IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

John C. Riesbeck
Boatswain's Mate
Second Class (E-5)
United States Coast Guard,

Appellant

BRIEF ON BEHALF OF THE APPELLANT

USCA Dkt. No. 17-0208/CG

Crim. App. No. 1374

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

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Index of Brief

TABLE OF AUTHORITIES

Issues Presented

I. **WHETHER THE MEMBERS OF APPELLANT'S COURT-MARTIAL PANEL WERE PROPERLY SELECTED.**

II. **WHETHER APPELLANT WAS DEPRIVED OF A FAIR TRIAL, OR THE APPEARANCE OF A FAIR TRIAL, WHERE A MAJORITY OF THE PANEL MEMBERS WERE FORMER VICTIM ADVOCATES AND THE MILITARY JUDGE DENIED A CHALLENGE FOR CAUSE AGAINST ONE OF THEM.**

Statement of Statutory Jurisdiction

The convening authority approved a sentence that included a punitive discharge. Accordingly the U.S. Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction over Boatswain's Mate Second Class (BM2) John C. Riesbeck's case under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. §866(b)(1)(2012). This Court has jurisdiction pursuant to Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A members panel with enlisted representation, sitting as a general court-martial, convicted BM2 Riesbeck, contrary to his pleas, of two specifications of making a false official statement, one specification

of rape by force, and one specification of communicating indecent language, in violation of Articles 107, 120, and 134, UCMJ, 10 U.S.C. §§ 907, 920, 934 (2008). (J.A. at 260.) The members sentenced BM2 Riesbeck to confinement for three months, reduction to paygrade E-2, and a bad-conduct discharge. (J.A. at 268.) The convening authority approved the sentence and, except for the punitive discharge, ordered it executed. (J.A. at 33.)

On August 5, 2014, the lower court affirmed the findings and sentence as approved by the convening authority. (J.A. at 14-25). BM2 Riesbeck petitioned this Court for review on October 3, 2014. This Court granted the petition and summarily set aside the CGCCA decision, holding that Rule for Courts-Martial (RCM) 912(b)(3) provides an exception to waiver where the objection is made on the basis of an allegation that the convening authority selected members in violation of RCM 502(a)(1). (J.A. at 26-27.) This Court returned the record of trial to the CGCCA for further proceedings. (*Id.*)

The CGCCA ordered a post-trial hearing pursuant to *United States v. Dubay*, 17 C.M.A. 147 (C.M.A. 1967) to "receive testimony and other evidence, and make findings of fact" regarding whether or not

BM2 Riesbeck was deprived of an impartial panel and "any other matters that appear germane." (J.A. at 28-29.) On 20 January 2015, the Judge Advocate General of the Coast Guard remanded the record of trial to Commander, Coast Guard Pacific Area to conduct the post-trial hearing. (J.A. at 30.) Upon conclusion of the post-trial hearing, the Judge Advocate General of the Coast Guard referred the case to the CGCCA for review under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012).

Following the post-trial hearing, the Appellant raised, among others, the following issues to the CGCCA: the convening authority did not personally select the members of the panel, disregarded the requirements of Article 25, UCMJ, improperly considered gender disproportionally, and was disqualified based on his intolerant attitude toward the alleged offenses (J.A. at 2). The CGCCA held that these issues lacked merit. (J.A. at 1-13). Petty Officer Riesbeck timely petitioned this Court for review. On 28 April 2017, this Court granted review with regard to the two issues presented. The appellant filed a motion for an extension of time to file the brief until June 12, 2017, which this Court granted. This brief timely follows.

Statement of Facts

Selection of the members in this case began in late February or early March 2012. The process of advice from the staff judge advocate (SJA) and selection of members took place entirely in writing. Therefore, it is possible to reconstruct the entirety of the member selection process from the administrative records. The paper record shows how a break-down in communications led to a flawed member-selection process.

