

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,)	REPLY 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
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Argument

The government insists that Colonel (COL) Forsyth, COL Ackerman, and Lieutenant Colonel (LTC) Arcari were not dishonest during voir dire and that there was no basis to challenge them. According to the government, only limited information was presented during the approximately ten meetings of the Sexual Assault Review Board (SARB) where SFC Commisso’s case was briefed. So the affected panel members did not have real “knowledge” of SFC Commisso’s case.

This argument elides the other functions of the SARB. The SARB meetings took a comprehensive approach to sexual assaults involving US personnel in Hawaii. Analyzing the SARB’s various functions is necessary to understand the many dishonest answers given by the three panel members, and to show why the

public would lose faith in the impartiality of the military justice system if it knew these three members sat in judgement of SFC Commisso.

The government also argues the defense's voir dire questions were not specific, failing to alert the SARB members of their prior knowledge of SFC Commisso's case or of their membership in the SARB. This argument requests an arduous standard, forcing defense counsel to ask panel members about membership in every conceivable group or charity by name. Here, the defense fairly put the members on notice their SARB membership was at issue by asking them whether (1) they were in a group dealing with sexual assault in the military, or (2) were actively involved in the sexual assault response system.

Lastly, the government asks this Court to test for prejudice and to consider Rule for Court-Martial (R.C.M.) 1210 before deciding that SFC Commisso's request for a mistrial should have been granted. This Court should follow the two-part test found in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984) and *United States v. Mack*, 41 M.J. 51 (C.M.A. 1994), and not add a third requirement after SFC Commisso's court-martial. As with any other implied bias case, this two-part test focuses on the structure of the court-martial, and is not subject to analyzing the prejudice on the underlying merits. Rather, *McDonough* and *Mack* protect an appellant's right to an impartial panel.

1. *McDonough*'s two-part test ensures that appellants receive an impartial fact-finder. The test does not entail a determination that the biased fact-finder acted reasonably.

It is common ground that the two-part test from *McDonough* and *Mack* applies to SFC Commisso's court-martial. But the military judge held and the government wrongly asserts that there are additional requirements to relief not found in these cases.

The government claims SFC Commisso is not entitled to a new trial because he failed to show the three panel members' prior knowledge of the case and their SARB membership contributed to the findings and sentence, or that a new trial would probably produce a more favorable result. (Gov't Br. 27-29.) Yet the government does not offer any precedent to demonstrate this additional step is required. It cites six cases involving panel member dishonesty, one that even predates *Mack*'s adoption of the *McDonough* test, and every one fails to discuss Rule for Court-Martial (R.C.M.) 1210 or to test for prejudice.¹ Of the cases cited by the government that test mistrial requests for prejudice, none discuss panel member dishonesty.²

¹ *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984); *United States v. Albaaj*, 65 M.J. 167 (C.A.A.F. 2007); *United States v. Humphreys*, 57 M.J. 83, 96-97 (C.A.A.F. 2002); *United States v. Lake*, 36 M.J. 317, 322-324, (C.M.A. 1993); *United States v. Mack*, 41 M.J. 51 (C.A.A.F.1994); *United States v. Sonogo*, 61 M.J. 1 (C.A.A.F. 2005);

² *United States v. Ashby*, 68 M.J. 108, 121-123 (C.A.A.F. 2009) (holding trial counsel improper comment on appellant's right to silence harmless beyond a

That the government fails to identify any authority requiring SFC Commisso to show a biased fact-finder contributed to the result should not be a surprise. The proper lens for understanding this case is the same as it is for all implied bias ones—improperly empaneled members are an affront to the structure of the court-martial. If this Court finds the two-part test of *McDonough/Mack* is satisfied, SFC Commisso’s conviction and sentence must be set aside.

2. The government emphasizes the panel members’ limited knowledge of SFC Commisso’s case, ignoring the other dishonest answers given during voir dire. Multiple material questions were answered dishonestly.

The military judge abused his discretion by ignoring the reasoning of *United States v. Albaaj*, 65 M.J. 167 (C.A.A.F. 2007), and applying the incorrect legal test to determine panel member dishonesty. The government repeats these mistakes and gives undue deference to the affected members’ decision not to disclose information, inferring this as evidence of their good faith. (Gov’t Br. 18.) This circular reasoning makes it impossible to find panel members ever acted dishonestly, since a failure to disclose equates to good faith.

