IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Crim.App. Dkt. No. 202100008
Nixon KEAGO Midshipman U.S. Navy, Appellant	USCA Dkt. No. 23-0021/NA

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

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Issue Presented

DID THE MILITARY JUDGE ERR BY DENYING THREE ACTUAL AND IMPLIED BIAS CHALLENGES FOR CAUSE AGAINST THREE MEMBERS?

Introduction

This case is fact-driven. It does not present any difficult questions of law. Military judges must excuse potential members who demonstrate actual or implied biases. The liberal grant mandate means military judges must grant defense challenges in close cases.

But as this Court will see from the facts contained below, the military judge did not reasonably apply the liberal grant mandate. He allowed three members who harbored many obvious actual and implied biases to remain on the panel. Thus, this Court should correct the military judge's error and set aside the findings and sentence.

Statement of Statutory Jurisdiction

This case fell within the lower court's jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

Statement of the Case

A panel of members convicted Appellant, contrary to his pleas, of attempted sexual assault, sexual assault, burglary, and obstructing justice in violation of Articles 80, 120, 129, and 131b, UCMJ.[1] The military judge conditionally dismissed two specifications of sexual assault as unreasonable multiplications of other charges.[2] Appellant was acquitted of one specification of attempted sexual assault in violation of Article 80, UCMJ.[3] The members sentenced Appellant to forfeiture of all pay and allowances, confinement for twenty-five years, and to be dismissed.[4] The military judge recommended that the convening authority suspend fifteen years of confinement for a period of twenty years.[5] The convening authority, however, approved the sentence as adjudged.[6]

On July 5, 2022, the lower court affirmed the findings and sentence.[7] Appellant filed a motion for reconsideration en banc, and the lower court denied his motion on August 30, 2022.[8] Appellant timely petitioned this Court for review on October 28, 2022.

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[1] J.A. at 530-32.
[2] J.A. at 539.
[3] J.A. at 539.
[4] J.A. at 533.
[5] J.A. at 540.
[6] J.A. at 538.
[7] J.A. at 1-12.
[8] J.A. at 243-55.

Statement of Facts

The military judge denied defense challenges against the following members:

A. Lieutenant Commander Cox.[9]

Before his selection, Lieutenant Commander (LCDR) Cox revealed that a man had kidnapped his mother and held her at gunpoint in an attempt to rape her.[10] Unsurprisingly, he described the conversations with his mother about her experience as "indelible."[11]

In a supplemental member questionnaire, used in the COVID environment to replace group voir dire, LCDR Cox asserted that the Naval Academy had a problem with sexual assault that must be fixed.[12] He candidly admitted to having strong opinions or beliefs about sexual assault in the military, explaining, "victims have had to fight against institutional inertia and other pressures to ensure they received justice."[13]

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[9] The members' names in this Brief match the names used in the Joint Appendix, but are different than the pseudonyms used in the pleadings filed with the lower court, the lower court's opinion, and Appellant's Supplement to the Petition for Review before this Court.
[10] J.A. at 289.
[11] J.A. at 324.
[12] J.A. at 304.
[13] J.A. at 306.

Lieutenant Commander Cox volunteered to be a Fleet Mentor for the Naval Academy's Sexual Assault Prevention Response (SAPR) program during the year leading up to the trial.[14] "This was something [he] wanted to do as a faulty member, and [he] found it to be a good use of time."[15] He discussed "understanding consent in relationships" and circumstances that could lead to sexual assault with students.[16] He had gone through the Navy's training on sexual assault, and thought that this training was a reliable guide to the law of sexual assault.[17]

In addition to—or perhaps because of—LCDR Cox's disqualifying personal history and views on sexual assault generally, he arrived at the court-martial with preconceived views about Appellant's guilt. When asked whether he believed there was some truth to the charges against Appellant, he wrote, "The fact that there are charges suggests that something happened. I understand that false sexual assault accusations don't make it very far under scrutiny."[18] "[S]ince we are at the court-martial stage, a flimsy or easily proven-false accusation would have been dropped by now."[19] Even during individual voir dire, he persisted:

I think that the fact that we—the fact that you get through charges in a

[14] J.A. at 317-18, 325, 327.
[15] J.A. at 318.
[16] J.A. at 325.
[17] J.A. at 296.
[18] J.A. at 303.
[19] J.A. at 303.

> proceeding like this means that it is not a simple he said/she said or some other scurrilous—I feel like **something had to have happened**. Like some or [*sic*] of event had to happen for the charges to get this far. And it's not a simple matter of an accusation and a denial.[20]

If foreknowledge of Appellant's guilt weren't bad enough, LCDR Cox believed that, were he innocent, Appellant would testify. Lieutenant Commander Cox answered affirmatively to multiple questions asking if he wanted to hear from Appellant during the trial.[21] Despite the trial counsel's multiple attempts at rehabilitation, LCDR Cox maintained that an innocent person would testify:

> Defense: But if an innocent person had an opportunity to testify and show you they're innocent, you think that they would do that?
>
> LCDR Cox: Yes.[22]

Lieutenant Commander Cox understood the defense has no obligation to present any evidence or to disprove the element of the offense, but he believed that choosing not to "seems a little self-defeating."[23]

Ultimately, LCDR Cox said he could follow the military judge's instructions.[24]

The defense challenged LCDR Cox on the grounds of both actual and

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[20] J.A. at 321-22 (emphasis added).
[21] J.A. at 303, 320-21, 328.
[22] J.A. at 328.
[23] J.A. at 294, 315.
[24] J.A. at 331.

implied bias for all the reasons cited above.[25]

