IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Issue Presented:

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

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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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866(b). The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On March 17-19, 2014, a panel of officers sitting as a general court-martial convicted Appellant, contrary to his pleas, of failure to obey a lawful general regulation, false official statement, abusive sexual contact (two specifications), indecent viewing, indecent photographing, indecent broadcasting, and obstruction of justice in violation of Articles 92, 107, 120, 120c, and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 892, 907, 920, 920c, and 934 (2012).[1] (JA 018, 133). The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for one year, to forfeit all pay and allowances, and to be discharged from the service with a bad-conduct discharge. (JA 134). The convening authority approved the findings and sentence as adjudged. (JA 001).

On Aril 29, 2016, the Army Court dismissed the findings of guilty of the Specification of Charge III for violation of a lawful order and the Specification of Charge V for making a false official statement. (JA 007). The Army Court affirmed the findings on the remaining charges and specifications and re-assessed and affirmed Appellant's sentence. (JA 008). On May 25, 2016, Appellant petitioned this Honorable Court for review, and this Court granted Appellant's petition on June 29, 2016.

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[1] The panel acquitted Appellant of rape (three specifications) in violation of Article 120, UCMJ. (JA 133).

Statement of Facts

Shortly after Private First Class (PFC) EW arrived at her first duty assignment at Marine Corps Base Hawaii (MCBH), she underwent hip surgery at Tripler Army Medical Center (Tripler). (SJA 004). Private First Class EW could not walk or drive for weeks after the surgery, so she relied on a wheelchair and rides from others to get around. (SJA 004). As part of her treatment, PFC EW was prescribed several medications including morphine and physical therapy. (SJA 004). During one of her physical therapy appointments at Tripler, PFC EW met appellant who was conducting his own physical therapy. (SJA 006).

After appellant introduced himself by his first name, the two had a conversation that ended in Appellant's exchange of phone numbers with PFC EW to make plans to go out that night. (SJA 006-010). Appellant picked PFC EW up near the gate of MCBH as planned, loaded her wheelchair into his car, and took her to dinner at the Cheesecake Factory. (SJA 013). Sometime after dinner and a motorcycle ride, Appellant brought PFC EW back to his apartment where they sat down on the couch to watch a television show. (SJA 016-017). As they sat on the couch, PFC EW's hip began to hurt, so she took one of her prescription Morphine pills. (022-023). Private First Class EW felt drowsy and fell asleep on the couch fully dressed in a "camo shirt, a lime greet top, [her] bra, [her] jeans, and a belt." (SJA 023-025). Sometime later, PFC EW awoke to the feeling of Appellant

touching her chest and stomach but she stayed silent and pretended to be asleep because of her past. (SJA 024-025). She felt that if she resisted it could get worse. (SJA 027).

Private First Class EW eventually felt Appellant get up and listened as he "moved around to the back of the couch." (SJA027). Upon returning, "[h]e grabbed [her] and the next thing [she] remembered was flashes like a photography flash and then click." (SJA 027). Although her eyes were still closed, she saw "a bright flash like it was on a phone." (SJA 028). While pretending to be passed out, she thought about how she could find and delete the photographs, but still did not say anything because "[she] didn't want him getting mad at [her]." (SJA 028).

U.S. Army Hawaii (USARHAW) conducted a monthly Sexual Assault Review Board (SARB) to review all sexual assault cases involving members of units under its command in accordance with AR 600-20, Appendix F. (JA 167, 262, 264). During these SARBs,

> [E]ach unit [Sexual Assault Response Coordinator] or Commander presents a one page slide on open cases or reported sexual assault allegations. The briefing focuses on status of investigation and report of services provided to the alleged victim. No specific subject or alleged victim identifying information is included other than gender, rank (and in some instances, service affiliation) of the alleged victim and subject.

(JA 264).

Prior to Appellant's court-martial, the SARB met at least four times during which time slides pertaining to Appellant's case were presented. (JA 265). The slides contained notes that the victim was an active duty female Marine and that the subject was a male active duty E-7. (JA 265).

Shortly after Appellant's court-martial adjourned, the special victim prosecutor was sitting in a SARB with one of the panel members, Colonel (COL) Michael Forsythe, who expressed concern about the summaries of cases presented at SARB's. (JA 144). The special victim prosecutor disclosed this statement to defense, which led to the defense counsel filing a motion requesting a post-trial Article 39(a) hearing, moving for both a mistrial and a new trial. (JA 135).