The government is perfectly correct that SFC Commisso relies heavily on *Albaaj*. (Gov’t Br. 20.) *Albaaj* redirects the inquiry away from the members’

reasonable doubt); *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013) (holding *Brady* violation harmless beyond a reasonable doubt); *United States v. Diaz*, 59 M.J. 79, 90-97 (C.A.A.F. 2003) (finding accumulation of evidentiary errors warranted mistrial);

intentions, and makes it the panel members' responsibility to correct misinformation they provided the court. *Id.* at 170. *Albaaj* does not attempt to decipher the panel member's good or bad faith. Simply, the failure to correct prior misinformation shows COL Forsyth, COL Ackerman, and LTC Arcari acted dishonestly.³

The military judge and the government attempt to distinguish *Albaaj*, however, by arguing the voir dire questions were too general, and they failed to put COL Forsyth, COL Ackerman, and LTC Arcari on notice they were providing incorrect information. (JA 267-268, Gov't Br. 20-22.) But this argument does not fairly address all of the voir dire questions.

a. Defense counsel specifically asked the panel if they had heard anything at all about SFC Commisso's case.

The government and military judge focus on the meaning of "knowledge," and argue the limited facts presented at SARB meetings, although briefed repeatedly to COL Forsyth, COL Ackerman, and LTC Arcari, do not necessarily equate to prior knowledge of SFC Commisso's case. (JA 267-268, Gov't Br. 19.)

³ The military judge also found the Army Benchbook's instructions did not put the members on notice they had a duty to correct misinformation they provided during voir dire, even though all three panel members discussed their prior knowledge of the case during the court-martial. (JA 267.) This analysis ignores *Albaaj*, and to the extent the Benchbook failed to incorporate a clear rule to correct misinformation, it should not prejudice SFC Commisso. "The duty to disclose cannot be dependent upon the court member's own evaluation of either the importance of the information or his ability to sit in judgment." *Albaaj* at 170.

But the focus on knowledge ignores one specific question from the civilian defense counsel. He asked the members whether they had “heard about any of the facts of this case *whatsoever?*” (JA 57)(emphasis added.)

Semantic disagreements about when one can be said to truly know something become immaterial when faced with this question. Defense counsel unambiguously asked the panel members to search their memories for *any* exposure they had to SFC Comisso’s case. Three panel members had been briefed on his case approximately ten times, yet they said nothing. Then during court-martial, they discussed these prior briefings among themselves, but did not disclose it to the parties. *Albaaj* is clear that COL Forsyth, COL Ackerman, and LTC Arcari had a duty to tell the court the truth, not decide among themselves to keep a secret because they deemed it immaterial.

b. Defense cannot be expected to list every organization, extra duty, or charity by name when asking about potential biases. Defense counsel asked the members if they were involved in the sexual assault response system or if they were in a group dealing with sexual assault in the military. Both of these questions should have triggered a positive response from COL Forsyth, COL Ackerman, and LTC Arcari.

The government argues the defense failed to specifically ask COL Forsyth, COL Ackerman, and LTC Arcari if they served on the SARB, so they forfeited the issue.⁴ (Gov’t Br. 22.) The responsibilities of SARB members dictated in

⁴ This argument is based on the “general” nature of defense counsel’s questions, as well as the defense’s imputed knowledge of the members’ service on the SARB.

Appendix F of AR 600-20 demonstrate the members' lack of candor. The SARB members are required to recommend improvements to processing sexual assault cases, to monitor each alleged sexual assault incident and determine prevention and response training needs, and to review agreements with other services and civilian agencies regarding sexual assault prevention. (JA 263.)

Colonel Forsyth, COL Ackerman, and LTC Arcari, by virtue of their membership in the SARB, were in a group dealing with sexual assault in the military and involved in the sexual assault response system. In this group, they had to report monthly to a superior on the status of sexual assault investigations in their own units, as well as devise systems for improving US Army Hawaii's response system to sexual assaults. Yet they all answered no when defense asked

(Gov't Br. 26 at footnote 3.) While the government cites Army Regulation (AR) 600-20 as the basis to impute defense knowledge of COL Forsyth's, COL Ackerman's, and LTC Arcari's service on the SARB, it offers no pin cite to support this argument. (Gov't Br. 26 at footnote 3.) Appellate defense counsel could not find anything in the extract from AR 600-20 that designates membership to the SARB based on command status, except for the requirement of the installation commander to convene the SARB on a monthly basis. (JA 262.) Other brigade or battalion commanders are not listed as mandatory members of the SARB under F-3 of AR 600-20. (JA 262-263.) So this argument appears to lack merit. Considering the constant changes from senior leaders and the civilian leadership to combating the scourge of sexual assault in the military, it is unreasonable to impute knowledge of every conceivable group or board responding to sexual assault to defense lawyers. Further, if knowledge should be imputed in this case it should be on the government, which appointed these three members to the SARB and where by regulation, one of the government's attorneys attended these monthly meetings with these three panel members.

these two questions during voir dire, and failed to correct these answers during the court-martial while discussing their SARB membership amongst themselves.

