IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	FINAL BRIEF ON BEHALF OF
	)	APPELLANT
Appellee	)	
v.	)	
	)	
Sergeant First Class (E-7)	)	Crim. App. Dkt. No. 20140205
JASON M. COMMISSO	)	
United States Army,	)	USCA Dkt. No. 16-0555/AR
Appellant	)	

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

Granted Issue

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE DEFENSE'S POST-TRIAL MOTION FOR A MISTRIAL, THEREBY VIOLATING APPELLANT'S RIGHT TO HAVE HIS CASE DECIDED BY A PANEL OF FAIR AND IMPARTIAL MEMBERS, BECAUSE THREE PANEL MEMBERS FAILED TO DISCLOSE THAT THEY HAD PRIOR KNOWLEDGE OF THE CASE.

Statement of Statutory Jurisdiction

The U.S. Army Court of Criminal Appeals (Army Court) had jurisdiction pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On March 17-19, 2014, a panel of officers sitting as a general court-martial in Honolulu convicted Sergeant First Class (SFC) Jason M. Commisso, contrary to his pleas, of two specifications of abusive sexual contact, and single specifications of indecent viewing, indecent recording, indecent broadcasting, violating a lawful general regulation, obstructing justice, and making a false official statement, in violation of Articles 120, 120c, 92, 134, and 107, UCMJ, 10 U.S.C. §§ 920, 920c, 892, 934, & 907 (2012). He was acquitted of three specifications of rape. (JA 132-133.) The panel sentenced SFC Commisso to be reduced to the grade of E-1, confined for one year, and a bad-conduct discharge. (JA 134.). The convening authority approved the sentence as adjudged. (JA 1.)

On April 29, 2016, the Army Court set aside and dismissed the specifications of violating a lawful general regulation and making a false official statement, and affirmed the remaining findings of guilty and the sentence. (JA 1-8.) It decided the granted issue, which was briefed by appellant to the Army Court, without explanation. There was no oral argument. Sergeant First Class Commisso was notified of the Army's Court decision and timely petitioned this Court for review on May 25, 2016. The government submitted a 10-day letter in accordance with Rule 21(c)(2) opposing the granting of a petition for review. The Court granted review on June 29, 2016.

Statement of Facts

Sergeant First Class Commisso met Marine Private First Class (PFC) EW at a physical therapy appointment on May 31, 2013. (JA 103.) He asked for her phone number and they exchanged numerous text messages. (JA 104-105.) They agreed to go to dinner and watch a movie. (JA 105-108.) After dinner, they went on a motorcycle ride and then to his apartment. (JA 109-112). While there, PFC EW took some morphine to relieve pain resulting from a hip injury she had previously suffered. (JA 113.) She claimed that the medication made her drowsy and she fell asleep on a couch in the living room. (JA 113.) Private First Class EW also claimed she later awoke to find SFC Commisso lifting her shirt and photographing her bare breasts without her consent. (JA 115-116.) She further claimed SFC Commisso touched her breasts. (JA 114.) PFC EW then went back to sleep and later awoke in his bed. (JA 117.) She claimed that while in bed, SFC Commisso performed various sexual acts upon her without her consent. (JA 118-125.)

The next day, SFC Commisso drove PFC EW to her barracks. (JA 126.) Later, PFC EW reported he sexually assaulted her. (JA 127.) During the subsequent investigation, United States Army Criminal Investigation Division (CID) agents discovered SFC Commisso sent a fellow Soldier, Sergeant (SGT) Stringer, a photograph of PFC EW unclothed. (JA 128.) They also discovered

SFC Commisso deleted several text messages to SGT Stringer from his own cellular telephone, along with some photographs of PFC EW. (JA 129-131.) He was subsequently tried by court-martial.

Prior to SFC Commisso's court-martial, the general court-martial convening authority (GCMCA) conducted monthly reviews of all sexual assault cases in the command. (JA 170-171.) These meetings were referred to as the Sexual Assault Review Board (SARB).