A. Use of "Digests" and Failure to Communicate Directly Lead to Article 25 Violations

When the member selection process began, Vice Admiral (VADM) Brown was the Commander of the Coast Guard Pacific Area (PACAREA). (J.A. at 232.) Captain (CAPT) William Cheney, was the staff judge advocate (SJA) of the PACAREA (J.A. at 313-14.) The SJA did not meet in person either with VADM Brown or his successor, Admiral (ADM[1]) Zukunft, or with Rear Admiral (RADM) Colvin and

[1] ADM Zukunft was then VADM Zukunft. For clarity, he is referred throughout by his current rank.

RADM[2] Ryan who also made member selections to discuss member selection or the Article 25, UCMJ requirements. (J.A. at 321, 332-33, 337, 339, 390.) The SJA communicated to the convening authorities about member selection by "digest," a form of internal memorandum. (J.A. at 510-19.)

Because the convening authority was at times out of the office for official travel, the deputy commander and the chief of staff sometimes acted on the digests in his absence. The SJA did not necessarily know who received and acted on his digest until he received it back with selections made. (J.A. at 358.) Each digest had a routing order through various headquarters personnel. (J.A. at 510-19.) Each was addressed to CG, PACAREA (PAC-OO). (*Id.*) None was addressed to the "convening authority". (*Id.*)

On 06 March 2012, the SJA sent a digest to VADM Brown recommending he select ten officers to serve on a new standing court-martial panel based on the Article 25 criteria, which were included in the digest for the convening authority to reference. (J.A. at 510.)

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[2] RADM Ryan was then CAPT Ryan. For clarity, she is referred throughout by her current rank.

Enclosed with the digest was a roster of all the officers in the San Francisco Bay Area generated by the Coast Guard's Personnel and Pay Center. (J.A. at 316, 510.)

The SJA testified that generating the rosters was left to the Pay and Personnel Center. (J.A. at 316.) CAPT Cheney also testified that the Pay and Personnel Center were limited in what information the Personnel Center could provide. (J.A. at 317-18.) While the digest instructed the convening authority to make selections based on all the Article 25 criteria, the rosters only provided the members name, education level, current unit and billet, time in service, rank and date of rank, gender, and selection for any previous courts. (J.A. at 473-509.)

The SJA did not add member questionnaires to the digest or in any way provide supplementary information beyond the information given by the Pay and Personnel Center. (J.A. at 356-57.) The submissions to the convening authority also did not reflect any subordinate commanders' recommendations about the fitness of officers and enlisted personnel in the pool to meet the Article 25 criteria. (J.A. at 348.) VADM Brown selected a panel of ten officers based of this limited information. (J.A. at 510-12.) On 14 March 2012, VADM Brown

signed an order convening a court-martial composed of the ten officers he selected. (J.A. at 512.)

VADM Brown was replaced as PACAREA commander by ADM Zukunft on 27 April 2012. (J.A. at 332.) On 22 May 2012 the SJA sent a digest advising the convening authority to select enlisted members after BM2 Riesbeck elected enlisted representation. (J.A. at 514.) The roster of enlisted members contained the same types of information contained on the officer roster. (J.A. at 486-509.)

RADM Colvin, the Deputy Commander, received the digest, selected members from the list, and initialed it as the "acting" convening authority. However, he provided no date as to when he initialed it. (*Id.*) The digest is dated 22 May 2012. (J.A. at 514.) Travel records show ADM Zukunft, the new Area Commander was expected to travel in the afternoon of 22 May 2012 on a temporary duty trip. (J.A. at 350-51.) That trip ended on Saturday, 26 May 2012. (*Id.*) Records from Pacific Area indicate that he retained command authority through that time period. (J.A. at 534.) Additionally, ADM Zukunft testified via affidavit it was his policy that "only in exigent circumstances would an

acting Commander fulfill duties as acting convening authority." (J.A. at 527.)

Following an unwritten process that was routine in the PACAREA SJA's office, the SJA and his staff next contacted the enlisted members selected by RADM Colvin to determine their availability before preparing a draft convening order. (J.A. at 370-72.) By 06 June 2012, several enlisted members were identified as unavailable, although the standard for unavailability was somewhat undefined and left to the SJA's staff to determine. (J.A. at 378-81.) Therefore, the SJA requested the convening authority select an additional eight enlisted members. (J.A. at 516.)