The government opposed the challenge.[26] It conceded that LCDR Cox's mother's attempted rape "has had an impact on him," but argued it would not affect him during the court-martial.[27]

The military judge denied Appellant's challenges of LCDR Cox for actual and implied bias.[28] He found the kidnapping and attempted rape of LCDR Cox's mother to be a "non-issue" in terms of his ability to serve as a panel member, despite never instructing him not to think about his mother's experience during trial.[29] The military judge acknowledged that LCDR Cox "might think about" Appellant's failure to testify during deliberations.[30] But he found LCDR Cox would not hold it against Appellant.[31] He interpreted LCDR Cox's statement that "something had to have happened" to mean LCDR Cox may believe "some sort of event had to have happened but not necessarily an illegal event."[32] The military judge did not point to any statements from LCDR Cox to support this finding.[33] Finally, the military judge found that LCDR Cox's involvement as a Fleet Mentor

[25] J.A. at 470-72.
[26] J.A. at 472-73.
[27] J.A. at 472.
[28] J.A. at 473-75.
[29] *See* J.A. at 330-31; J.A. at 473.
[30] J.A. at 474.
[31] J.A. at 474.
[32] J.A. at 474.
[33] *See* J.A. at 474.

was more about finding a way to be involved with students, "not because it specifically related to sexual assault."[34]

B. Lieutenant Commander Middlebrook.

The supplemental members' questionnaire asked potential members if they would automatically believe a woman who claimed to have been sexually assaulted.[35] Lieutenant Commander Middlebrook answered "we should err on the side of believing rather than on the side of disbelieving."[36] She explained, "my belief is that you should believe—that the fact that it's gotten to a court-martial says someone did believe them at some point . . . ."[37] She answered in the affirmative to a question asking whether someone who is convicted of sexually assaulting multiple women should automatically be given a lengthy prison sentence.[38]

During voir dire, the defense asked LCDR Middlebrook if she believes a person needs to give "clear and unequivocal consent for sexual activity or what's your opinion on that?"[39] She said, "Yes."[40] The government attempted to rehabilitate her by asking, "Can you imagine a scenario where one person is not

[34] J.A. at 473.
[35] *See* J.A. at 350.
[36] J.A. at 350.
[37] J.A. at 369.
[38] J.A. at 351.
[39] J.A. at 381.
[40] J.A. at 381.

consenting but the other person honestly believes that they are consenting?"[41] But she responded, "Not off the top of my head."[42]

Like LCDR Cox, LCDR Middlebrook ultimately said she could follow the military judge's instructions.[43]

The defense challenged LCDR Middlebrook for actual and implied bias because (1) she believed people must err on the side of believing a woman who says she was sexually assaulted; (2) she had strong opinions about sexual assault, in part due to conversations with military personnel who shared their experiences of sexual assault; (3) she believed that a lengthy prison sentence was necessary for someone convicted sexually assaulting multiple women; and (4) she displayed resistance to accepting mistake of fact as a defense.[44]

Notably, the government did not oppose the defense's challenge for cause against LCDR Middlebrook.[45] But the military judge denied the defense challenge anyway.[46] The military judge did not address LCDR Middlebrook's belief that women who said they were sexually assaulted should presumptively be believed.[47] He found LCDR Middlebrook believed a lengthy sentence was necessary "in the

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[41] J.A. at 381.
[42] J.A. at 387.
[43] J.A. at 387.
[44] J.A. at 465-66.
[45] J.A. at 467 ("No argument, Your Honor").
[46] J.A. at 467-68.
[47] *See* J.A. at 467-68.

context of multiple convictions over time as opposed to multiple convictions at one proceeding."[48] The military judge did not cite statements from LCDR Middlebrook to support this finding.[49] Finally, while the military judge discussed LCDR Middlebrook's understanding of consent, he did not address her inability to "imagine a scenario where one person is not consenting but the other person honestly believes that they are consenting."[50]

As the highest-ranking member, LCDR Middlebrook was the senior member on the panel.[51]

C. Lieutenant Skogerboe.

Lieutenant (LT) Skogerboe's wife was raped in high school, ten to fifteen years before this trial.[52] Lieutenant Skogerboe had discussed the assault with his wife, and "help[ed] her move through a traumatic event that she had gone through and ensur[ed] that she fel[t] comfortable with where she's at right now."[53] He believed that the Naval Academy—indeed everyone—had a problem with sexual assault that must be fixed until there are zero cases of sexual assault.[54] In fact, LT Skogerboe thought that was their purpose at the court-martial:

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[48] J.A. at 467-68.
[49] *See* J.A. at 467-68.
[50] J.A. at 387, 468.
[51] J.A. at 515.
[52] J.A. at 426, 441-42.
[53] J.A. at 426.
[54] J.A. at 410, 432.

> [O]bviously we wouldn't necessarily be here if there wasn't an issue. So I think with that, even if it's just one case, I think the Naval Academy in which it needs to fix, [*sic*] and it's always going to be a continuous problem until one day we no longer have to be here in these type of trials . . . . [E]ven if it's just one case, I think it's a big problem that the Naval Academy needs to take care of. [55]

Lieutenant Skogerboe said that "when somebody mentions sexual assault or sexual harassment, it usually brings a cringe or kind of like a distaste."[56]

Lieutenant Skogerboe also "automatically ha[d] a positive opinion" of law enforcement.[57] He confirmed it was "a patriotic belief" that was "pretty deeply rooted in [his] identity as a U.S. Naval officer."[58] But he assured the government he would not automatically believe a law enforcement officer's testimony.[59]