The review was conducted with all brigade commanders and relevant staff. (JA 170.) The meeting would begin by discussing sexual assault prevention and then move into case review. (JA 197.) Commanders would take turns briefing the GCMCA on the status of the open cases in their respective subordinate units. (JA 170-171.) Each individual case was depicted on a PowerPoint slide, consisting of a summary of the facts reported by the alleged victim, the ranks of the subject and alleged victim, and a summary of the services offered to the alleged victim. (JA 146-149.) After case review, "the meeting would progress to more best practices from the unit's themselves." (JA 197.)

The SARB consisted of the following members: (1) Sexual Assault Response Coordinator (SARC); (2) victim advocate; (3) Army Criminal Investigation Command; (4) staff judge advocate or representative; (5) provost marshal or representative; (6) chaplain or chaplain's representative; (7) sexual

assault clinical provider or sexual assault care coordinator; (8) Chief, Behavioral Health, and (9) other members who were appointed because their responsibilities pertained to sexual assault (for example, victim witness liaisons or an Alcohol and Substance Abuse Program representative). (JA 262-263.) The regulation makes no provision for defense representation, and so far as the record reveals, no person in attendance was a defense counsel for SFC Commisso or any other Soldier.

Cases were briefed at the SARB starting when the command became aware of the sexual assault allegation. (JA 201.) The briefings continued at each monthly SARB until the GCMCA closed the case. (JA 173-174.) The GCMCA would not close the case until after the court-martial ended. (JA 174.) According to the military judge's findings, a slide depicting PFC EW's version of the facts was presented to the SARB at least four times prior to trial. (JA 265.) However, PFC EW reported the alleged incident on June 1, 2013, and the court-martial was not until March 19, 2014. (JA 146-149.) So it appears the slide was briefed at least ten times before the panel rendered their decision. The SARB is a "victim based meeting," and the victim's allegations are not challenged. (JA 204-205.) The relevant summary on PFC EW's slide indicated the following:

> Alcohol Involvement: No but the victim used morphine and other narcotics that she was prescribed.
>
> Environment: Victim met the accused at physical therapy, and then went to dinner with him. She then agreed to spend the night at his apartment so he would not have to drive her home. After taking some

> medication and watching TV, victim fell asleep. She awoke to the accused touching her breasts and taking nude photos of her. She then fell asleep again and awoke again in the accused [sic] bed with the accused forcing her to perform oral sex on him. The accused then grabbed her neck and penetrated her vagina with his fingernails, but was too weak from the medication to stop him. The accused admitted to these acts but stated that it was all consensual, and that the scratches were on his body because the victim "liked it rough."
>
> Disposition of Subject: Docketed for GCM 15-17 January 2014[1]

(JA 146.) Private First Class EW transferred to Camp Pendleton, California in September 2013. (JA 102.) Thus, slides depicting her version of the allegations and the status of the accused's upcoming court-martial were briefed at least five times after PFC EW left Hawaii.

During voir dire, the military judge asked the panel whether they knew "Marine Private First Class, [EW], named in the specifications." (JA 34.) The military judge also asked whether anyone on the panel had prior knowledge of the facts or events alleged in the accused's case. (JA 34.) Civilian defense counsel asked if any panel member was in a group that dealt with issues of sexual assault in the military, or whether they had ever been involved in the sexual assault response system. (JA 59-60.) Defense counsel also asked "[h]as anyone heard about any of

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[1] Four slides were provided to trial defense counsel as part of post-trial discovery. These slides all contained a different disposition depending on where in the process the case was at the time the particular slide was generated. One slide indicated the Article 32 was conducted, another updated the docketing of the GCM for 17-18 March 2014, and the last slide the government provided contained the disposition of the court-martial and the sentence. (JA 146-149.)

the facts of this case whatsoever?" (JA 57.) Three of the panel members, Colonel (COL) Forsyth, COL Ackerman, and Lieutenant Colonel (LTC) Arcari personally attended multiple SARB briefings where PFC EW's version of the facts was presented in detail, yet they responded negatively to all of these questions. (JA 265.) These officers were three of the ten panel members. (JA 100.)