The military judge held an Article 39(a) hearing where the three panel members who had attended the SARB were called as witnesses. (JA 167). The first panel member who was called to testify was Colonel (COL) Bret Ackermann. (JA 169). During his testimony, COL Ackermann continually referred to the "victims" whose cases were briefed at the SARB as the "alleged victims." (JA 171). Further, he stressed that the purpose of the SARB was to ensure that alleged victims were receiving the support and requirements they are entitled to and was in no way an investigative function. (JA 170). When asked about the specifics of Appellant's case, COL Ackermann stated

> I knew, during the past year, there was a case that was briefed of a Solder, at the time, I'm sorry. There was a, at

> the time, there was an alleged Marine victim and the subject was Army, but was a Soldier. But that was the only one that stood out. So when I came to this trial, it didn't surprise me that, I mean, I wondered if that was, but I couldn't tell you honestly if that was or was not.

(JA 176). He further noted that he did not think about the connection during voir dire, and even when asked if he knew any facts of this case he "didn't know that that was the exact same case. Because, again, no personal identifiable information was given." (JA 177). Colonel Ackermann stated that he never made the link because he did not recall any specific information from the slide. (JA 177).

The only thing that COL Ackermann remembered from the slide briefing was the service of each of the parties and this was not obvious to him at the point that he saw the flyer. (JA 180, 186). Further, he testified that he did not consider anything from the SARB briefing during his deliberations. (JA 180). Colonel Ackermann did not believe he needed to make the military judge aware that he remembered this detail from the SARB once he made the connection because he "thought that the SARB board was just more administrative and not investigative. It was separate from the focus of the court here and deliberations based just on the evidence that's presented." (JA 188).

In support of the government response to the defense motion, the government attached an affidavit written by COL Forsythe. (JA 159). In his affidavit COL Forsythe swore that while at a monthly SARB review following

Appellant's case, he "told the senior commander that there is the potential to compromise the legal system because of the short statement of alleged circumstances that the slides contain." (JA 159). He wrote that having sat on a recent court-martial, he felt it was incumbent upon him to try to fix the process; however, during the court-martial he only remembered one piece of information. (JA 159). He went on to explain that the fact that the case involved a Marine and a noncommissioned officer (NCO) was the only piece of information he remembered and that he was able to be completely objective based on the information. (JA 159).

Colonel Forsythe was also called to testify during the Article 39(a) hearing. (JA 196). During his testimony, he acknowledged that at one point either during or after the trial he asked other members of the panel, "Do you remember from one of the previous SARBs this Marine piece?" (JA 203). A couple panel members answered, "Yeah." (JA 203). He made it a point to emphasize that the only thing he remembered about SARB briefing was that the case involved Soldier and a Marine. (JA 202). When asked why he did not disclose when asked during voir dire if he knew some information or had knowledge of the case he answered, "Because 'knowledge,' to me, means knowledge of details. I remembered one single fact. So, 'knowledge,' to me, was a little more broad than just a single fact.

I didn't know anything about it other than there was a Marine victim alleged." (JA 203).

Colonel Forsythe realistically stated that when he spoke with the senior commander at the SARB after Appellant's trial, his concern was that "[a] great deal of the people who sit in the meeting around the table are potential panel members, because [they are] in a pool that is selected for court-martial." (JA 208). Thus, he wanted to ensure that those sitting on courts-martial have as little information prior to trial as possible. (JA 208).

In explaining what he remembered about Appellant's case from the SARB, COL Forsythe repeatedly stood by his assertion that he did not even recall the ranks nor any other facts from the slide, just that the parties were a "NCO and Marine." (JA 203). Moreover, based on having known this minimal information, he testified that he did not have any concern about having misled the court because the information he knew was so minimal. He noted that he felt he was completely objective and that if there was something keeping him from being objective he would have come forward. (JA 209). During his testimony he analyzed his knowledge as akin to a headline of a newspaper. (JA 211).

Colonel Forsythe explained the SARB process, noting that on average they would only spend approximately a minute at the most on each slide and that at times they would go through between forty five and fifty cases in a SARB. (JA

200, 205). He also admitted, "I'm in listen mode in that meeting. If it's not a case that's from my brigade, I'm kind of—to be honest, I'm kind of sort of tuned out, but for some reason that single fact was the thing that I remembered." (JA 206). The defense counsel asked him, "[C]an you express why you didn't feel like you had a duty, at some point, whenever that was, that you realized that this was a case with a Marine and a servicemember to then stop and tell the judge?" (JA 215) Colonel Forsythe responded, "Because that's all I knew and what difference does it make? It had no bearing on the case." (JA 215). Colonel Forsythe also confirmed that it had no bearing on deliberations whatsoever. (JA 215).

