IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

TYLER W. BLAIR
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433
Bar no. 37601

PAUL S. LAPLANTE
Lieutenant Commander, JAGC, U.S. Navy
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-2479
Bar no. 37861

JOSEPH M. JENNINGS
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 37744

BRIAN K. KELLER
Deputy Director
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

Index of Brief

Table of Authorities

Page

Issue Presented

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

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2020), because Appellant's approved sentence included a dismissal and confinement for more than one year. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2020).

Statement of the Case

A panel of members sitting as a general court-martial convicted Appellant, contrary to his pleas, of two specifications of attempted sexual assault, four specifications of sexual assault, four specifications of burglary, and one specification of obstructing justice in violation of Articles 80, 120, 129, and 131b UCMJ, 10 U.S.C. §§ 880, 920, 929, 931b (2012). The Members sentenced Appellant to twenty-five years of confinement, forfeiture of all pay and allowances, and a dismissal. The Convening Authority took no action,[1] the

[1] Appellant states that the Convening Authority "approved the sentence as adjudged." (Appellant's Br. at 2.) In fact, the Convening Authority took "no action on the findings or sentence in this case." (J.A. 538.) Because the earliest offense took place before January 1, 2019, the Convening Authority was required

Military Judge entered the judgment into the Record, and the sentence, except for the punitive discharge, was executed.

On review, the lower court affirmed the findings and sentence. *United States v. Keago*, No. 202100008, 2022 CCA LEXIS 397, at *26 (N-M. Ct. Crim. App. July 5, 2022).

Upon Appellant's Petition, this Court granted review. (Appellant's Pet., Oct. 28, 2022; Appellant's Supp. Pet., Dec. 16, 2022); *United States v. Keago*, No. 23-0021/NA, 2023 CAAF LEXIS 113, at *1 (C.A.A.F. Feb. 23, 2023).

Statement of Facts

A. The United States charged Appellant with sex crimes and related offenses against three Victims.

The United States charged Appellant with offenses related to the sexual assault three different Victims at the Naval Academy. (J.A. 275–80.) The Charges involved: first, burglaries surrounding the sexual assaults where Appellant entered the Victims' rooms without their consent, (J.A. 277); second, an attempted sexual assault without consent when Appellant entered a Victim's berthing aboard ship and pulled her shorts down, (J.A. 275); and, third, two separate sexual assaults involving two different Victims, both of whom were asleep. (J.A. 277–278, 280.)

---

to take action on the sentence. *United States v. Brubaker-Escobar*, 81 M.J. 471, 472–75 (C.A.A.F. 2021). However, Appellant raises no assignment of error as to this issue.

B. The Military Judge presided over group and individual voir dire.

1. Lieutenant Commander Cox understood the burden of proof, would follow instructions, and would consider all the evidence.

a. Lieutenant Commander Cox's Supplemental Questionnaire included promises to follow instructions and apply correct burdens of proof.

In his Supplemental Questionnaire, Lieutenant Commander Cox stated that: (1) Appellant's charges do not "warrant any inference of guilt," (J.A. 294); (2) he understood Appellant's choice not to testify "may not be considered adverse to [Appellant] in any way," (J.A. 294); (3) he would "vote for a finding of 'Not Guilty'" if he "was not convinced beyond a reasonable doubt," (J.A. 294); and (4) Appellant was "presumed to be innocent until proven otherwise." (J.A. 303).

b. Lieutenant Commander Cox understood how to weigh evidence and agreed to follow the Judge's instructions.

Lieutenant Commander Cox said in his questionnaire that "[t]he fact there are charges suggests something happened" and he thought that "false sexual assault accusations don't make it very far under scrutiny." (J.A. 303.) He also said that "since we are at the court-martial stage, a flimsy or easily proven-false allegation would have been dropped by now." (J.A 303.) However, he further stated that "[w]hether or not [Appellant] is guilty remains to be seen in the trial." (J.A. 303.) He "absolutely" believed it was "possible for an innocent person to be charged with serious crimes[.]" (J.A. 303.)

Lieutenant Commander Cox further said, "I will hold [the United States] to the standard the judge deems," when asked in voir dire whether he would hold the United States to its "beyond a reasonable doubt" burden. (J.A. 321.)

When further questioned, he explained that since Appellant's charges made it to court-martial, he thought "it is not a simple he said she said." (J.A. 322.) He felt "something had to have happened" "[l]ike some . . . event had to happen for the charges to get this far." (J.A. 322.) Though he believed an allegation should "be taken seriously," he did not "automatically lean one way or the other." (J.A. 322.) He said he "absolutely" would wait until "he heard all the evidence" to decide the case. (J.A. 322.)

c. Lieutenant Commander Cox said he would not hold it against Appellant if he did not testify, and agreed to give Appellant a fair trial while following the Judge's instructions.