At some point during the court-martial, COL Forsyth noted to the other panel members that he recognized this case from SARB meetings he attended. (JA 266.) Colonel Ackerman and LTC Arcari similarly recalled the case from SARB meetings. (JA 266.) At no point during or immediately after trial did they inform the military judge and counsel that they had in fact attended one or more briefings on the case.

A week after sentence was announced, on March 25, 2014, COL Forsyth attended yet another monthly SARB meeting. During the meeting, he made several comments after PFC EW's slide was displayed. He stated that he had been a panel member in SFC Commisso's court-martial and was concerned that the details on the SARB slides might taint him or other panel members. (JA 204.) He also reflected aloud on whether he had been truthful during voir dire, stating "[d]id I lie? Maybe I did. I don't think I did." (JA 144.)

Colonel Forsyth later testified that the information on the slides may cause SARB members to lose their objectivity when hearing the case, and it may harm

the perception the Army is transparently solving the problem of sexual assault. (JA 204.) He was concerned with the perception people would have of the system if they knew information was being provided to future panel members in a victim based meeting. (JA 205.) "We have to be objective. … I don't want the system to be questioned. It's got to be fair for both sides." (JA 212.) Adrian Howe, the acting installation SARC for the March 25, 2014 SARB recalled COL Forsyth saying, "[H]e might have felt a little bit biased sitting on a court-martial panel already having some knowledge of the case." (JA 234.) Shortly after COL Forsyth's comments at the SARB, case summaries were omitted from SARB slides.

After learning of COL Forsyth's comments, the defense filed a post-trial motion with the military judge, seeking a mistrial based upon implied member bias. (JA 135.) The military judge conducted a post-trial Article 39(a) session, during which the three members referred to above were examined and other evidence and argument was presented. Ultimately, the military judge denied the defense motion. (JA 269.)

Summary of Argument

Three panel members were disingenuous in response to multiple voir dire questions. They failed to inform the court they were members of a monthly meeting designed to prevent sexual assaults. At these meetings, they repeatedly

encountered PFC EW's version of SFC Commisso's case before acting as fact-finders.

Even assuming they did not intentionally provide false statements during voir dire, however, they had a continuing duty to correct the misinformation they provided the court. Had defense counsel known three of the ten panel members were members of the SARB dealing with PFC EW's allegations, they could have successfully challenged at least one of the members under the implied bias standard. The public would lose confidence in the impartiality of the military justice system if it knew thirty percent of SFC Commisso's panel was composed of members who heard PFC EW's unchallenged allegations multiple times before court-martial.

Additionally, the affected members' involvement in the case went beyond hearing the allegations before trial. At the SARB meetings, these members helped develop best practices to prevent future sexual assaults based off allegations like the ones made by PFC EW. Considering the level of involvement of these three members, and the percentage they compromised on the panel, the military judge should have granted the defense post-trial motion for a mistrial.

Argument

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE DEFENSE'S POST-TRIAL MOTION FOR A MISTRIAL, THEREBY VIOLATING APPELLANT'S RIGHT TO HAVE HIS CASE DECIDED BY A PANEL OF FAIR AND

IMPARTIAL MEMBERS, BECAUSE THREE PANEL MEMBERS FAILED TO DISCLOSE THAT THEY HAD PRIOR KNOWLEDGE OF THE CASE.

Standard of Review

A military judge's denial of a motion for a mistrial is reviewed for an abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). Under that standard, the reviewing court must "determine whether the military judge's findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Baker*, 70 M.J. 283, 291 (C.A.A.F. 2011). "A military judge abuses his discretion when (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010).

Here, the military judge had to determine whether any panel member should have been challenged due to implied bias. This Court reviews "implied bias challenges pursuant to a standard that is less deferential than abuse of discretion, but more deferential than *de novo* review." *United States v. Peters*, 74 M.J. 31, 33-34 (C.A.A.F. 2015) (citing *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006)) (internal quotations omitted).

Law and Argument

"The Supreme Court has noted that a touchstone of a fair trial is an impartial trier of fact." *United States v. Albaaj*, 65 M.J. 167, 168 (C.A.A.F. 2007) (quoting *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 554 (1984)). "Where a potential member is not forthcoming ... the process may well be burdened intolerably." *Id.* (quoting *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994)). "As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen,* 56 MJ 172, 174 (C.A.A.F. 2001) (citing *Mack*, 41 M.J. at 54).