The military judge also called the third panel member who had attended the SARB to testify during the Article 39(a) hearing, Lieutenant Colonel (LTC) Arcari. (JA 228). She recalled the conversation with COL Forsythe and, in reference to this case stated that she responded, "You're right. I think I remember that as well." (JA 229). However, she could not remember if the Marine was the "victim or the subject," all she remembered was it was somebody "outside of the Army." (JA 229). She testified that there was no further comment made by any panel member about the SARB slide after that brief exchange. (JA 230). The last comment she remembered was following the court-martial deliberations "at the very end [COL Forsythe] felt he should talk to the installation SARB committee and explain that the folks in that room could be called for court-martial duty." (JA 230). She

confirmed like the others that no member raised this issue at any point during the deliberation portion of the trial. (JA 231).

Based on the motions, attachments, and the testimony at the Article 39(a) hearing, the military judge made findings of fact and conclusions of law. (JA 264-269). The military judge found, "Three members of the court-martial were member[s] of the USARHAW SARB during a period when the case involving [Appellant] was reviewed by the SARB: COL Ackerman, COL Forseyth [sic] and LTC Arcari. None of these officers were members of or had any command affiliation with [Appellant's] brigade-size element." (JA 265).

The military judge determined that each of those panel members answered negatively to six key questions during voir dire. (JA 266). They included: (1) "Does anyone know Private First Class, and this is Marine Private First Class, [EW], named in the specification?"; (2) "Does anyone have any prior knowledge of the facts or events alleged, in this case?"; (3) "Has anyone heard about any of the facts of this case whatsoever?"; (4) "Are you, a member of your family, or close friend a member of a group or charity that deals with issues of sexual assault even in the military or in general?"; (5) "Have you ever been a unit victim advocate, sexual assault response coordinator, or otherwise involved in the sexual assault response system?"; and (6) "If any member of the court is aware of any

matter which he or she believes may be a ground for challenge by either side, such matter should now be stated." (JA 265).

The military judge further found, "At some point early in the proceedings but after voir dire, COL Forsythe became aware that the alleged victim [PFC EW] was a Marine. COL Forsythe realized that a case previously briefed at the SARB involved an alleged female Marine victim and an Army NCO." (JA 266). Colonel Forsythe made a comment to COL Ackerman and LTC Arcuri at some point during the proceedings "that the case at trial may have been the same case briefed at the SARC involving a female Marine and an Army NCO." (JA 266).

The members of the panel did not disclose any of this information before or during Appellant's trial. However, "[b]oth COL Ackerman and LTC Arcuri made it clear that COL Forsythe did not make his comments about the SARB briefing during discussion of the facts of [Appellant's] case during deliberation." (JA 266). Furthermore, "COL Forseyth [sic], COL Ackerman, and LTC Arcuri are clear they did not recall any specific information or facts from any SARB briefings that might pertain to [Appellant's] case other than the involvement of an alleged female Marine active duty victim and a male Army NCO/E-7." (JA 266).

The military judge found the following based on the facts:

> It is unfortunate COL Forsythe did not raise to the court the same concern he addressed to his fellow SARB members during trial and to the SARB. However, considering all the evidence, the facts do not support that

> COL Forsythe acted dishonestly or intentionally withheld information for at least 3 reasons. First, COL Forsythe was one of 3 members who had been exposed to SARB briefings which may have triggered a connection based on the accused's rank and [EKW's] status as a Marine. COL Forsythe queried those members at some point during the trial on this issue. None of them, including COL Ackerman [sic] as the president of the panel felt compelled by the instructions on voir dire to make any further disclosure to the court. Second, none of the specific questions posed were sufficiently direct to either expressly or implicitly call for disclosure of the extremely limited information COL Forsythe or the other members knew or remembered about the allegations. They had not investigated, did not know any facts about, and had not formed any opinions about the accused's cased based on the SARB briefing. None of them was even sure the accused's case was in fact the case reviewed at the SARB. Finally, COL Forsythe's ultimate disclosure of this issue at a public SARB meeting in the presence of the SVC and others, coupled with his concomitant statements at the time, reflect he harbored no dishonest or fraudulent intent.