This time however, RADM June Ryan, at the time the Chief of Staff PACAREA, made the selections. There is no indication that RADM Ryan was supposed to be the acting convening authority as envisioned by ADM Zukunft's policy, although it appears RADM Ryan was designated as acting Commander over that time period. RADM Ryan chose eight enlisted members. (J.A. at 486-509.)

On 08 June 2012 the SJA sent a digest with a draft amendment to convening order to the convening authority. (J.A. at 518-19.) The draft

convening order implemented the choices of RADM Colvin, and RADM Ryan and the results of further SJA canvassing. (*Id.*) This time the digest was received and acted on by ADM Zukunft himself. (*Id.*)

This digest was very different from the digests used by RADM Colvin and RADM Ryan to actually pick the members. Significantly, this digest omitted any discussion of the Article 25 factors and was drafted in such a way as to suggest that a single individual, ADM Zukunft, had acted as convening authority throughout the process. (*Id.*) The digest asked the convening authority to simply sign a draft order that reflected choices already made. (*Id.*)

The digest sent to ADM Zukunft also did not include the rosters or any biographical information about the members on the draft order. (*Id.*) It did not give any indication that subordinates had made these selections or the identity of the subordinates. (*Id.*) ADM Zukunft simply signed the drafted order. (*Id.*) Subsequently, he also signed an amendment replacing a member excused for a recent arrest with a new member. (J.A. at 520.) The new member had previously been identified by RADM Ryan as a potential member, but ADM Zukunft signed that amendment also without reference to any biographical data and again

without knowing even who selected the member originally. (*Id.*) Unlike the digests acted on by VADM Brown, ADM Zukunft did not initial or sign the digest to indicate he had read it and the digest was not signed to indicate how had been routed through the staff. (J.A. at 518, 522.)

The SJA testified that he assumed that the various convening authorities and "acting" convening authorities or subordinates knew how to choose panel members and the criteria required for choosing them since he believed they had done it before. (J.A. at 337, 339, 390.) The SJA believed that each "selection" was performed by the convening authority or a properly designated acting convening authority, although that was not always true. (J.A. at 327, 338, 534.)

Responding to written questions during the *Dubay* process, ADM Zukunft demonstrated he misunderstood the statutory requirements of Article 25 and did not apply them correctly. When asked how he analyzed the selections of the panel members he responded:

> There are no qualifications beyond education level, years of service and pay grade to analyze.

(J.A. at 524.) This indicates he believed the information on rosters like the ones created in this case encompassed all the factors he was to consider. Considering he received no guidance from the SJA when he

signed the convening order, it is likely he had acted based on that understanding. He also testified:

> Judicial temperament is not a quality I am provided when making selections. This is not a "best qualified" process but I do look for diversity.

(J.A. at 524.)

There is no evidence that selecting officials knew most the members selected, in the sense of evaluating judicial temperament or experience or other meaningful Article 25 criteria, except in rare instances. (J.A. at 524-30.)

B. Voir Dire

The Military Judge denied a defense challenge for cause concerning LCDR KO, who was both a victim of improper sexual attention in the workplace and also a victim advocate.

During voir dire, the Military Judge asked LCDR KO a number of questions about sexual assault in the military. (J.A. at 75-76, 79-80.) The defense counsel asked for additional inquiry, including questions about whether she had been a victim of sexual assault. (J.A. at 84-85.) The Military Judge denied those requests. (*Id.*) The defense counsel pressed for the Military Judge to inquire about LCDR KO's role as

victim advocate. (J.A. at 85.) He again refused to ask those questions. (*Id*.). Finally, after further defense prodding, the judge relented as to questions regarding friends of hers who were "expert" in the law, medicine and psychiatry and what they may have told her about sexual assault. (J.A. at 87). The judge asked two questions and the court recessed. (J.A. at 88.)

After the recess, the defense counsel pressed again for the judge to question LCDR KO further because the defense was concerned about the member's answers. (J.A. at 89-90.) Based on the witness's demeanor during voir dire, the defense counsel believed the member was reluctant to mention that she was the victim in a prior incident. (J.A. at 90.) Initially, the judge again said he would not ask any more questions, but finally relented. (J.A. at 90-92.)