A panel member has a continuing duty of candor that extends beyond voir dire through the duration of the trial. *Albaaj*, 65 M.J. at 170. A member is not the judge of his or her own qualifications. *Id.* at 170 (referencing Rules for Courts-Martial [hereinafter R.C.M.] 801(a)(4), 912(f)(3)). "Honest disclosures must be made throughout the trial 'regardless of [the member's] own belief as to their ability to sit as court members.'" *Id.* (quoting *United States v. Rosser*, 6 M.J. 267, 273 (C.M.A. 1979) (alterations in original)).

Mack correctly adopted the two-pronged test articulated by the Supreme Court in *McDonough* for determining whether a new trial is warranted when there is an allegation that a juror failed to disclose information during voir dire:

> (1) a juror failed to answer honestly a material question on voir dire; and

(2) a correct response would have provided a valid basis for a challenge for cause.

Albaaj, 65 M.J. at 169-70 (citing *Mack*, 41 M.J. at 55 (quoting *McDonough,* 464 U.S. at 556)).[2]

Here, the issue is whether any of the three panel members were subject to challenge under the implied bias test. "Implied bias is an objective test, 'viewed through the eyes of the public, focusing on the appearance of fairness.'" *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007). While "implied bias should be invoked rarely," this does not mean that there should be judicial resistance or disdain for finding implied bias. *Id.* at 277. "Instead, the statement reflects that . . . where there is no finding of actual bias, implied bias must be independently established." *Id.*

"[M]ilitary judges are enjoined to be liberal in granting defense challenges for cause." *Clay*, 64 M.J. at 276 (citing *United States v. Moreno*, 63 M.J. 129, 134

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[2] The Supplement (at p. 9-10) incorrectly suggested that this case should be tested for prejudice. Upon further review of the pertinent authorities, implied bias cases do not require a showing of prejudice. *See United States v. Peters*, 74 M.J. 31 (C.A.A.F. 2015). There is also no freestanding prejudice requirement in the *Mack/McDonough* test, nor was prejudice discussed in *Albaaj*. Essentially, structural error exists once the two prongs are met. "'Structural errors involve errors in the trial mechanism' so serious that 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008), quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). And the Supreme Court found structural error in *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016), referred to at p. 20 *infra*.

(C.A.A.F. 2006)). "[A] member *shall* be excused in cases of . . . implied bias." *Wiesen*, 56 M.J. at 174 (emphasis added). The liberal grant mandate is "part of the fabric of military law," and in close cases military judges are required to liberally grant challenges for cause. *See Clay*, 64 M.J. at 277.

1. Three panel members failed to answer multiple voir dire questions honestly.

Every member of the panel responded negatively to whether they: (1) knew "Marine Private First Class, [EW], named in the specifications;" (2) had prior knowledge of the facts or events alleged in the accused's case; (3) were a member of a group that deals with issues of sexual assault in the military; (4) had ever been involved in the sexual assault response system; and (5) had "heard about any of the facts of this case whatsoever?" (JA 34, 57, and 59-60.) For COL Forsyth, COL Ackerman, and LTC Arcari, these answers were false.

Colonel Forsyth recalled this case was briefed at the SARB during voir dire, and he discussed the prior SARB briefings with COL Ackerman, and LTC Arcari during the court-martial.[3] (JA 266.) When COL Forsyth remembered during voir

[3] The military judge found that COL Forsyth realized this case had been briefed at the SARB sometime *after* voir dire. (JA 266.) But this finding is not supported by the record. Colonel Forsyth believed it was the flyer that informed him the victim was a Marine PFC, but the flyer did not state PFC EW was a Marine. (JA 161-162, 201-202, 214, and 218.) Rather, it was the military judge who first discussed PFC EW's service in the Marines, and that was *during* voir dire. (JA 34 and 218.) Therefore, it is peculiar the military judge found COL Forsyth became aware the victim was a Marine after voir dire, since that finding is not supported in the

dire SFC Commisso's case was briefed at the SARB, and neglected to let any party know this or that he was even a member of the SARB, he was dishonest.