(JA 268). The military judge ultimately found that if COL Forsythe had disclosed what he knew about the case from the SARB during voir dire, it would not have formed a valid basis to sustain an implied bias challenge. (JA 268).

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.

Summary of Argument

The military judge did not abuse his discretion in not granting a mistrial because the three panel members at issue did not fail to answer a material question dishonestly nor would the defense been successful in a challenge for cause if they did disclose their minimal knowledge of Appellant's case. *See McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). The military judge properly concluded that based on the questions that were asked of the panel members, no panel member had an affirmative duty to change a response to a question once they realized they had seen the case briefed at a SARB. (JA 268). Not only did the military judge correctly conclude the panel members were all candid in their answers to the questions provided and did not have a duty to further disclose based on the facts, but he also correctly found that there would have been no valid challenge for cause because their knowledge amounted to no more than the service affiliation of the victim and Appellant. (JA 268).

However, even if the military judge improperly concluded that any of the three panel members would not have withstood a challenge for cause, the standard for granting a mistrial is high and is used only in rare circumstances to preclude a miscarriage of justice. *See generally United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). Because Appellant failed to show that but for the panel members serving, the trial would have reached a different result and justice required a mistrial, there was no abuse of discretion in denying the mistrial nor was there a miscarriage of justice warranting such a drastic remedy.

Standard of Review

A military judge's denial of a motion for a mistrial is reviewed for an abuse of discretion. *Diaz*, 59 M.J. at 90. "Declaration of a mistrial is . . . a drastic remedy which should be used only when necessary to prevent a miscarriage of justice. A military judge's determination on a request for mistrial . . . will not be reversed absent clear evidence of abuse of discretion." *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999).

Law and Analysis

The military judge did not abuse his discretion in denying Appellant's motion for a mistrial. A military judge has "considerable latitude in determining when to grant a mistrial." *Diaz*, 59 M.J. at 90 (citing *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998)). "A military judge has discretion to 'declare a

mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.'" *United States v. Coleman*, 72 M.J. 184, 186 (C.A.A.F. 2013) (quoting R.C.M. 915(a)). However, appellate courts "will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009).

Because the military judge made findings of fact and conclusions of law on the record in this case, his decision in denying a mistrial would only arise to an abuse of discretion if his findings of fact upon which he predicated his ruling are not supported by the evidence in the record; if he applied incorrect legal principles; or if his application of correct legal principles to the facts is clearly unreasonable. *United States v. Williams*, 37 M.J. 352, 355 (C.M.A. 1993) (citing *United States v. Travers*, 25 M.J. 61, 62-63 (C.M.A. 1987).

> An abuse of discretion occurs when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.

United States v. Bess, 75 M.J. 70, 73 (C.A.A.F. 2016).

While, it must be noted that the Sixth Amendment to the Constitution guarantees the accused in a criminal case the right to a fair and impartial jury, (U.S. Const. amend. VI) the United States Supreme Court "has long held that [a

litigant] is entitled to a fair trial but not a perfect one, for there are no perfect trials." *McDonough*, 464 U.S. at 553 (internal quotations and citations omitted). Moreover,

> The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible: it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

United States v. Mack, 41 M.J. 51, 54 (C.A.A.F. 1994) (citing *Smith v. Phillips*, 455 U.S. 209, 218 (1982)). Thus, an Appellant can enjoy the benefit to a fair and impartial jury, while not receiving a perfect jury, for it stands true that "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." *Smith* 455 U.S. at 218.

Thus, in order to determine whether the military judge abused his discretion in not granting a mistrial based on Appellant's assertion that the panel members would have been stricken for implied bias, this court should look to the two-pronged test articulated by the Supreme Court in *McDonough*, which the military has adopted for determining whether a new trial is warranted based on the alleged

failure of a panel member to disclose information during trial. 464 U.S. at 558; *See United States v. Mack*, 41 M.J at 55.

In accordance with *McDonough* and *Mack*, Appellant must demonstrate that a member "failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *United States v. Sonego*, 61 M.J. 1, 3 (C.A.A.F. 2005) (quoting *McDonough*, 464 U.S. at 556). As noted by this court in *United States v. Humpherys*,

> The post-trial process empowers the military judge to investigate and resolve allegations, such as those in this case, by interviewing the challenged panel members. It allows the judge to accomplish this task while the details of trial are still fresh in the minds of all participants. The judge is able to assess first-hand the demeanor of the panel members as they respond to questioning from the bench and counsel. Our role in the process is to review the results and ensure the military judge has not abused his or her discretion in reaching the findings and conclusions.