The defense challenged LT Skogerboe for actual and implied bias, based on his wife's traumatic sexual assault experience and his bias in favor of law enforcement.[60] The government opposed, arguing LT Skogerboe said he could differentiate between what happened to his wife and this trial.[61]

The military judge denied Appellant's challenge to LT Skogerboe.[62] He found LT Skogerboe was indeed struck by his wife's "emotions and effects that

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[55] J.A. at 432.
[56] J.A. at 427.
[57] J.A. at 446.
[58] J.A. at 446.
[59] J.A. at 457.
[60] J.A. at 485-87.
[61] J.A. at 487-88.
[62] J.A. at 488-90.

she's felt" as a result of her rape, but "he was not seeking to vindicate her and wouldn't automatically believe victims solely because of his wife's 15-year-old experience."[63]

Summary of Argument

The liberal grant mandate enjoins military judges to err on the side of granting the defense's challenge. Put simply, close calls require excusals. Whether this Court tests for actual or implied bias, the three members at issue in this case should have been excused.

Lieutenant Commander Cox harbored actual and implied biases that were not susceptible to the military judge's corrective instructions. His stated belief that the mere referral of charges was proof that "something had to have happened" and that "a flimsy or easily proven-false accusation would have been dropped by now" casted doubt on his ability to be fair. This doubt was solidified once he described his mother's attempted rape as "indelible" and said he would definitely be thinking about why Appellant did not testify. Lieutenant Commander Cox understood that the law required him to presume Appellant's innocence, but any time he was allowed to speak freely, he returned to his earlier theme: "I do want to hear from Midshipman Keago during trial, and I do think he should testify" because innocent

[63] J.A. at 490.

people would. This is actual bias, and the military judge should have removed the member.

Lieutenant Commander Middlebrook twice proclaimed she "believe[d] we should err on the side of believing" a woman who says she was sexually assaulted. She felt someone convicted of sexually assaulting multiple women should automatically be given a lengthy prison sentence. She should have been excused based on her predisposition to believe complaining witnesses, and in turn, the government's case.

Finally, LT Skogerboe has even stronger opinions about sexual assault since learning of his wife's traumatic rape. He admitted that "when somebody mentions sexual assault or sexual harassment, it usually brings a cringe or kind of like a distaste." Lieutenant Skogerboe's automatic and involuntary physical response to the words "sexual assault" confirms his bias. He also had a positive bias—a "patriotic belief" that was "deeply rooted in [his] identity as a U.S. Naval officer"—in favor of law enforcement. His excusal was not a close call.

This Court should set aside the findings and sentence.

Argument

THE MILITARY JUDGE ERRED BY DENYING CHALLENGES FOR CAUSE AGAINST THREE MEMBERS.

Standard of Review

This Court reviews a military judge's ruling on a challenge for cause based on actual bias for an abuse of discretion.[64] "A military judge abuses his discretion when: (1) he predicates his ruling on findings of fact that are not supported by the evidence of record; (2) he uses incorrect legal principles; (3) he applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) he fails to consider important facts."[65]

The standard of review on a challenge for cause premised on implied bias, however, is less deferential than abuse of discretion, but more deferential than de novo review.[66]

Discussion

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel."[67] This right is protected by the use of peremptory and for-cause challenges during voir dire.[68]

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[64] *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020) (citation omitted).
[65] *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017).
[66] *Id*. at 385 (citation omitted).
[67] *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (citations omitted).
[68] *Id*.

The military justice system recognizes two types of bias: actual and implied.[69] "Actual bias is defined as 'bias in fact.'"[70] "It is 'the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.'"[71] The test for actual bias is whether any personal bias is such that it "will not yield to the military judge's instructions and the evidence presented at trial."[72]

On the other hand, the 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 of appearance of fairness in the military justice system.'"[73] "Implied bias exists when, despite a disclaimer, most people in the same position as the court member would be prejudiced."[74]

"'[M]ilitary judges must liberally grant challenges for cause.'"[75] This liberal grant mandate exists because a military accused has only one peremptory challenge "and because the manner of appointment of court-martial members

[69] *Hennis*, 79 M.J. at 384.
[70] *Id*. (quoting *United States v. Wood*, 229 U.S. 123, 133 (1939)).
[71] *United States v. Woods*, 74 M.J. 238, 245 (C.A.A.F. 2015) (Stucky, J., concurring) (quoting *Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007)).
[72] *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012) (citation omitted).
[73] *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (quotation omitted).
[74] *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008) (citation omitted).
[75] *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005) (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

presents perils that are not encountered elsewhere."[76] In close cases, "the challenge should be granted."[77]

A. Lieutenant Commander Cox's inclusion was an abuse of discretion.

1. Lieutenant Commander Cox's description of his mother's attempted rape as "indelible" demonstrates actual and implied bias.

Through a series of conversations, LCDR Cox was told by his mother how a man kidnapped and attempted to rape her.[78] He described how these conversations were "pretty impactful" and "stuck with" him.[79] The word he used to describe hearing these accounts from his mother was "indelible"—meaning unforgettable.[80]

No reasonable person whose mother told stories of being victimized by a rapist would plausibly watch alleged victim after alleged victim testify without thinking about his mother's horrifying accounts. Such a background renders any normal person unable to impartially determine guilt or decide sentence in an attempted sexual assault case—a crime similar to the one committed upon that person's mother. The gravamen of attempted rape evokes significant emotion, and all the more so when one's mother was a victim of that crime. Lieutenant

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[76] *James*, 61 M.J. at 139 (quoting *United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985)).
[77] *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015).
[78] J.A. at 323-24.
[79] J.A. at 324.
[80] J.A. at 324; MERRIAM-WEBSTER (Apr. 5, 2023 11:00 AM), https://www.merriam-webster.com/dictionary/indelible.