When the judge asked LCDR KO if she was ever a victim of sexual assault LCDR KO answered, "Not a sexual assault." (J.A. at 92.) After some further prompting, she eventually revealed she was the victim of a workplace incident in which a civilian employee created a pornographic depiction on his work computer and labeled the female participant in

the depiction as LCDR KO herself. (J.A. at 92-93.) At the time she was the worker's supervisor. (*Id.*)

The defense counsel eventually challenged LCDR KO for cause. (J.A. at 228.) He raised the fact she had not been completely forthcoming when answering her member questionnaire because she had not revealed that she was the victim of a subordinate's improper conduct. (J.A. at 228-30.) The defense counsel also raised she was reluctant in answering the court's questions about her experience. (J.A. at 231.) The defense counsel emphasized that she called the incident that she was involved in "workplace violence," although she preferred not to be referred to as a victim. (J.A. at 93, 231.)

The defense further pointed out to the military judge that there were five members who were trained as victim advocates and victim advocates could potentially be more likely to identify with the victim of a crime rather than the alleged perpetrator (J.A. at 234.) He argued that there was a disproportionate number of victim advocates and that removing this member – particularly in light of her status as a crime victim herself – would alleviate the defense team's concern. (*Id.*) The Judge denied the challenge indicating that he believed that the member

was "wholly credible and forthcoming." (J.A. at 235.) Although the military judge had articulated the implied bias standard earlier in the voir dire, his rationale in reject the challenge did not address the implied bias standard. He discussed his impressions of the member's candor rather than the perspective of an outside observe. (J.A. at 235.)

Summary of Argument

The members in this case were not personally selected by the convening authority, who signed a convening order amendment without knowing anything about the selected members and without knowing who originally selected the members. Further, he fundamentally misunderstood the Article 25, UCMJ selection criteria.

Additionally, there is an unresolved appearance of unfairness in this case because the panel that convicted BM2 Riesbeck was composed of a majority of victim advocates, one of whom was the victim of a sexually related offence herself.

Argument

I

THE MEMBERS OF APPELLANT'S COURT-MARTIAL PANEL WERE NOT PROPERLY SELECTED.

Standard of Review

An appellate court reviews "claims of error in the selection of members de novo as questions of law." *United States v. Sullivan*, 74 M.J. 448, 450 (2015).

Discussion

A member of the armed forces has no right to a trial by jury as envisioned by the Sixth Amendment. *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988); *United States v. Kemp*, 46 C.M.R. 152, 154 (C.M.A. 1973). In place of this right, Congress has substituted UCMJ, Article 25(d)(2) which mandates:

> When convening a court-martial, the convening authority *shall* detail as members thereof 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.* (Emphasis added.)

A military accused has a right to a fair and impartial panel. *United States v. Roland*, 50 M.J. 66, 68 (C.A.A.F. 1999). This right "is

the cornerstone of the military justice system." *United States v. Hilow*, 32 M.J. 439, 442 (C.M.A. 1991). The convening authority must apply the criteria from Article 25, UCMJ to pick those "best qualified" to be members. Article 25 provides a military accused with a "valuable protection." *United States v. Benedict*, 55 M.J. 451, 458 (C.A.A.F. 2001), (Effron, J. dissenting.)

Not only must the panel by actually fair, but it must also have the appearance of fairness. *United States v. Ward*, 75 M.J. 225, 228 (C.A.A.F. 2015). The panel selected in this case has no appearance of fairness because the members added in the amendments were not properly chosen by the convening authority. Additionally, the convening authority did not apply the Article 25, UCMJ criteria because he did not know the criteria and did not have enough information to make an informed decision.