57 M.J. 83, 96 (C.A.A.F. 2002).

A. Appellant failed to demonstrate that any of the three members failed to answer a material question honestly.

The first prong reflects that reviewing courts "expect complete candor from court members during voir dire." *United States v. Albaaj*, 65 M.J. 167, 169 (C.A.A.F. 2007). In addition to honest answers, the first prong of the *McDonough* test requires the question posed be "material," meaning "[h]aving some logical

connection with the consequential facts . . . [or] [o]f such a nature that knowledge of the item would affect a person's decision-making." *Id.* (quoting *Black's Law Dictionary* 998 (8th ed. 2004).

In this case, the military judge did not abuse his discretion by finding that the three challenged panel members did not fail to answer a material question honestly. The record shows that each member in question never felt compelled by the instructions on voir dire to make any further disclosure to the court, thus supporting the military judge's finding that "[N]one of the specific questions posed were sufficiently direct to either expressly or implicitly call for disclosure of the extremely limited information COL Forsythe or the other members knew or remembered about the allegations[,]" was not clearly erroneous. (JA 268).

In *McDonough*, the Supreme Court was presented with determining whether the Appellant was denied his right to an impartial jury in a products liability case, where a prospective juror failed to disclose that his son had suffered a serious injury. 464 U.S. at 555. Members responded on a degree-scale as to what they believed fell into the category of a "serious injury." *Id.* Where one of the jurors had a son who suffered an injury but who answered "no" to the question, the court found that the disclosure was not intentional, reasoning, "The varied responses to respondents' question on voir dire testify to the fact that jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be

uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." *Id.* Here, COL Forsythe continually stated that he did not believe that knowing that the case involved a Marine and an NCO amounted to having "knowledge" of the case. (JA 202). While in the military panel members are taken from fewer "walks of life" and share more commonly understood vocabulary, a word such as "knowledge" amongst others in the English language is still subject to varying interpretations. For COL Forsythe, "knowledge" meant more than partial awareness. It meant more than just recognition of a single fact.

Moreover, the military judge in this case found that while all three panel members came to believe they had heard about this case at the SARB, none of them found it necessary to disclose that information. (JA 267). The military judge followed this finding with the conclusion that, "none of the specific questions posed were sufficiently direct to either expressly or implicitly call for disclosure of the extremely limited information COL Forsythe or other members knew or remembered about the allegations." (JA 267). This conclusion was fully supported by the record and thus not clearly erroneous. As such, this court must use this finding in determining whether the military judge abused his discretion.

The military judge's conclusion that the voir dire questions did not directly call for disclosure of the information is directly in line with the Supreme Court's holding in *McDonough* that "[t]o invalidate the result of a 3-week trial because of a

juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *Id.*

Appellant relies heavily on *Albaaj* for the proposition that "[i]f 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."[2] 65 M.J. at 170. The pivotal difference between the facts in *Albaaj* and those here is that not one of the three panel members in question came to believe he or she realized a fact that would change the answers to the questions. (JA 267). Instead, as the military judge found, the questions were too narrow to assume a member would believe he or she had a duty to disclose such limited information. (JA 267).

In *Albaaj*, the panel member at issue failed to disclose a prior work relationship with a key defense witness. *Id.* There, the defense called the Appellant's brother to testify, and his testimony spanned over twenty-one pages of the record. *Id.* The panel member who previously worked with the witness did not disclose the working relationship even upon realizing it during trial. *Id.* The court ordered a *DuBay* hearing where it came to light that the panel member had

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[2] Appellant repeatedly argues that, based on *Albaaj*, the motive for concealment does not matter. However, as noted by the Supreme Court in *McDonough*, the motive can play a part in the analysis, "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." 464 U.S. at 556.

developed a negative impression of the witness while working with him. *Id.* Whereas there the panel member should have alerted the court to a direct change to his answer to an obvious question, here it is unclear what question any panel member would change their answer to as the questions did not directly hit the issue presented. (JA 267).