Commander Cox was actually biased.

Neither the trial counsel nor the military judge attempted to rehabilitate LCDR Cox on his mother's experience, let alone inquire into it.[81] In *United States v. Richardson*, this Court held that the military judge abused his discretion because he failed to inquire into a potential bias "for the purpose of determining whether and how [it] might have implicated the doctrine of implied bias."[82] Here, the military judge acknowledged the lack of inquiry as to the attempted rape when he said, "[i]t's not even clear from the voir dire" whether the attempted rape is closely related to the charged offenses in this case.[83] Yet he failed to ask LCDR Cox any questions about it. Indeed, this Court cannot know how closely related the alleged offenses are because of this factfinding failure. Therefore, the military judge, like in *Richardson*, did "not have sufficient facts either to reach this conclusion, or to preclude its possibility."[84] Therefore, the military judge's finding that the attempted rape was "a non-issue, fully unrelated to his ability to serve as a panel member" is clearly erroneous.[85]

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[81] *See* J.A. at 314-23, 330-31.
[82] *United States v. Richardson*, 61 M.J. 113, 119-20 (C.A.A.F. 2005) (finding abuse of discretion where the military judge failed to apply the correct legal standard of implied bias and denied the defense's request to reopen voir dire).
[83] J.A. at 473; *see United States v. Castillo*, 74 M.J. 39, 42 (C.A.A.F. 2015) (finding no implied bias where the member, a victim of sexual assault, said his experience was not "the same issue at all" to the case on trial).
[84] *Richardson*, 61 M.J. at 119.
[85] J.A. at 473.

Moreover, the military judge failed to instruct LCDR Cox to set aside his mother's experience as he heard the evidence and during deliberations, despite knowing the attempted rape "stuck with" him.[86]

Lieutenant Commander Cox's personal history, reinforced by both his predisposition that sexual assault is a problem in the Naval Academy and his call to action in becoming a sexual assault mentor, demonstrates that he could not decide this case impartially.[87] Denying the challenge of LCDR Cox was outside the military judge's reasonable range of options because LCDR Cox was actually biased.

The military judge should have also excused LCDR Cox on the basis of implied bias. Lieutenant Commander Cox's description of his mother's attempted rape as "indelible" must be seen in light of all the circumstances—including his strong belief that victims have had to fight against institutional inertia to receive justice and his assumption that "something had to have happened" for this case to be at trial.[88] Thus, an informed member of the public might well ask why the military judge retained LCDR Cox. At a minimum, LCDR Cox should have been struck under the liberal grant mandate.

[86] J.A. at 324.
[87] J.A. at 304, 317, 326.
[88] J.A. at 303, 306, 322, 324.

2. Lieutenant Commander Cox's belief that "a flimsy or easily proven-false accusation would have been dropped by now," and his admission that he would wonder why Appellant did not testify constitutes actual and implied bias.

Lieutenant Commander Cox believed that the Academy had a problem with sexual assault that must be fixed.[89] He volunteered that, "victims have had to fight against institutional inertia and other pressures to ensure they received justice."[90] He wrote in his supplemental questionnaire, "The fact that there are charges suggests that something happened. I understand that false sexual assault accusations don't make it very far under scrutiny."[91] "[S]ince we are at the court-martial stage, a flimsy or easily proven-false accusation would have been dropped by now."[92]

The military judge insisted that LCDR Cox "appeared very literal."[93] If LCDR Cox literally meant that "a flimsy or easily proven-false accusation would have been dropped by now" and therefore "something had to have happened," LCDR Cox believed this case was at trial because Appellant must have done something to end up accused at a court-martial, and that he was probably guilty.[94] This view is contrary to the presumption of innocence. Lieutenant Commander

[89] J.A. at 304.
[90] J.A. at 306.
[91] J.A. at 303.
[92] J.A. at 303.
[93] J.A. at 474.
[94] J.A. at 303, 322.

Cox presumed Appellant's guilt before and during trial because, as he explained during voir dire, this case wouldn't be at trial it if was just "a simply matter of accusation and denial."[95] The charge sheet was Prosecution Exhibit One for LCDR Cox. He was predisposed to finding guilt before hearing the evidence because he assumed merit to the government's case by merely reading the charge sheet. His thoughtful explanations demonstrate his actual bias in favor of alleged victims. Thus, denial of the challenge for cause was outside the military judge's reasonable range of options.[96]

The military judge's ruling relied on a clearly erroneous finding of fact. He characterized LCDR Cox's statement as: "[LCDR Cox] indicated that the fact that we're here *may* mean that some sort of event had to have happened but not necessarily an illegal event."[97] But LCDR Cox never stated that something *may* have happened; rather, he stated "something had to have happened."[98] He stated this in his supplemental questionnaire and re-affirmed his position in voir dire.[99] He never modified his belief that whatever "had to have happened" might have

[95] J.A. at 322.
[96] *Commisso*, 76 M.J. at 321 (explaining a military judge abuses his discretion when "he applies correct legal principle to the facts in a way that is clearly unreasonable").
[97] J.A. at 474 (emphasis added).
[98] J.A. at 322.
[99] J.A. at 303, 322.

been legal, and the military judge never inquired into that fact.[100] There is no support in the record for the military judge's finding that LCDR Cox believed the event resulting in court-martial may have been legal.[101]