A. ADM Zukunft did not personally select members

The convening authority must select the members personally and may not delegate this duty to another. *United States v. Ryan*, 5 M.J. 97, 100-101 (C.M.A. 1986). The convening authority can rely on recommendations of his subordinate commanders for the compilation of

a list of eligible members. *Benedict*, 55 M.J. at 455. However, the convening authority's staff may not present to him a member selection panel in such a way that he has no alternative but to affirm the recommendations. *United States v. Marsh*, 21 M.J. 445, 449 (C.M.A. 1986). The point is not whether the convening authority physically signed the convening order, but whether he "properly selected the members by applying the criteria of Article 25 when doing so." *Benedict*, 55 M.J. at 455 (Baker, J. concurring).

Although RADM Colvin and RADM Ryan purported to select members as convening authority, they did so without authority. On 22 May 2012, RADM Colvin selected 10 enlisted members for this case. RADM Colvin signed the selection document as "acting," asserting that he selected the 10 enlisted members as "acting" for ADM Zukunft. However, RADM Colvin did not have authority as "acting" commander on that day. (J.A. at 534.) The SJA testified that he subjectively believed RADM Colvin was "acting" commander for VADM Zukunft that day, which perhaps explains the misunderstanding. (J.A. at 326-27.) Because he was not acting as convening authority, RADM Colvin did not have legal authority to make member selections. The same may

be said of RADM Ryan, although she was an acting Commander. ADM Zukunft's testimony that he did pass his responsibility as convening authority when he was out of the office except in exigent circumstances makes it more likely than not that she was also not supposed to act in his place (J.A. at 527, 534.) At best, they acted as a subordinates of ADM Zukunft, the actual convening authority. In any event, it was ADM Zukunft who signed the amendments.

When ADM Zukunft signed the 08 June and 11 June amendments to the convening order, he was not aware of RADM Colvin and RADM Ryan's selections. Admiral Zukunft was given a digest that summarized the actions of the other officers up to that point, yet was written in such a way as to imply that all the previous selections had been completed by ADM Zukunft. (J.A. at 518, 522.) He was not given an opportunity to review the rosters used to select the members. (*Id.*) He was only provided with a draft order implementing his subordinate's decisions with the SJA's recommendation to sign it. (*Id.*) He was not given the names of the selectors. (*Id.*) This is the very definition of an impermissible *fait accompli*. The convening authority had no real alternative but to implement his subordinate's choices.

This Court has consistently upheld selections where there is evidence that the convening authority understood the Article 25(d) criteria and knew the identity of a subordinate who made preliminary recommendations. For example, in *United States v. Kemp*, 46 C.M.R. 152, 155 (C.M.A. 1073) the convening authority knowingly approved a list prepared for him by his subordinates. Similarly in *Benedict*, there was testimony by the SJA that the convening authority had "gone through the package" containing the subordinates recommendations. 21 M.J. at 454. This satisfied the requirement that Article 25 qualifications were fairly considered. *Id.* Note that, unlike this case, the convening authority's knowledge of the Article 25 factors and the identity of the subordinate making the recommendation were not questioned by appellant's counsel. *Id.*

The CGCCA held and the government contended below that the convening authority, relying on his subordinates' previous selections, properly adopted those selections in constituting this court-martial. (J.A. at 5-6.) The court explained his failure to know and apply Article 25 properly, while giving the court "pause", was overcome by his reliance on his subordinates. (J.A. at 7.)

The lower Court failed to address the point of appellant's argument. The convening authority cannot rely on his subordinate's recommendation if he does not know who made the recommendation. On its face, the 08 June digest even states that ADM Zukunft himself had selected the members for the amendment he was signing. (J.A. 518.)

"Rely," according to Merriam-Webster online Dictionary, can be defined as "to have confidence based on experience." Importantly, this was ADM Zukunft's first selection of members as Commander, PACAREA. There is no evidence that he "relied" on his subordinates.

There is no evidence that ADM Zukunft even read the digests addressed to him. There is not an initial or signature on the digests from 8 June and 11 June as there was on the digests received by VADM Brown. (J.A. at 518, 522.) In fact, these digest request that the Convening Authority select a box to either "Concur" or "Non-Concur" with the excusals and member substitutions associated with the draft order attached. These boxes are left blank. While the government may argue that the signature on the amendment to the Convening Order is

sufficient, there is no evidence ADM Zukunft read the digest before he signed the amending order.