This case is much more akin to that of *United States v. Lake*, where this court found that the panel members did not willfully or deliberately conceal information. 36 M.J. 317, 323 (C.A.A.F. 1993). There, it came to light that one of the panel members had signed for the Appellant's initial charge sheet and additional charges in her capacity as the Secretary to the General Staff for the Commander at Fort Belvoir. *Id.* Moreover, the allied papers in that case showed that another panel member was a government witness's company commander who testified at the Article 32 investigation and at trial, along with being Appellant's girlfriend's company commander. *Id.* Moreover, this court found that the same panel member had previously "coordinated an interview between this member of her command and a Federal law enforcement agent about Appellant's case." *Id.*

In determining that there was no willful concealment this Court looked to general questions asked, such as "Does anyone have any prior knowledge, other than Major Gaskin, of the facts or events in this case?" to which both panel members answered in the negative. *Id.* The other question they answered in the

negative was, "Is any member aware, to phrase it another way, of any matter which may raise a substantial question concerning your participation in this trial as a court member?" *Id.* This court held,

> A failure to disclose the above-noted information in response to these more general questions can at best be termed inadvertent. Although we do not condone such reticence by these members, we simply cannot rationally consider it substantial evidence that they purposefully disregarded the judge's questions or disobeyed any other instruction given by the judge in this case.

Id.

During trial in Appellant's case, both defense counsel and the military judge went to great lengths to determine whether any of the panel members had an implied or actual bias related to sexual assault in the military. Despite numerous questions asked by all parties, defense did not specifically ask if any member of the panel had sat on a SARB before. Appellant should not be permitted to Monday morning quarterback his case on appeal. If he believed the answer to that question was imperative to his case, he could have asked at trial. Without that direct question, there was no dishonestly toward the court nor a duty to disclose on the part of any of the panel members.

B. Not only did Appellant fail to show that a panel member answered dishonestly, Appellant failed to show that a truthful response would have provided a valid basis for a challenge for cause.

The second prong of the test requires Appellant to establish that a member's correct response would have provided a valid basis for a causal challenge. *Albaaj*, 65 M.J. at 169. A panel member shall be excused for cause if 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." R.C.M 912(f)(1)(N). These challenges encompass both actual and implied bias. *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007).

Appellate courts give the "military judge great deference when deciding whether actual bias exits because it is a question of fact, and the judge has observed the demeanor of the challenged member." *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000). "The test for actual bias is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)). In the case of actual bias, appellate courts are deferential to a military judge's ruling because such challenges "involve[] judgments regarding credibility, and because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility

during voir dire.'" *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (quoting *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)).

A military judge's rulings on "issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo." *United States v. Miles*, 58 M.J. 194, 195 (C.A.A.F. 2003). "[T]he test for implied bias is objective, and asks whether, in the eyes of the public, the challenged member's circumstances do injury to the 'perception or appearance of fairness in the military justice system.'" *Terry*, 64 M.J. at 302 (quoting *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006)).

In making judgments regarding both actual and implied bias, the court looks to the totality of the circumstances. *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004). Here, the military judge properly concluded that the panel members' testimony coupled with defense counsel's concession during argument at the post-trial Article 39(a) show "that the facts as developed in the evidentiary hearing would not support a challenge based on actual bias." (JA 268). When there is no actual bias, "implied bias should be invoked rarely." *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006)).

Where a military judge recognizes his duty to liberally grant defense challenges for cause and puts his reasoning on the record, his exercise of discretion will rarely be reversed. *Clay*, 64 M.J. at 277. Military judges need not express

"record dissertations" concerning a decision on implied bias but must provide "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). In this case the record shows the military judge knew and applied the correct law. (JA 264-69).

As articulated by the military judge,

> If COL Forsythe affirmatively disclosed his limited exposure to information about the accused's case or his participation in the SARB, it would not have furnished a valid basis for an implied bias challenge. The scope of his non-disclosure was only that was [sic] that he knew of a pending sexual assault case involving a Marine and an Army NCO subject. No evidence supports COL Forsythe knew or remember [sic] any other specific information.

(JA 268). In fact, the military judge went on to observe that rather than showing a basis for cause based on implied bias, COL Forsythe's later disclosure and reasons behind it at the SARB epitomized the type of panel member the military justice system needs, "[h]is testimony and his conduct giving rise to this motion clearly reflect his concern for impartiality and fairness in the process." (JA 268).