Furthermore, COL Forsyth, COL Ackerman, and LTC Arcari were dishonest during voir dire when they denied involvement in the response to sexual assault allegations or membership to a group dealing with sexual assaults in the military. Civilian defense counsel asked these questions because he wanted to discover other possible biases on the part of panel members. Anyone familiar with the military in the last few years knows the increased attention sexual assaults have received from the top civilian leadership. This has led to the creation of multiple resources for victims, and many members of the military are asked to serve in additional duties that help victims. Yet all three panel members denied being a member of one of these groups, even though the SARB is clearly a group designed to deal with sexual assaults in the military. As COL Forsyth testified, SARB meetings were also about providing victim services and the development of best practices to prevent future sexual assaults, which means they are involved in the sexual assault response system. Attending monthly SARBs should have caused these three to say yes to the defense counsel's questions, and it is hard to understand why they did not.

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record, and COL Forsyth claimed multiple times to have remembered this fact during voir dire.

While the military judge found COL Forsyth, COL Ackerman, and LTC Arcari did not recall they were briefed at the SARB until after voir dire, each one remembered SFC Commisso's case during the court-martial because it had an unusual rank and service component combination, namely that SFC Commisso was an Army E-7 and PFC EW was a Marine Corps E-2. (JA 176, 187, 201, and 229). So even assuming none of the affected panel members knew they were providing false information during voir dire, they still did not answer questions honestly because they failed to correct the erroneous information they previously provided. Nothing in recent decisions by this Court on member dishonesty suggests a willfulness requirement. In *Albaaj*, this Court expressly held:

> If a court member learns of information during the trial which makes an earlier response to a voir dire question inaccurate, the member should so advise the court. The duty of candor does not stop at the end of voir dire but is an obligation that continues through the duration of the trial. It makes no difference whether the member knew during voir dire that his response to a question was incorrect or whether he later realized, or reasonably should have realized, that his initial response was incorrect—the duty to honestly inform the court is the same.

65 M.J. at 170 (citations omitted).

Albaaj further held a nondisclosing member's potential bad faith "is not the proper inquiry. A panel member is not the judge of his own qualifications." *Id.* *See also Rosser*, 6 M.J. at 273 ("No premium will be paid in the military justice system for lack of candor on the part of its members. Indeed, [the MCM] requires full disclosure of *any* possible grounds for challenge by the court members

regardless of their own belief as to their ability to sit as court members."). So a prospective panel member's internal thought process during voir dire is simply irrelevant to whether he or she will be deemed "honest." There is no dispute that all panel members became aware of their prior false answers during the court-martial. Failing to correct the record means they were dishonest.

2. These questions were material.

The first prong of the *McDonough/Mack* test also requires the question be "material." The term "material" means "having some logical connection with the consequential facts or of such a nature that knowledge of the item would affect a person's decision making." *Albaaj*, 65 M.J. at 170 (citing *Black's Law Dictionary* 998 (8th ed. 2004) (alterations in original omitted)). Voir dire questions related to potential bias meet this definition of material. Honest answers to voir dire affects decisions to challenge members. So whether a potential member has prior knowledge about the facts, or is a member of a victim centered sexual assault group, is material. Accordingly, the first prong of the *McDonough/Mack* test is met.

3. Correct responses during voir dire would have provided a valid basis for a challenge for cause for COL Forsyth, COL Ackerman, or LTC Arcari.

Turning to the second prong, there is little doubt that a correct response would have provided a valid basis for challenge. Here, three members met with other senior leaders and witnessed multiple discussions of the facts and proposed

ways ahead in SFC Commisso's case. Significantly, these discussions were focused on the alleged victim in the presence of multiple members of law enforcement, while SFC Commisso and his representative were not present.

Impartial court-members are indispensable to a fair court-martial. *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995); *See also Smith v. Phillips*, 455 U.S. 209 (1982); *Remmer v. United States*, 347 U.S. 227 (1954). Rule for Courts-Martial [hereinafter R.C.M.] 912(f)(1)(N) provides that a member "shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." This rule encompasses challenges based on both actual and implied bias. *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997).

