold appellate record, should be given proper deference because she applied the liberal grant mandate. *See Clay*, 64 M.J. at 274.

Where no actual bias exists, this Court has determined that implied bias should be invoked rarely. *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006) (citation omitted). Where a military judge considers a challenge based on implied bias, recognizes her duty to liberally grant defense challenges, and places her reasoning on the record, "instances in which the military judge's exercise of discretion will be reversed will indeed be rare." *Clay*, 64 M.J. at 277. Indeed, this Court has an extremely high standard for finding implied bias. For example, in *United States v. Townsend*, this Court found no implied bias for a member whose father was a police officer, had a "healthy respect" for law enforcement, was enrolled in law school and desired to become a prosecutor, and had a negative view towards civilian defense counsel. *Townsend*, 65 M.J. 460, 465 (C.A.A.F. 2008). This Court found that the member affirmatively dispelled any potential for implied bias when he said that he would "cast aside any legal notions he developed from

his legal education and would strictly follow the instructions of the military judge." *Id.*

Most recently, in *United States v. Castillo*, a panel member was challenged for implied bias on grounds that the member had personal experience as a sexual assault victim, directly supervised two other panel members, and routinely relied on trial counsel for military justice advice. *Castillo*, 74 M.J. at 41. The member disclaimed bias, stating that his sexual assault "would not impact his ability to judge the case" due to the differences between the two crimes. *Id.* In ruling that the military judge did not err in denying the implied bias challenge, this Court found the member's statement "in tone and content as well as the absence of a presumptive rule of disqualification supports the military judge's decision." *Id.* at 42. In regards to relying on trial counsel for advice, this Court reasoned that the member "had only been in his position ninety days, a fact that weighs against a finding of implied bias." *Id.* at 43.

In both cases, the military judges considered the implied bias challenge, recognized the liberal grant mandate, and placed their reasoning on the record. Similarly, the military judge in the instant case applied the same standards. Moreover, the military judge was able to see CDR K's demeanor when she affirmatively dispelled any potential for implied bias and stated that she would follow the instructions of the military judge. In addition, the fact that CDR K had

only assumed her collateral position as SAPR Coordinator for about 90 days should weigh against a finding of implied bias. *See Castillo,* 74 M.J. at 43.

As the Government further demonstrates below, empanelling CDR K did not create the appearance of an unfair trial. Viewed through the eyes of the public, when considering the totality of the circumstances, CDR K's objective answers to the *voir dire* questions and continued impartiality throughout the trial did not raise any question as to the fairness of the proceedings.

1. **CDR K's professional role in SAPR Planning was a collateral duty that was operational in nature, did not focus on sexual assault response, and did not appear to provide any special insight into this case that would give a member of the public pause.**

Appellant argues that CDR K's collateral duty of writing a sexual assault operational plan "touched all aspects of sexual assault prevention." Appellant's Br. at 11. However, the record shows that sexual assault prevention was only a small aspect of her duties. CDR K's billeted position was as the Leadership, Diversity, and Inclusion Officer for the Atlantic Area staff. J.A. at 055. Her position was not one in which she dealt with individual victims or cases. *Id.* The aspect of her job that dealt with sexual assault was "purely a[n] operational or administrative type of activity" to make sure the Coast Guard was addressing safety as it relates to preventing sexual assault. *Id.* As a collateral duty, which she was tasked with only a few months prior to Appellant's trial, CDR K was working on developing a

sexual assault prevention plan to ensure commands had proper lighting in the berthing area and other "things of a more broad nature." *Id*. at 055, 062. This was a task that she did not volunteer for; it was assigned to her to complete. *Id.* at 062. CDR K never claimed to be Atlantic Area's "number one" person with respect to SAPR planning, but only with respect to an operational plan for prevention, which focused on physical and external changes—presumably to prevent all crimes and mishaps, not just sexual assault. Most importantly, in response to a question during *voir dire*, CDR K stated that her work would not affect her impartiality in this case. *Id.* at 73-74.

Moreover, her work in developing operational plans focused on topics that were not relevant to the case at hand. Here, the crime occurred while Appellant was far removed from a military base, not in a barracks room or in an area of a base with inadequate lighting. CDR K's work did not appear to provide any special insight into this case that would give a member of the public pause.