B. The Article 25, UCMJ criteria were not properly applied by ADM Zukunft

Even if this Court believes ADM Zukunft personally selected the members, ADM Zukunft did not properly apply the Article 25 criteria when he signed the amendments to the convening order. He did not have enough information to do so and he misunderstood the standard.

There is affirmative evidence ADM Zukunft misunderstood the Article 25 criteria. He had no idea that he must select the "best qualified" members and base that selection, at least in part, on the judicial temperament of those members. (J.A. at 524.)

Additionally, even if the ADM Zukunft had he read the rosters of potential members created in this case – which he did not – he could not have properly applied the criteria based on what was provided. As he accurately testified, "judicial temperament is not a quality that I am provided when making selections." (J.A. at 524.) Indeed, the individuals who actually did make selections in this case were provided insufficient information to make decisions about judicial temperament.

The roster information provided to the VADM Brown, RADM Colvin, and RADM Ryan about the pool of potential members was so minimal as to make it impossible for any officer to apply the Article 25, UCMJ factors. The rosters provided only contained the members name, education level, current unit and billet, time in service, rank and date of rank, gender, and selection for any previous courts. With few exceptions, the convening authorities were not personally familiar with the members they were selecting. (J.A. at 528-30.) Additionally, there was no communication with the SJA's office about these selections outside of the written digests, so the original convening authorities and their subordinates did not receive additional information about the members which is not captured in the rosters.

The most concerning omission is any information about the member's experience (other than their current unit) and their judicial temperament. The only information provided was statistical in nature. It is impossible to gauge the temperament or suitability of a person based solely on statistics like rank or time in service. This omission underscores why subordinate recommendations – when done properly –

can help a convening authority make an informed choice among a pool of potential members he has never met.

Contrast this case with the recent decision in *United States v. Bartee*, 76 M.J. 141 (C.A.A.F. 2017). In *Bartee*, this Court upheld a panel selection process, despite the exclusion of some pay grades from the selection materials, because the convening authority was able to assert he had "personally selected" the members from among his entire command with full awareness of the Article 25 factors and the roster of available marines. *Id.* at 144-45. This personal selection, the foundation of the Article 25, UCMJ process, is absent in the case of BM2 Riesbeck because the convening authority was not even given a roster of his brand new command and received no information about the members when he signed amendments to the convening order.

Neither ADM Zukunft nor RADM Colvin and RADM Ryan could have properly applied the Article 25, UCMJ criteria based on so little information. ADM Zukunft himself received no information at all about any of the members.

C. Prejudice

The Appellant asserts that the procedure used in the selection process of these members is structural in nature and, as such, needs no showing of material prejudice to his substantial rights. *Arizona v. Fulimante,* 499 U.S. 279, 310 (1991). In the present case, the total lack of application of the basic protections of Article 25 warrants a structural-error like analysis.

Regardless, the appellant believes that even if this Court finds that there is merely a statutory error, there is an "unresolved appearance of unfairness" in the selection process. *Ward*, 74 M.J. at 227. The convening authority's complete failure to know or apply Article 25 does leave the unresolved appearance of fairness given the significance of the Article 25 protections. Further, appointing members with no information about their experience resulted in a panel with a majority of victim's advocates, a source of implicit bias.

D. Conclusion

Because ADM Zukunft did not personally select the members and did not properly apply the Article 25 criteria, this court-martial suffers

from a jurisdictional defect. RCM 201(b). The findings and sentence should be set aside and the case remanded with a rehearing authorized.

II

APPELLANT WAS DEPRIVED OF A FAIR TRIAL, BECAUSE A MAJORITY OF THE PANEL MEMBERS WERE FORMER VICTIM ADVOCATES AND THE MILITARY JUDGE DENIED A CHALLENGE FOR CAUSE AGAINST ONE OF THEM.

Standard of Review

An appellate 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).

Argument

While actual bias is that bias which will not yield to the evidence in the eyes of the military judge, implied bias is reviewed by an objective standard through the eyes of the public. *United States v. Napoleon,* 46 M.J. 279, 283 (C.A.A.F. 1997). This standard is focused on the perception or appearance of fairness of the military justice system. *United States v. Armstrong*, 54 M.J. 51, 53-54 (C.A.A.F. 2000). As a final protection, there is a "liberal grant" mandate for military judges

when they rule on challenges for cause. *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987).