Military judges must test the impartiality of potential panel members for both actual and implied bias. *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005). Unlike actual bias, this Court reviews an allegation of implied bias objectively through the eyes of the public with a focus upon the appearance of fairness. *Id.* (citation omitted). In applying that standard, 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." *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008).

"The hypothetical 'public' is assumed to be familiar with the military justice system." *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citations omitted). Because implied bias is an objective standard, a military judge's ruling is afforded less deference. *Strand*, 59 M.J. at 458; *see also United States v. Lavender*, 46 M.J. 485, 488 (C.A.A.F. 1997). This Court evaluates challenges for implied bias based upon the totality of circumstances. *Richardson*, 61 M.J. at 119.

Colonel Forsyth was right to worry about the public's perception of military justice if it knew he and other panel members were repeatedly exposed to the victim's unchallenged version of events in meetings designed to prevent future sexual assaults. Indeed, he felt strongly enough about the issue to raise it *sua sponte* to other members during the trial, and again a week later at the next SARB briefing he attended, pointing out that the detailed factual summaries could create bias and perception issues.[4]

That change came too late for SFC Commisso because COL Forsyth and the other members decided for themselves they were not actually biased. If they had presented their concerns about the public's perception of the military justice system to the parties during court-martial, the issue could have been resolved by removing them from the panel. Instead, three of the ten members had prior,

[4] On the brighter side, these factual summaries were eliminated from SARB briefing slides after his comments. So a ruling in favor of SFC Commisso would not open the floodgates to overturn all cases coming out of US Army Hawaii.

undisclosed knowledge of the case repeatedly provided to them in victim-based meetings where law enforcement was present, and no one discovered it until after the court-martial. Had the military judge not conducted the post-trial Article 39(a) session, there would be no record of the potential bias. The judge is to be commended for conducting a post-trial evidentiary hearing, but in the end he resolved the issue incorrectly.

While the three panel members claimed they could not remember the facts of SFC Commisso's case during the court-martial, that is irrelevant to an implied bias analysis. In these meetings, members were tasked with serving victim needs and preventing future sexual assaults based off of unchallenged reports. Colonel Forsyth, COL Ackerman, and LTC Arcari had already assumed the truth of PFC EW's allegations by performing their assigned tasks on the board, even if they could not remember precisely what her allegations were. Further, these SARB meetings went beyond serving her needs. Private First Class EW left Hawaii in September 2013. (JA 102.) According to the practices the panel members described, cases were briefed once a month and not closed out until after court-martial. So PFC EW's case was briefed at least five times after she left Hawaii for Camp Pendleton, a base where the GCMCA or any member of the SARB lacks authority to provide her any service. And the dates of the legal proceedings continued to be updated. (JA 146-149.) It is hard to understand what purpose

these continued briefings had, but easy to conclude that the public would worry that such briefings would improperly influence future panel members.

The civilian system would never tolerate a scenario where thirty percent of a criminal jury was briefed multiple times on the allegations from the victim's perspective, in meetings attended by representatives of law enforcement but not the defense, nor would thirty percent of the jury be involved in helping the victim receive salutary services due to her allegations, or continue to receive such briefings even after they can possibly provide those services. Implied bias is clear. On these facts, the military judge abused his discretion in failing to grant a mistrial.

The Supreme Court recently made clear that the participation of even a single disqualified person on a multimember adjudicatory body whose decision making is not subject to discovery suffices to invalidate a decision. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909-10 (2016). By that standard, even if only one of the three officers who were repeatedly exposed to PFC EW's account in the course of SARB briefings, that would be impermissible. That there were three officers in that position, where seven votes were required both to convict and to sentence and where voting is by secret written ballot—is simply icing on the cake. R.C.M. 921(c).

Conclusion

For the foregoing reasons, the Court should reverse the decision of the Army Court and set aside the findings of guilty and sentence, with leave to conduct a new trial with an untainted panel.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Commisso, Crim. App. Dkt. No. 20140205, Dkt. No. 16-0555/AR, was delivered to the Court and Government Appellate Division on July 28, 2016.

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