Appellant claims that CDR K "was responsible for conceptualizing and implementing all efforts to eradicate sexual assault in her area of responsibility." Appellant's Br. at 10 (citing J.A. 62-63). However, this statement is not supported by the record. The "LANTAREA plan" that she was responsible for focused on externalities and required "operational commands to check their on-board 'A' instructions to ensure . . . they have proper lighting and berthing areas." J.A. at

055, 071. CDR K had "nothing to do with individual cases," and everything "to do with programmatic issues." *Id.* at 063. The SAPR plan helped address the Coast Guard's Commandant's strategic SAPR plan to "stop sexual assault." *Id.* at 071. "The whole plan is focused on prevention. It's not our job to look at response." *Id.* at 072.

While Appellant correctly stated that "leadership was her main focus," it was her focus during her primary responsibility as the Leadership, Diversity, and Inclusion Officer, not in her collateral role as SAPR coordinator. CDR K and trial counsel had the following colloquy:

> A. It could be both. I've done a lot of reading over the last several months, so I wouldn't -- I couldn't tell you.
> Q. And, ma'am, is that reading because of the job ----
> A. Correct.
> Q. ---- that you've been doing recently? When were you tasked with that job?
> A. March-ish.
> Q. Is that a collateral duty or is that your main -- has that been your main focus ----
> A. No, my main focus is leadership, and we feel that sexual assault is part -- providing an environment for all of our members, that is safe from sexual assault is part of good leadership. Also, you know, safe from harassment, bias, all the different things that fall under diversity inclusion is all a leadership issue."

J.A. at 062. Nowhere in her responses did CDR K state that her planning involved drafting or conducting sexual assault training, drafting response plans, or directly responding to sexual assault incidents, which may have given the military judge cause for concern. When considering the totality of the circumstances, it was not

asking too much of the public to understand and realize that an officer who spent part of her duties working on preventing sexual assault from an operational perspective, without ever dealing with victims of sexual assault or the ensuing investigation, would be able to put aside what she knew about sexual assault prevention and consider the evidence impartially. Her comments, taken in full context, support the military judge's conclusion that a reasonable member of the public would perceive CDR K as fair and impartial.

Other than the specific positions enumerated in RCM 912(f)(2), court members are not *per se* disqualified because of their duty position or military specialty. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). This case is comparable to *Daulton*, a case in which a member admitted during *voir dire* that she had received psychiatric training and clinical experience during her medical residency while sitting in a case involving alleged indecent acts with children. *Id.* This Court held that the military judge did not err by denying challenge for cause, where the member's background and experience "may have given her empathy for injured and abused children." In light of the member's statements that she had "no preconceived notions about accused's guilt and no inelastic attitudes regarding punishment," this Court found that there was no error in not granting the challenge for cause. *Id.*

The circumstances in the present case are even less concerning; while the member in *Daulton* held the primary position of a medical doctor, CDR K was not billeted as the SAPR Common Operating Picture Coordinator. Although CDR K was assigned to draft Atlantic Area's SAPR operational plan, there are no facts in the record that show CDR K received any extensive training in the field of sexual assault that would remotely show any empathy beyond that of any other member of the Coast Guard for sexual assault victims. Similar to the member in *Daulton*, CDR K did not reveal any "preconceived notions about accused's guilt and no inelastic attitudes regarding punishment." *See Daulton*, 45 M.J. at 217.

Appellant cites *United States v. Dale*, 42 M.J. 384 (C.A.A.F. 1995) for the proposition that CDR K's official duties created a concern about the public's perception. In *Dale*, the defense challenged a member who served as the deputy chief of security police on the base. *Id.* at 385. The member's "entire career had been spent in the security police field." *Id.* As part of his normal duties, "he supervised security police investigations and has sat in on the 'cops and robbers' briefings for the base commander in the absence of the squadron commander." *Id.* This Court held that the member should have been removed from the panel because he was "intimately involved in the law enforcement function at the base." *Id.* at 386.

Unlike the member in *Dale*, CDR K's entire twenty-plus year career was not spent in sexual assault billets, but rather, her career focused on Coast Guard operations and planning. J.A. at 355-56. CDR K was not "intimately involved" with the SAPR program, especially in regards to responding to victims of sexual assault. This was the only time in her career in which she performed this type of work; it was a job that CDR K herself stated she did not volunteer for. CDR K specifically stated that she was not a Sexual Assault Response Coordinator or a Victim Advocate "because [her] job is purely [an] operational or administrative type of activity," which "ensure[s] . . . that we're as safe as possible with our barracks . . . when we're on-boarding people . . . ." *Id.* at 055. Moreover, CDR K never worked in law enforcement and did not have any interaction with the investigation of the case. Her involvement with sexual assault prevention makes her potential for bias far more attenuated than the member in *Dale*. Thus, Appellant's reliance on *Dale* is misplaced.