Lieutenant Commander Cox started with the presumption that "something had to have happened" and that a referred charge is "not a simple matter of an accusation."[102] Therefore, it isn't surprising that LCDR Cox thought that Appellant would need to demonstrate why he was innocent by testimony or otherwise. There is no need to rely on inference for this proposition. Lieutenant Commander Cox told the military judge, "I would like to hear the Defense's side of the story."[103] Where the supplemental questionnaire asked whether Appellant "should testify to prove his innocence," LCDR Cox gave a simple answer: "Yes."[104] By the end of voir dire, he said at least three times, "I do want to hear from Midshipman Keago during the trial, and I do think he should testify."[105] He repeatedly said he would "wonder" why Appellant did not testify and assured the military judge, "[i]t will come to mind [during deliberations] that he didn't."[106] Lieutenant Commander Cox did not articulate any reasons why an accused may choose not to testify, elusively

[100] *See* J.A. at 322.
[101] *See* J.A. at 322.
[102] J.A. at 322.
[103] J.A. at 329.
[104] J.A. at 303.
[105] J.A. at 303, 320, 328.
[106] J.A. at 321, 327.

asserting, "[t]here's a lot of like possibilities."[107]

Even the softball questions designed to smooth over problematic answers caused problems. The supplemental questionnaire asked, "Do you think that if MIDN Keago decides not to testify at his trial, he must be hiding something?"[108] Lieutenant Commander Cox wrote, "No, but it would help to see some other sort of evidence or witness to corroborate his innocence."[109] *No, but*. Surely he understood, at least, "that the defense has no obligation to present any evidence or to disprove the elements of the offenses."[110] But LCDR Cox relied, "Yes, though that seems a little self-defeating."[111] *Yes, though*.

Anytime the government successfully led LCDR Cox to say he understood Appellant's right to remain silent, LCDR Cox would revert to his stated desire to hear from Appellant anyway.[112] Even after multiple attempts at rehabilitation, LCDR Cox maintained that an innocent person would testify:

> Defense: But if an innocent person had an opportunity to testify and show you they're innocent, you think that they would do that?
>
> LCDR Cox: Yes.[113]

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[107] J.A. at 320-21.
[108] J.A. at 303.
[109] J.A. at 303.
[110] J.A. at 294.
[111] J.A. at 294.
[112] J.A. at 320-21, 328-29.
[113] J.A. at 328.

The military judge failed to weigh LCDR Cox's verbal promise to follow the law against his insistence that he expects to hear from Appellant—at least if Appellant is innocent.

There are important points of comparison between LCDR Cox and the member at issue in *United States v. Woods*.[114] Captain V, the challenged member in *Woods*, arrived at court with an erroneous view of the law. She believed the burden of proof lay with the defense, not the government, and that this supposed burden of proof was important to the military.[115] She did not express any inclination to believe an accuser, or assume that an accusation that made it to trial must have some validity. She simply expected that, as a legal matter, the defense would have to prove innocence. When the military judge informed her of the true state of the law, she readily accepted that she had had an erroneous view of the burden at trial.[116]

Even though Captain V's error was one of criminal procedure, and not oriented toward believing a particular version of an event, her inclusion on the panel was error. Four judges on this Court found that the military judge's decision to retain Captain V under those circumstances constituted implied bias, and one

[114] *Woods*, 74 M.J. at 238.
[115] *Id.* at 239.
[116] *Id.* at 241.

found actual bias.[117] In finding Captain V held an actual bias, Judge Stucky found that Captain V's misunderstanding of the presumption of innocence and the burdens of proof and persuasion compromised her ability to decide the case impartially.[118]

Lieutenant Commander Cox's participation in this case is a clearer example of both actual and implied bias than that of Captain V's in *Woods*. Lieutenant Commander Cox's answers reveal "a state of mind that leads to an inference that the person will not act with entire impartiality."[119] His belief that a flimsy case would have been dropped by now demonstrates a bias far more serious than Captain V's misunderstanding of the law, which could have been addressed with an instruction.[120] His opinion that an innocent person would testify persisted despite instructions to the contrary.[121] His beliefs aren't mistakes about the law. They are beliefs about how the world actually works—something less susceptible to a military judge's correcting admonition than a mistake about the law. They are beliefs about what is likely to be true.

At some level, LCDR Cox understood that the government bore the burden of proof. He understood that "the guidance above reminds us [that Appellant is]

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[117] *Woods*, 74 M.J. at 244-45.
[118] *Id.* at 245-46.
[119] *Fields*, 503 F.3d at 767.
[120] J.A. at 303.
[121] J.A. at 328.

presumed to be innocent until proven otherwise."[122]

But a member's assurance that he can apply the presumption of innocence is not dispositive.[123] "Once facts are elicited that permit a finding of inferable bias, then, just as in the situation of implied bias, the juror's statements as to his or her ability to be impartial become irrelevant."[124] Almost anyone, even someone who believes as LCDR Cox does, can be led to verbally eschew biases and voice a willingness to follow the law as instructed by the military judge. Almost no potential member, save perhaps one deliberately trying to be excused, will express to the military judge a present intent to disregard the law. The trial counsel—sometimes pleadingly—convinced LCDR Cox to verbalize his assent to rehabilitative propositions. For example:

> Trial Counsel: You—you wouldn't hold it against the Defense if they elected not to—to put on any evidence or to cross-examine a witness in any way? Can you do that? Can you follow that instruction?
>
> LCDR Cox: I can, yes.
>
> Trial Counsel: Okay.[125]

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[122] J.A. at 303.
[123] *Townsend*, 65 M.J. at 463.
[124] *United States v. Torres*, 128 F.3d 38, 47 (2d Cir. 1997). The Second Circuit noted that, once a member provides facts permitting inferable bias, it is possible for the judge to "be persuaded by the force of the juror's assurance" that the member will be impartial upon further inquiry. *Id.* at 47 n.12.
[125] J.A. at 315.