The presence of so many victim advocates on the panel and LCDR KO's experience as a victim and create "too high a risk that the public will perceive" that the panel is not composed of fair, impartial members. *United States v. Moreno*, 63 M.J. 129, 131 (C.A.A.F. 2006), (*citing United States v. Wiesen*, 56 M.J. 172, 155 (C.A.A.F. 2001)).

Prior experience as a victim advocate is not necessarily disqualifying. A member should not necessarily be disqualified merely because their official duties touch upon matters at issue in a court-martial. For example, a peace officer is not *per se* excluded from service as a member in a court-martial. *United States v. Berry,* 34 M.J. 83, 88 (C.M.A. 1992). Likewise, an attorney is not *per se* excluded simply because it is a legal proceeding. *United States v. Hedges*, 11 C.M.A. 642, 643 (C.M.A. 1960). Rather, the question is whether or not the member's official duties create a concern about the public's perception of fairness.

In this case the perception of unfairness comes from the large number of victim advocates. LCDR KO was one of five victim advocates. Experience working with people who have been traumatized by sexual

violence would reasonably tend to engender sympathy toward victims and bias toward perpetrators. The training for this position also emphasized accepting victim allegations at their word. (J.A. at 183-84.) The presumption of innocence and the burden of proof beyond a reasonable doubt requires member to critically examine an accusation and resolve any reasonable doubt in the favor of the accused. This training and experience would potentially make that harder.

Even though all of these victim advocates may have genuinely believed they could be impartial, an outside observer would question the fairness of a panel composed of a majority of members who have received training to work with sexual crime victims deciding a sexual assault case. This is implied bias.

This Court has previously found implied bias when a large block of members are all laboring under a similar threat to their impartiality, regardless of their apparently genuine disclaimers of bias. In *United States v. Wiesen*, a brigade commander and his subordinates were two-thirds of the members of a panel – enough to vote for a conviction. 56 M.J. 172 at 175. In that case, the risk that so many of the panel members could be under the sway of the senior member was too high.

Id. at 176-77. While the presence of two or three panel members in one rating chain does not necessarily create an unacceptable perception of unfairness, a majority of members in the same rating chain does. *Id.* The same should be true of a panel full of victim advocates in a sexual assault case. It stretches credibility too far. The defense wanted LCDR KO removed in part because it wanted to reduce the number of victim advocates. (J.A. at 234-35.) If the challenge had been granted, the defense would have also used its preemptory challenge against HS1 S, another victim advocate. (J.A. at 236.) As it was, the defense had to use its preemptory challenge against LCDR KO and HS1 S sat on the panel. (*Id.*)

However, LCDR KO was not just a victim advocate. She was also a victim of an unwanted sexually related attention in the workplace herself. While it was not a contact offense, the experience was understandably sensitive for her and LCDR KO did not readily reveal the details of the incident until prodded. (J.A. at 91-92.) Even after she finally revealed the nature of what happened, she said she "[d]id not want to go into it all . . ." (*Id.*) It is not necessarily a reflection on her truthfulness, but it does tend to show that the incident was impactful

for her. Personal experience as a crime victim can be another source of implied bias. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F.1996).

The presence of so many victim advocates on the panel underscores the problem with selecting a panel without information about the members' experiences. If the convening authority had more information, he might not have appointed a panel with an implicit bias problem.

Conclusion

The defense challenge against LCDR KO should have been granted. As one of five victim advocates and a crime victim herself, her presence on the panel would have created an appearance of unfairness. Further, denial of the challenge forced the defense to use its preemptory challenge unnecessarily.

Respectfully Submitted,

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court and served on Appellate Government Counsel on 12 June 2017.

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Certificate of Compliance

This brief complies with the page limitations of Rule 24(b) because it contains less than 14,000 words. Using Microsoft Word version 2013 with 14-point-Century Schoolbook font, this brief contains 6,062 words.

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