The facts in this case are also unlike those in *United States v. Clay*. In *Clay*, the accused was charged with the rape and indecent assault of a female. 64 M.J. 274, 275 (C.A.A.F. 2007). During *voir dire*, the senior member stated that he "would be merciless within the limit of the law" to anyone who raped a young female, that he had clear "moral convictions" regarding that issue, and that such an offense was "as serious [an] offense as [he] could think of." This Court found that

it was error to allow that member to serve on the panel because his answers created the perception that he would favor the harshest sentence available. Given the "close case" and *no indication* that the military judge had considered implied bias or the liberal grant mandate, the military judge erred in denying the challenge for cause. *Id.* In contrast, CDR K's flexible views and lengthy individual *voir dire* stands in sharp contrast to the strong sentiments expressed by the member in *Clay*. After being told that she would be asked to consider the entire range of punishments, including no punishment, CDR K did not equivocate or attempt to qualify her responses, nor was there a perception that she would be "merciless."

In regards to Appellant's subtle claim of unlawful command influence, CDR K spoke specifically to the opinions she had with regard to whether the media was affecting convening authorities' responses to sexual assault. She showed genuine concern about how the media can affect a commander's decision to refer charges:

> I am concerned that, you know, sometimes people feel -- may feel pressured to, you know, either press charges when there isn't sufficient information, or press a higher level of charges when it's not necessarily warranted because they're trying to be extra overly cautious. Nobody wants to be the guy who -- you know, to put something aside and then have the media get upset at them.

J.A. at 056.

Furthermore, CDR K did acknowledge that "she was aware of the President's statements and the political pressure on military commanders." Appellant's Br. at 11. In that regard, CDR K specifically stated:

> I know that there was a lot of blow-back when the President came and spoke about, you know, something to the effect of, 'If you are convicted of sexual assault you must be discharged', and so forth. There was concern that that could be improper . . . if someone is, say, convicted of sexual assault but it's not, it's, you know, a relatively minor case, for lack of a better descriptive, and another punishment might be more appropriate. People may want - - People may go further because they're -- they want to, you know, make sure their bosses are happy. And that's a concern to me, very much a concern to me . . . . I would like this to be reasonable and, you know, for everyone involved. I think that we need to – justice applies to everyone, not just the people we like, or however you want to put it.

J.A. at 063. CDR K expressed a strong opinion that commanders may feel pressured to overcharge a case when the facts do not support the charge because of fear of media backlash. The plan she was working on did not indicate a certain position or certain outcomes of cases. *Id.* at 072. Nothing in her responses indicated that she had a strong opinion as to the guilt or innocence of a defendant or that her opinions on overcharging would interfere with the way she handled her duties. If anything, her opinion made her more sympathetic to Appellant, due to her concern about the potential for an accused to be charged without sufficient evidence. That opinion would cause her to look more critically at the government in this case, rather than the Appellant.

In sum, both the trial judge, with the advantage of observing CDR K during a lengthy voir dire, and the Coast Guard Court of Criminal Appeals, correctly concluded, after review of the totality of the circumstances, that Appellant did not

demonstrate implied bias, and the bases for these conclusions were clearly stated in the record.

2. CDR K's personal and professional experiences with sexual assault did not imply bias where she was not a victim of sexual assault and remained flexible in her views.

CDR K is familiar both with people who have been accused of sexually related crimes and people who have been victims of sexual assault. In analyzing whether these experiences could cause CDR K to appear biased, this Court should consider that there is no *per se* rule of disqualification when a prospective member or one close to her has been a crime victim. When the member's experiences are different or distant in time from the matters at trial, the danger of implied bias is reduced. Also, the test for implied bias does not require that a member be ignorant of personal experience; rather, the test looks to whether the member can be fair. Here, CDR K's diverse experiences, viewed objectively, did not contribute to the appearance of an unfair trial.