But whenever he was permitted to express his own thoughts, LCDR Cox's biases resurfaced. Rehabilitation is expected.[126] But if a member "return[s] to his earlier theme" of wanting to hear from the defense, it dilutes LCDR Cox's agreement to follow the military judge's instructions.[127] At the very least, the appearance of unfairness remained.

3. Lieutenant Commander Cox's volunteerism as a Fleet Mentor for SAPR classes demonstrates implied bias.

As an alumnus and two-time instructor, LCDR Cox heard Naval Academy leadership discuss sexual assault cases.[128] He volunteered to be a Fleet Mentor for sexual assault classes during the year leading up to the trial.[129] He was aware of news reports on the topic.[130] He thought that the Navy's training on sexual assault was a reliable guide to the law of sexual assault. After all, he explained, "what else would the training be based on, if not the same definitions and policies that the UCMJ and courts would follow?"[131]

Lieutenant Commander Cox had a history of discussing how to "understand[] consent in relationships" with his mentee Academy students.[132] He

[126] *Woods*, 74 M.J. at 243.
[127] *United States v. Clay*, 64 M.J. 274, 278 (C.A.A.F. 2007).
[128] J.A. at 284, 326.
[129] J.A. at 306, 325.
[130] J.A. at 298.
[131] J.A. at 296.
[132] J.A. at 325.

discussed "the sorts of circumstances and patterns that could lead to sexual harassment or sexual assault."[133] His mission was "to inform them and empower and maybe motivate the rest of the midshipmen to recognize and try to stop those sorts of things from happening."[134] This, viewed in the context of his mother's attempted rape and belief that the military had not handled sexual assault cases well in the past, demonstrates actual and implied bias.[135] Lieutenant Commander Cox has demonstrated, through his volunteerism and his questionnaire answers, that he harbors a bias in favor of alleged victims.

The military judge found LCDR Cox volunteered to be a Fleet Mentor to be involved with students, "not because it specifically related to sexual assault, harassment, [and] bystander intervention."[136] Still, LCDR Cox viewed his volunteerism as a way to get involved with sexual assault prevention, which was important to him.[137] His volunteerism demonstrates a personal investment in these issues. He had not been involved with SAPR programs before, but it was something he wanted to do as a faculty member, and found it "really really rewarding."[138] Lieutenant Commander Cox's SAPR volunteerism alone may not

[133] J.A. at 325.
[134] J.A. at 325.
[135] J.A. at 306, 324
[136] J.A. at 473.
[137] J.A. at 327.
[138] J.A. at 317-18.

lead to finding of implied bias, but viewed in the context of all other grounds for removal, a member of the public would doubt the fairness of Appellant's panel. Thus, bias can be inferred from LCDR Cox's experiences as a SAPR Fleet Mentor.[139]

4. The military judge abused his discretion by finding no actual or implied bias based on the totality of the circumstances.

Against the occasional "right answer" LCDR Cox managed during rehabilitation, the military judge failed to weigh the spontaneous, candid, and disqualifying responses he gave both in individual voir dire and on the supplemental questionnaire. Lieutenant Commander Cox explicitly said his mother's experience was "indelible;" there was some truth to the charges; and he would think about Appellant's failure to testify during deliberations. His actual bias prevented him from requiring the government to meet its burden. The military judge should have removed this member for actual bias.

In the face of actual bias, the case for implied bias makes itself.[140] The liberal grant mandate makes the error particularly egregious.[141] A reasonable member of the public would think it unfair that a member would sit who:

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[139] *See Hennis*, 79 M.J. at 385 (explaining bias can be "inferred from" a juror's experiences and relationships) (quotations and citations omitted).
[140] *Clay*, 64 M.J. at 277 ("[W]here actual bias is found, a finding of implied bias would not be unusual.").
[141] *Peters*, 74 M.J. at 34.

- Described his mother's kidnapping and attempted rape as "indelible;"[142]
- Thought that false or flimsy allegations of sexual assault "didn't make it very far;"[143]
- Thought that Appellant "should testify to prove his innocence;"[144]
- Wanted evidence to "corroborate [Appellant's] innocence;"[145]
- Thought that it would be "self-defeating" if Appellant relied on the presumption of innocence;[146]
- Had not only been through the Navy's training on sexual assault, but thought it was a reliable guide to the law; [147]
- Thought that the Academy had a problem with sexual assault that must be fixed;[148] and
- Was a "Fleet Mentor" for the Naval Academy's SAPR classes during the year leading up to the trial.[149]

Some of these factors would individually make the case for implied bias at least "a close question," warranting removal of the member.[150] The presence of all of them assures that a disinterested and informed member of the public would doubt the

[142] J.A. at 323-24.
[143] J.A. at 303.
[144] J.A. at 303.
[145] J.A. at 303.
[146] J.A. at 294.
[147] J.A. at 296.
[148] J.A. at 304.
[149] J.A. at 306, 327.
[150] *Peters*, 74 M.J. at 34.

fairness of the court-martial.[151]