Asked if "the defense is required to provide evidence to contradict" the prosecution's case "to find [Appellant] not guilty" Lieutenant Commander Cox responded: "Not necessarily, no, though I'm sure it helps their case." (J.A. 304.) He agreed Appellant had "no obligation to present evidence or disprove the elements," but thought that "seems a little self-defeating." (J.A. 294, 315.)

On voir dire, he agreed he "wouldn't hold it against the Defense if they elected not to . . . put on any evidence or to cross-examine a witness" and would follow the Judge's instructions. (J.A. 315.) He said he would "give [Appellant] a

fair trial" and agreed he "had no particular beliefs or biases" that would "prevent [him] from giving [Appellant] a fair trial." (J.A. 310.)

Lieutenant Commander Cox noted several times he wanted to hear from Appellant. On his questionnaire, he agreed he "wanted to hear from [Appellant] during trial" and Appellant "should testify to prove his innocence." (J.A. 303.) When asked if a decision not to testify meant Appellant was hiding something, he wrote, "No, but it would help to see some other sort of evidence or witness to corroborate his innocence." (J.A. 303.) When asked about Appellant testifying, he said "Yes . . . I do think he should. But, again, I understand he doesn't have to." (J.A. 328.) He understood it was Appellant's "right not to" testify, "that he does not have to," "I do understand why he wouldn't," and "I don't hold that against him if he does not." (J.A. 320, 327–28.) He said his original responses meant he "would be interested to hear what the Defense had to say." (J.A. 328.) He could "think of reasons" why a "completely innocent" person would not "testify in their own defense." (J.A. 320–21.)

When asked "if an innocent person had an opportunity to testify and show you they're innocent," he thought they would. (J.A. 328.) But he "would not hold it against him because it is his right not to." (J.A. 327–28.) Finally, he said: "I would like to hear the Defense's side of the story." (J.A. 329.)

d. Lieutenant Commander Cox explained his thoughts on sexual assault in the military.

Asked in the questionnaire about his ability to set aside previous training, Lieutenant Commande Cox said: "[t]his is confusing—what else would the training be based on, if not the same definitions and policies that the UCMJ and courts would follow?" (J.A. 296.)

He noted that "the entire Navy and [Department] of Defense have the same [sex assault] problem" and the Naval Academy is not "unique in this regard." (J.A. 304.) He wrote sexual assault "still happens way too often" and victims "have had to fight against institutional inertia" to receive justice. (J.A. 306.) He "believe[d] [sexual assault] still remains" at the Naval Academy. (J.A. 327.) He did not "believe [people claiming to be victims] MUST be believed by the jury until proven one way or the other." (J.A. 301.)

e. Lieutenant Commander Cox was a "Fleet mentor."

He volunteered "as a Fleet mentor for the Academy's [Sexual Assault Prevention Response] program," where he monitored a "midshipmen run, midshipmen led" seminar where students discussed topics like "fraternization," "healthy relationships," "all sorts of stuff," and sexual assault. (J.A. 317–18, 325.)

Asked if he volunteered specifically because of the sexual assault issue, he said "Not particularly, no," though he found it "important." (J.A. 318–319.) He

just "wanted to find some way to get involved in something instead of just being a teacher," and the program was "one of the earliest opportunities." (J.A. 318–19.)

f. Lieutenant Commander Cox discussed how his mother and another woman were kidnapped at gunpoint in 1975 and "almost raped." He stated it would not affect his ability to follow the Judge's instructions and weigh the evidence.

During voir dire, he discussed how his mother told him that, in 1975, she and another woman were "kidnapped" "by a man at gunpoint." (J.A. 289, 324.) The man "intend[ed] to rape" them, but they were "rescued by police." (J.A. 289, 324.) He could not remember much about his mother's telling this story because it had "been a while" and "was part of a kind of series of conversations." (J.A. 324.) He stated "the conversation [with his mother] at that moment" was "pretty indelible." (J.A. 324.)

He said there was no reason he would "be unable to fairly and impartially determine all the issues in this case in accordance with the evidence, the [Judge's] instructions, and the applicable law." (J.A. 331.)

2. Lieutenant Commander Middlebrook stated sexual assaults should be investigated, Appellant was "innocent until proven guilty," and affirmed she would follow the Judge's instructions.

a. Lieutenant Commander Middlebrook agreed she would not infer guilt from Appellant's charges, would follow the Judge's instructions, and would be fair and impartial.