There is no *per se* rule of disqualification when a potential member's relative has been the victim of a crime similar to the one charged against the accused. *Daulton*, 45 M.J. at 217; *United States v. Brown*, 34 M.J. 105 (C.M.A. 1992) (in a consensual sodomy case, the father of a victim of homosexual assault was not disqualified). In *United States v. Terry*, 64 M.J. 295 (C.A.A.F. 2007), the appellant was convicted of the rape of a female airmen. During *voir dire*, a panel

member revealed that his wife had been sexually assaulted by her stepfather at least ten years prior. In finding that the military judge did not err by denying the challenge for cause against the member, this Court considered a number of factors that minimized the member's appearance of implied bias, including the length of time that had passed from when the crime occurred, that the family had reconciled, and the member's willingness to broach the subject during *voir dire*. *Terry*, 64 M.J. at 304. Like *Terry*, a significant length of time has passed since CDR K's brother's last conviction. CDR K stated that she has reconciled with her brother and continues to have a relationship with him. J.A. at 067. CDR K was also very candid and forthcoming about her experience with her brother's crimes. *Id.*

Further, in *United States v. Fulton*, 44 M.J. 100, 100 (C.A.A.F. 1996), the accused was on trial for attempted larceny, and larceny of stolen credit cards to obtain goods through fraud. During *voir dire*, a member admitted that he had been the victim of a burglary several years prior, but that he could set that incident aside and decide the case based solely on the facts presented. *Id*. Defense counsel argued that the member's experience as a victim of a similar crime would influence his fairness during trial. *Id.* at 101. This Court found no implied bias in the member's status as a victim of a crime because it was attenuated by the passage of time and the crimes of the accused were different from the burglary the member experienced. *Id.*

Similar to *Fulton*, the crimes of CDR K's brother and those at issue in this case are very different. Neither CDR K nor her family members were the victims of an adult sexual assault. She described her brother as "a pedophile," indicating that her nieces were young girls when they were victimized. J.A. at 056. There is nothing in the record to indicate that either CDR K or a family member was the victim of an adult sex crime. There is an immense difference between being a stranger victim of an alcohol-related sexual assault and being a child molestation victim at the hands of a family member. The only similarity is the sexual activity.

This case is further distinguishable from *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985), upon which the defense relies. In *Smart*, the appellant was charged with committing two robberies with what appeared to be a handgun. *Id.* at 16. During *voir dire*, two members revealed that they had been victims of robbery on multiple occasions. The first member had been the victim of two robberies. *Id.* He stated on several occasions that "he did *not* believe that he could disregard any outside influence and base the sentence solely on the facts presented in court." *Id.* at 19. The second member, explained that he had been robbed "six or seven times" and that his father had been robbed with a pistol. *Id.* at 17. The Court held that the military judge erred by denying defense challenges for cause against both members, ruling that the military judge failed to attempt to rehabilitate the first member to see if he could be fair and impartial member. In regards to the second

member, the Court ruled that although "victims of robbery are not automatically excluded from sitting as jurors in robbery trials," the crime of armed robbery "is a traumatic event, which usually has great impact on the victim." *Id.* at 20. The risk was too high that the second member could not remove his past recollections and experiences with armed robbery. *Id.*

In the instant case, CDR K was not a victim of sexual assault or any similar sexual crime. It is too attenuated to imply bias to her merely because her brother was convicted of child molestation. Her brother's acts were not traumatic events that happened to CDR K personally. *See Smart*, 21 M.J. at 17. Additionally, the military judge clarified CDR K's answers and rehabilitated her regarding her brother's past. J.A. at 056-059. Thus, Appellant's reliance on *Smart* is misplaced.

CDR K's compassion for both victims and those accused or convicted of crimes shows not that she is biased, but that she is exactly the type of court-martial member that convening authorities are admonished to select. Article 25, UCMJ, provides that "a convening authority shall detail as members [of a 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." Nothing in Article 25 requires members to be totally naïve of matters similar to those involved in a court-martial, lacking in training and life experience, or otherwise ignorant. In this case, the record shows that CDR K is an

individual with diverse life experiences, which have taught her to have compassion for both the accused and the victim, to view the world with appropriate skepticism, to take serious matters seriously, and to rigorously follow instructions where required.