Perhaps the best description of the extent of COL Forsythe's knowledge was made during the Article 39(a) hearing when he stated that he remembered "only a 'headline' of a sexual assault allegation involving a Marine victim and an Army NCO pending disposition." (JA 268). The military judge stressed the importance of the standard for granting a mistrial or a new trial based on non-disclosed information stating that in order to grant the challenge the "information *would*

furnish a valid basis for challenge, not a post hoc speculative assertion that a party would have exercised a [peremptory] challenge, which is a wholly subjective standard." (JA 269).

In *Lake*, this Court held "[i]nsubstantial participation in a case; innocuous prior knowledge of the facts of a case; or official acquaintance with government witnesses are not *per se* disqualifying." *Id.* at 324 (Internal citations omitted). This Court reasoned that there, the matters raised by the Appellant did not create a "substantial doubt" about the impartiality or fairness of the legal proceedings against him.[3] *Id.*

In *United States v. Edwards*, this Court held that there were not sufficient grounds for a challenge for cause where the provost marshal

> Had received the initial report relative to the death of the victim from accused's unit. He forwarded it to Seventh Army Headquarters in the usual and customary manner. The extent of the report was that a soldier had beaten a woman to death and the accused was suspected. In addition, he received a report over the telephone that the

[3] In *Lake* this Court held that where the defense counsel was in control of facts that should have alerted him to ask further questions or individually voir dire the panel members, the defense counsel waived any post-trial complaint that he was denied the opportunity to discover these matters. *Lake*, 36 M.J. at 324. Here, defense counsel knew that three of the panel members were commanders and should have known that commanders, especially those holding the position of Brigade Commander and above, attend the SARB in accordance with AR 600-20. Thus, defense counsel should have asked each commander about their participation in the SARB during individual voir dire if that was an issue of concern, and should not be able to assert that he would have challenged them for sitting on the SARB in hindsight.

> accused had beaten a woman to death which he relayed to the Chief of Staff.

This Court held that there was no error in the court denying the challenge. *United States v. Edwards*, 4 U.S.C.M.A. 299, 307 (C.M.A. 1954).

Appellant claims that panel members who have sat in a SARB dealing with this case cannot be impartial due to the victim focus of the SARB. In making these assertions, Appellant fails to acknowledge that throughout voir dire, both defense counsel and the military judge went into depth with questions surrounding the current pressures in the military dealing with sexual assault and the answers from all of the panel members that they could be impartial in dealing with a sexual assault case. (JA 040-44, 054-55). Without more, the information known to each of the panel members could not reasonably form a valid basis for a challenge and the military judge's conclusions as to such were correct in law.

C. Even assuming the military judge should have granted a challenge based on implied bias, Appellant was not entitled to a mistrial because such a challenge would not have produced a more favorable result.

"The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons." Rule for Courts-Martial [hereinafter R.C.M.] 915(a) discussion. A new trial should not be granted based on new evidence unless "if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused." R.C.M. 1210(f)(2)(B). Additionally, "[n]o fraud on the court-martial

warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged." R.C.M. 1210(f)(3).

The standard for whether a mistrial should have been granted was an abuse of discretion. In this case, the military judge did not abuse his discretion because his findings of fact were not clearly erroneous and his conclusions of law were properly based in the law. While hindsight can be helpful to an Appellant, here, unlike in *Albaaj*, the military judge conducted a post-trial Article 39(a) hearing in response to a motion for a mistrial and decided the issue at the trial level. "Nothing from the evidence regarding COL Forsythe's participation and conduct in [Appellant's] case (or the participation of COL Ackerman or LTC Arcari) cast doubt on the legality, impartiality or fairness of the proceedings." (JA 269).

Additionally, Appellant was acquitted of all offenses involving sexual misconduct that were not substantiated in his own confession. (SJA 068-084). The SARB is generally focused on sexual assaults in the military. As it relates to penetrative offenses, Appellant was acquitted of those charged. Thus, it can hardly be said that the panel members were biased or that a new trial would have led to a substantially different result. Furthermore, the military judge was not clearly erroneous in his finding that "[m]any of the 'facts' not substantiated in the panel's verdict, especially those involving forcible or nonconsensual penetrative offenses testified to by the victim. Likewise the panel sentence reflect[ed] no evidence of

disproportionality or other unfairness in result." (JA 269). As such, the military judge did not abuse his discretion in not granting a mistrial.

Conclusion

Wherefore, the United States respectfully requests that this honorable court affirm the decision of the Army court.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 24 day of August, 2016 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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