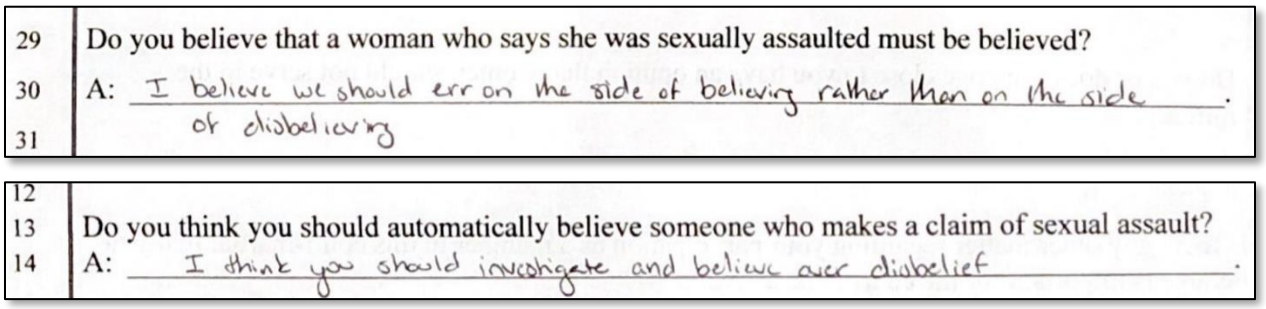
B. Lieutenant Commander Middlebrook's inclusion was an abuse of discretion because she displayed actual and implied bias in favor of alleged victims.

The supplemental members' questionnaire contained two questions addressing a potential member's bias when listening to the testimony of an alleged victim of sexual assault.[152] The two nearly identical questions asked potential members if they would automatically believe a woman who claimed to have been sexually assaulted. These questions were not designed to trip anyone up. Rather, they seem calculated to elicit answers military judges can use to show that a member (perhaps in spite of some troubling personal history or an unscripted moment in individual voir dire) would still be capable of fairly evaluating an alleged victim's testimony. A member should be able to evaluate the testimony of an alleged victim like any other witness's testimony. The obvious and only acceptable answer to these questions, of course, is *no—I could evaluate a complaining witness's testimony like that of any other witness's*.

Lieutenant Commander Middlebrook, however, answered the questions like

[151] *Peters*, 74 M.J. at 34 ("In reaching a determination of whether there is implied bias ... the totality of the circumstances should be considered.").
[152] J.A. at 350, 355.

this:[153]


29 Do you believe that a woman who says she was sexually assaulted must be believed?
30 A: I believe we should err on the side of believing rather than on the side
31 of disbelieving.

12
13 Do you think you should automatically believe someone who makes a claim of sexual assault?
14 A: I think you should investigate and believe over disbelief.

Her statements on her questionnaire were not given unthinkingly, as could occur when a member is peppered with numerous questions during in-person voir dire. To the contrary, she took the time to handwrite two statements advocating for "belie[f] over disbelief" of alleged victims.[154]

If one imagines for a moment that the military judge had asked the venire during group voir dire whether any of the members would "automatically believe someone who makes a claim of sexual assault," and that a potential member actually raised her hand—or, worse, answered with "believe over disbelief"—we would all know the right answer. The member would have a demonstrated bias, and would be unsuitable. This is precisely what happened here, only, because of COVID, the process was reduced to writing.

In *United States v. Ai*, this Court found no bias where a member had a prior relationship with a government witness because there was no evidence that the

[153] J.A. at 350, 355.
[154] J.A. at 355.

"member would 'naturally' favor or believe" the witness's testimony.[155] Here, LCDR Middlebrook's predisposition to believe a woman who says she was sexually assaulted is explicit.

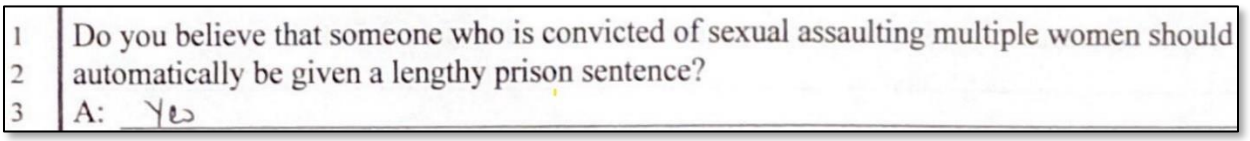
Lieutenant Commander Middlebrook was a somewhat more compliant patient than LCDR Cox when it came time for rehabilitation. In individual voir dire, LCDR Middlebrook (with the help of the trial counsel) provided a more appropriate response. She and the trial counsel recast her answers into a concern that an accusation be taken seriously and not disregarded.[156] But of course neither the questionnaire nor LCDR Middlebrook's answers in the questionnaire were about how one should respond to an initial complaint. The context of the questions is one in which the potential member will have to evaluate testimony at a trial. And that LCDR Middlebrook's biases did not go to just the initial outcry is corroborated by her other answers. Her second answer indicates that "believe over disbelief" is what happens after investigation—not before.

Indeed, like LCDR Cox, the fact that the accusation was at a court-martial made LCDR Middlebrook more credulous—not less. She explained that "my belief is that you should believe—that the fact that it's gotten to a court-martial says someone did believe them at some point . . . ."[157] These are not the thoughts of

[155] *United States v. Ai*, 49 M.J. 1, 5 (C.A.A.F. 1998).
[156] J.A. at 368-69.
[157] J.A. at 369.

someone who simply thinks we should take all allegations seriously. Nor would an objective, fully informed third party think that they were.

Believing alleged victims wasn't the only "automatic" for LCDR Middlebrook at this trial:[158]


Do you believe that someone who is convicted of sexual assaulting multiple women should automatically be given a lengthy prison sentence?
A: Yes

Again, the trial counsel was there to clean up, and LCDR Middlebrook was cooperative.[159] The trial counsel elicited LCDR Middlebrook's assurances that she would listen to other members' opinions about sentence, and ascertained that LCDR Middlebrook did not have a specific sentence already in mind.[160]

But "leading questions which led to predictable answers" are "ineffectual" rehabilitation where actual bias has become clear.[161] "It is settled law that a military judge should grant a challenge for cause not only where a court member demonstrates an inelastic disposition concerning an appropriate sentence for the offenses charged, but also where the presence of that member on the panel would create an objective appearance of unfairness in the eyes of the public."[162] The

[158] J.A. at 351.
[159] J.A. at 369-70.
[160] J.A. at 370.
[161] *Nash*, 71 M.J. at 89.
[162] *Clay*, 64 M.J. at 276 (finding implied bias).

member had an actual bias, and her inclusion was outside the military judge's range of reasonable options.