Appellant also concludes that although CDR K expressed compassion for her brother's crimes, "it goes too far to suggest that makes her neutral or even aligned with the accused based on this experience." Appellant's Br. at 13. However, Appellant fails to cite any authority for this sweeping conclusion, nor does he address the context in which CDR K was speaking when she spoke about the "damage" her brother's crimes had done to her family. In actuality, CDR K revealed: "I see what damage it does to a family when someone is convicted of sexual assault, you know, whether it's true or not. It's something I take extremely seriously. I think that there needs to be compassion on both sides of what's going on." J.A. at 057. Her statement, taken in context, shows openness to consideration of both sides of a sexual assault case, recognizing the gravity of such charges. Far from being an indication of bias, her answers reflect the qualities Article 25, UCMJ directs convening authorities to find in court-martial members.

Furthermore, CDR K stated that she appreciated both sides of the military justice system because of her past personal and professional experiences. CDR K was the supervisor of a junior member who was accused of sexual assault only to

have the accused later exonerated. She spoke to the harmful effect that an accusation can have on a member. J.A. at 057, 060. CDR K also revealed she had been a member in a previous court-martial for sexual assault, but stated her experience in that case would not influence her decision in Appellant's case or change her perspective on sexual assault. J.A. at 064-65. At all times she remained steadfast that she had an unbiased view and was acutely aware of the very serious nature of the charge: "I think that I could probably be one of the most fair people you could get on this because I do see both sides and I'm a perceiver, so I always want to see everything before I make a decision." J.A. at 068, 057. *See Strand*, 59 M.J. at 460 ("[A] member's unequivocal statement of a lack of bias can . . . carry weight when considering the application of implied bias" (internal quotations and citations omitted)).

Looking at the totality of the circumstances, a fully informed member of the public would understand and appreciate that her vast personal experience as a concerned service member made her a fair and impartial member. CDR K's diverse experience and understanding of both sides of a sexual assault case is exactly the type of court-martial member that Article 25, UCMJ, embodies.

3. CDR K's beliefs about consent did not amount to implied bias and did not affect the fairness of Appellant's trial.

"An accused is entitled to a fair and impartial panel of members." *United States v. Martinez*, 67 M.J. 59, 61 (C.A.A.F. 2008). While "[a]n inflexible member

is disqualified; a tough member is not." *United States v. Schlamer*, 52 M.J. 80, 92 (C.A.A.F. 1999) (where this Court found no implied bias for member who had tough views on sentencing but showed no inflexibility in her responses). The test is "whether the member's personal bias is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987). "Members are not and should not be charged with independent knowledge of the law." *United States v. Woods*, 74 M.J. 238, 244 (C.A.A.F. 2015).

During general *voir dire*, defense counsel had the following dialogue with the members:

> Q. Do all the members understand and agree that consent and permission can manifest in various ways, to include verbally and also physically?
> A. Affirmative response from all members.
> Q. Do the members think it's possible for someone to do something while they're drunk, that they wouldn't normally do while they're sober.
> A. Affirmative response from all members.
> Q. Do the members think it's possible for someone to do something while drunk, that they later regret when they become sober?
> A. Affirmative response from all members.
>
> J.A. at 048, 050.

During individual *voir dire*, defense counsel asked CDR K:

> Q. [D]o you think it's possible for someone to have consensual sex and then just be so intoxicated that they can't remember?
> A. My understanding is that if you are so drunk that you can't remember giving consent, then you are too drunk to give consent. That's my understanding.
> Q. And where does that understanding come from?

> A. That's what our training says. That's what the Coast Guard teaches us in our sexual assault class.
> Q. Would it be hard for you to, I guess, change that perspective, or believe another perspective on that?
> A. If the law told me that someone could give consent when they were severely intoxicated, I would, you know, I'd follow the law.
> . . .
> Q. So your belief is that the law says that if somebody is so drunk that they can't remember it, that means that they weren't able to give consent?
> A. My understanding is, if the person is so drunk that they are legally, you know, that they are intoxicated enough to not be able to give consent, then -- there is a line that says this person is too intoxicated to give consent. And I think -- I believe that -- I would be – You'd have to work hard to make me believe that someone was so drunk they can't remember anything about the evening, that they were then also able to give consent. I would have to be -- That would have to be proven to me.

J.A. at 065, 066.

Finally, trial counsel had the following colloquy with CDR K:

> Q. You mentioned your understanding of the law regarding substantial incapacitation, or incapacitation to the point where one cannot consent. Are you able to disregard what you believe now, if the judge instructs you otherwise?
> A. Yes.
> Q. And to follow whatever law the judge ---
> A. Correct.

J.A. at 073.