The government analogizes this case to *United States v. Lake* 36 M.J. 317 (C.A.A.F. 1993), where defense counsel's questions were so generic that the affected panel members could not be said to be dishonest.⁵ (Gov't Br. 21.) But in *Lake*, the members were asked if they had prior knowledge of the case or if they knew of anything which may raise an issue. These questions did not identify anything concrete for the panel members to focus on, and asked them to make broad legal conclusions they were incapable of making. Here, defense counsel focused the members to sexual assaults in the military, and asked factual questions about extra duties or involvement in the response system to these sexual assaults. Considering their involvement in both, COL Forsyth, COL Ackerman, and LTC Arcari should have informed the defense.

The government asks for too much. The rule the government wants would require lawyers to recite voir dire questions from a prepared list in a rote way that would bore the parties and annoy the members, making voir dire less of a conversation where advocates engage with panel members and more like a survey where questions are read from a checklist. The rule is also absurd on its face.

⁵ *Lake* is also before this Court adopted the *McDonough* test. So it is unclear what utility *Lake* has in determining what constitutes "dishonesty."

There is no way COL Forsyth, COL Ackerman, and LTC Arcari can honestly say they were members of the SARB, but not in a group dealing with sexual assaults in the military, or involved in the response system to sexual assaults.

The defense counsel's questions were fair, and they should have put the affected members on notice their SARB membership was at issue. Their failure to answer these two questions "honestly" during voir dire, to alert the defense they had been exposed to SFC Commisso's case, and to correct the mistaken impression throughout the court-martial, satisfy the first part of the *McDonough/Mack* test.

3. The military judge's findings, and the government's brief do not address the public's perception of the military justice system if it knew the full spectrum of duties performed by SARB members, and if it knew SFC Commisso's case was repeatedly briefed at the SARB to a significant percentage of his panel.

The military judge abused his discretion when finding there was no causal challenge for the three panel members. He failed to address the SARB's duties with particularity, and did not analyze the public's perception of SFC Commisso's panel being composed of SARB members who had repeatedly been briefed on SFC Commisso's case. (JA 268.) The military judge simply said the SARB's activities would not cause the public to worry, and the members all claimed they could not remember any information of consequence. (JA 268-269.) Neither the military judge nor the government addressed COL Forsyth's motivation to speak out at the SARB about the briefings might taint potential court-martial members. Colonel

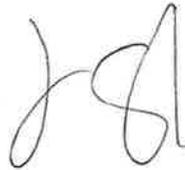
Forsyth was rightly worried about the public's perception of the military justice system, and his desire to speak out correctly identified a flaw in US Army Hawaii's conduct of the SARB meetings and its courts-martial. (JA 212.)

As stated in SFC Commisso's main brief, thirty percent of his panel was tasked with developing measures to prevent sexual assault for military personnel stationed in Hawaii. Thirty percent of his panel met with two representatives of law enforcement and a representative from the prosecutor's office on a monthly basis while no representative from the defense was present. At these monthly meetings, thirty percent of the panel was briefed on PFC EW's allegations, and the affected members were tasked with seeing to it that PFC EW was receiving medical and other attention for the trauma she allegedly suffered. Such a process creates the impression of bias, and no case cited by the government holding a lack of implied bias comes close to replicating the scenario presented here.

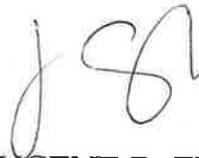
Colonel Forsyth did the right thing when he brought this issue to everyone's attention. He hoped someone could fix the problem. Luckily, prospective courts-martial are free from taint, in part, by the steps the SARB took after COL Forsyth aired his concerns. But no one has addressed the taint on SFC Commisso's court-martial. This Court should find the composition of his panel would cause the average member of the public to doubt the fairness and impartiality of the military justice system, and vacate the findings and sentence.

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 foregoing in the case of *United States v. Commisso*, Army Dkt. No. 20140205, USCA Dkt. No. _____/AR, was electronically filed brief with the Court and Government Appellate Division on September 9, 2016.


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