Lieutenant Commander Middlebrook was also predisposed to finding lack of consent. In her supplemental questionnaire, she was asked, "Do you agree that when women get sexually assaulted, it's often because the way they said 'no' was unclear? Please explain."[163] She wrote, "No – if it is not a clear yes, then it should be taken as a 'no.'"[164] During voir, the defense asked if she believes a person needs to give "clear and unequivocal consent for sexual activity or what's your opinion on that?" She answered, "Yes."[165] These answers indicate that, in any case where consent was not affirmatively stated, she would presume that a sexual assault occurred and be unable to impartially apply the defense of mistake of fact. Thus, for this additional reason, she was actually biased. And the government's attempt at rehabilitation failed: "Can you imagine a scenario where one person is not consenting but the other person honestly believes that they are consenting?" "Not off the top of my head."[166]

Lieutenant Commander Middlebrook was "never instructed or corrected by

[163] J.A. at 348.
[164] J.A. at 348.
[165] J.A. at 381.
[166] J.A. at 387.

the military judge" on her failure to recognize mistake of fact as a defense.[167] The military judge abused his discretion for failing to grant the defense's challenge for actual and implied bias—especially in light of the fact that the government did not oppose or argue to the contrary.[168]

C. Lieutenant Skogerboe's inclusion was an abuse of discretion because he displayed actual and implied bias based on his wife's traumatic rape.

Given that his wife is a rape victim, it is not surprising that LT Skogerboe described his reaction to sexual assault allegations in visceral terms: "when somebody mentions sexual assault or sexual harassment, it usually brings a cringe or kind of like a distaste."[169] Cringe means to "recoil in distaste."[170] Another word for an involuntary, visceral, negative emotional reaction to a subject is *bias*.[171] He had an actual bias, "a state of mind that leads to an inference that the person will not act with entire impartiality," regarding sexual assault.[172] To him, the mention of sexual assault was always cringe-worthy, but his wife's experience made it worse:

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[167] *United States v. Rogers*, 75 M.J. 271, 271-74 (C.A.A.F. 2016) (finding implied bias based on the members' misunderstanding of the law and improper burden shift).
[168] J.A. at 467.
[169] J.A. at 427.
[170] MERRIAM-WEBSTER (Apr. 5, 2023 9:48 AM), https://www.merriam-webster.com/dictionary/cringe.
[171] *See Bias*, MERRIAM-WEBSTER (Mar. 17, 2023 12:35 PM), https://www.merriam-webster.com/dictionary/bias ("an inclination of temperament or outlook . . . a personal and sometimes unreasoned judgment").
[172] *Woods*, 74 M.J. at 245 (Stucky, J., concurring) (quoting *Fields*, 503 F.3d at 767 (quotation marks and citation omitted).

"I think now I have a more personal feeling towards it."[173] His personal history with sexual assault, backstopped by his belief that "obviously we wouldn't necessarily be here if there wasn't an issue" establishes actual bias.[174] Lieutenant Skogerboe believed, "even if it's just one case, I think it's a big problem that the Naval Academy needs to take care of."[175]

Doubtless, any reasonable outside observer would expect this circumstance to bias LT Skogerboe in exactly the way he described. A rational "consideration of the public's perception of fairness in having a particular member as part of the court-martial panel" required this member's removal from the panel for implied as well as actual bias.[176]

Lieutenant Skogerboe also "automatically ha[d] a positive opinion" of law enforcement, which he characterized thus:

> Defense: Your default is a positive opinion of law enforcement?
>
> LT Skogerboe: Yes.
>
> Defense: It sounds like that's I guess kind of like a patriotic belief I guess.
>
> LT Skogerboe: Yes. [177]

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[173] J.A. at 442.
[174] J.A. at 432.
[175] J.A. at 432.
[176] *Peters*, 74 M.J at 34 (citation omitted).
[177] J.A. at 446.

Defense: Sounds like you've held that for quite a while, it's pretty deeply rooted in your identity as a U.S. Naval officer, right?

LT Skogerboe: Yes.

Lieutenant Skogerboe had a positive bias—a "patriotic belief" that was "deeply rooted in [his] identity as a U.S. Naval officer"—in favor of law enforcement.[178] This Court has found reversible error where the circumstances show a bias in favor of law enforcement.[179] Actual biases are seldom confessed with such candor. When the trial defense counsel began his opening statement by telling members that they would see that law enforcement had failed to properly investigate this case, LT Skogerboe would have been unreceptive.[180] Appellant's challenge to this member did not present a close case. It should have been granted for actual and implied bias.

Conclusion

Because the military judge abused his discretion by failing to grant three defense challenges for cause, this Court should set aside the findings and sentence.[181]

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[178] J.A. at 446.
[179] *See United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995) (finding the military judge abused her discretion in not excusing a member who "was intimately involved in the law enforcement function at the base").
[180] J.A. at 516.
[181] *Woods*, 74 M.J. at 245.

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I certify that a copy of the foregoing was electronically mailed to the Court and that a copy was electronically delivered to the Deputy Director, Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on April 5, 2023.

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This Brief complies with the type-volume limitations of Rule 24(c) because it does not exceed 14,000 words, and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

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