Although her statements are not entirely correct, she does indicate a willingness to follow the law and a recognition that what she knew came from her understanding of training she received. Once alerted to the fact that she was mistaken, CDR K unequivocally stated that she would be able to follow the

instructions given by the military judge. Her affirmations during general *voir dire*, and her reiterations during individual *voir dire*, show that any misunderstanding would not affect her ability to yield to the evidence presented and the judge's instructions. *See Reynolds*, 23 M.J. at 294. There is no evidence that CDR K did not follow those instructions and, absent evidence to the contrary, "court members are presumed to comply with the military judge's instructions." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003). Because CDR K did not indicate in any way that she would be anything other than fair and impartial, there was no basis to grant the defense's challenge for cause due to implied bias. Her initial statement of her understanding of the legal standard regarding the relationship between intoxication and consent does not show inflexibility to the evidence or the law.

The present case stands in stark contrast to *United States v. Woods*, where a prospective panel member asserted a strong belief that the military should apply a standard of "guilty until proven innocent." 74 M.J. 238, 244 (C.A.A.F. 2015). This Court held that "members are not and should not be charged with independent knowledge of the law," but because this issue was not just any principle of law, but "one of the fundamental tenets of U.S. criminal law that predates the founding of the republic," and the convening authority had the member's questionnaire upon

which she made such statements well ahead of trial, the public's perception of fairness would be negatively impacted. *Id.*

Unlike the member in *Woods*, CDR K was not dealing with a fundamental constitutional principle of law, but rather with consent, a highly technical and confusing concept that causes difficulty even for experienced practitioners. When the correct standard was explained to her, she stated that she was willing and able to listen to the evidence presented and follow the judge's instructions on the law.

As such, CDR K's beliefs about consent did not amount to implied bias and did not affect the fairness of Appellant's trial.

4. The collective grounds for challenging CDR K for implied bias do not support the challenge for cause.

While it is appropriate to consider the totality of circumstances during CDR K's *voir dire* when considering an implied bias challenge, the mere piling of non-meritorious claims does not transpose them into one meritorious claim. Appellant has failed to show that CDR K's experience with sexual assault, personal experiences with both people who have been accused of and the victim of sexual assault crimes, and her views on consent amount to implied bias. Even when taken together, the three issues do not meet the Appellant's burden.

Just as a member of the public would not find bias if a university planner—charged with a plan to improve lighting, placing emergency call boxes, and improving access controls of a university's campus in an effort to prevent sexual

assault and other crimes—were to sit on a jury involving a sexual assault, here, too, CDR K's collateral planning position is no cause for concern. Moreover, CDR K provided thoughtful and candid responses throughout *voir dire*. Consequently, the military judge found CDR K's statements "would not leave a reasonable member of the public" to doubt whether she would be fair or impartial. Because the military judge sits in the best position to evaluate the credibility of a prospective panel member, CDR K's unequivocal statements of impartiality should carry significant weight. *See Clay*, 64 M.J. at 277; *Youngblood*, 47 M.J. at 341.

Accordingly, an objective observer, considering CDR K's credibility and affirmation of impartiality, would not find implied bias even after considering each ground for challenge together.

VII.

Conclusion

Looking both at the individual issues addressed by Appellant and the totality of circumstances, Appellant has failed to carry his burden to show that the military judge erred in denying the challenge for cause against CDR K. A dispassionate, objective review of the record reveals that the claims asserted by Appellant are not disqualifying or egregious and would not, individually or collectively, result in the public perception that Appellant received something less than fair and impartial panel of members. The military judge had the opportunity to personally observe

CDR K and determined she could be fair and impartial. The record shows that CDR K understood and appreciated the role of a court member, including her obligation to apply the law as instructed upon by the military judge and his obligation to remain fair and impartial. A fully informed member of the public would have likewise observed CDR K's forthright answers and demeanor and heard her discuss why she was fair and able to see both sides. The military judge found no question, after observing *voir dire,* that her presence created the appearance of an unfair trial.

Accordingly, the United States asks this honorable Court to affirm the decision of the Coast Guard Court of Criminal Appeals.

VIII.

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(d) because it contains 9,599 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in proportional typeface with Times New Roman 14-point typeface.

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IX.

Certificate of Service

I certify that a copy of the foregoing was electronically submitted to the Court on 16 February 2016, and that opposing counsel, LT Philip Jones, USCG, was copied on that email at philip.a.jones@navy.mil.

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