In her Supplemental Questionnaire, Lieutenant Commander Middlebrook agreed she (1) "would not infer guilt" from Appellant's Charges, (J.A. 343, 352); (2) would "vote for a finding of 'Not Guilty' if [she] was not convinced beyond a reasonable doubt" that Appellant was guilty, (J.A. 343); (3) would follow the Judge's instructions, (J.A. 343, 345); and (4) would put aside anything she had "heard, read, or seen in the media" and "decide this case solely on" the evidence and the law. (J.A. 346).

b. Lieutenant Commander Middlebrook said someone claiming a sexual assault should be initially believed and have their claims investigated. But she would not necessarily believe a victim's testimony.

On her questionnaire, asked if "a woman who says she was sexually assaulted must be believed," she said: "I believe we should err on the side of believing rather than on the side of disbelieving." (J.A. 350.) She said "when someone comes to you like at the very initial stages" and "rather than saying, no, that it didn't happen" that "is where my belief is that you should believe." (J.A. 369.) "[T]he fact that it's gotten to a court-martial says someone did believe [these victims] at some point." (J.A. 369.) She thought sometimes "that when someone

reports [a sex assault]" "it won't be believed, and then they won't investigate it." (J.A. 380.) She was "not automatically saying that someone is lying when they bring up an allegation" but that "people are assumed innocent until proven guilty in a court of law." (J.A. 369.) She agreed that for a court-martial she could wait to "hear all the evidence" before making a decision. (J.A. 369.)

c. Lieutenant Commander Middlebrook explained her views on consent to sex.

Lieutenant Commander Middlebrook agreed that "somebody needs to essentially give sort of clear and unequivocal consent for sexual activity." (J.A. 381.) She explained that "no means no" and "non-verbal no's are still no's." (J.A. 381.) But "what yes means" and "what no means" is "something that is definitely [a] topic of conversation in our culture" and "consent is a hard thing" because it can be "uncertain." (J.A. 381.) She agreed a "yes removes that ambiguity, that lack of clarity." (J.A. 381.)

She said a "monogamous situation" was an example of a way "that people could consent without actually saying" yes or "using words at all." (J.A. 386.) She said that was a "wholly different situation" than a "one night stand" where "consent needs to be there if they've just met." (J.A. 386.) But consent is "very hard to prove one way or the other, and that's why it becomes sometimes a he said[-]she said thing." (J.A. 386.) She believed "there could be consent without a verbal yes." (J.A. 386.) She could not think of an example "off the top of [her]

head" of "a scenario where one person is not consenting but the other person honestly believed that they are consenting." (J.A. 386–87.)

d. Lieutenant Commander Middlebrook stated she could set aside her beliefs and fairly evaluate Appellant's case based on the evidence.

Lieutenant Commander Middlebrook agreed in her questionnaire that she had "strong beliefs or opinions about sexual assaults in the military." (J.A. 355). She said that sexual assault "does occur and it's something that shouldn't." (J.A. 374.) She said her beliefs "would [not] enter into [her] mind in any way" and would not "alter the evidence" she saw "in the courtroom." (J.A. 374.) She said she felt "comfortable" she could "judge this individual case despite any outside beliefs about what happened." (J.A. 374.) She agreed she could judge Appellant's case fairly based on the evidence and despite any outside beliefs. (J.A. 374.)

e. Lieutenant Commander Middlebrook indicated she was open to different sentencing options should Appellant be convicted and had no specific sentence in mind.

She disagreed in her questionnaire that "someone who is convicted of sexual assault" should "automatically be given a lengthy prison sentence." (J.A. 350.) She agreed that "someone who is convicted of sexually assaulting multiple women should automatically be given a lengthy prison sentence." (J.A. 350–51.) She said that if a person has "been connected to several" crimes, where "it's becoming a

pattern," and the accused has "gotten in trouble before" then "that's when I think a lengthy prison [sentence]" would be warranted. (J.A. 384.)

She would "listen," discuss, and "have [no] preconceived notion" on an appropriate sentence if the option of no punishment was raised. (J.A. 370.) She had no "specific idea" for a "prison sentence for multiple sex sexual assault convictions." (J.A. 369–70.) She was not "compelled to vote for any particular punishment if Appellant was found guilty." (J.A. 358.) She had no "thoughts or feelings [about] punishment that might affect [her] ability to adjudge a completely fair, impartial, and appropriate sentence" if Appellant was convicted. (J.A. 358.)

She would "fairly and impartially determine all the issues in this case in accordance with the evidence, the Military Judge's instructions, and the applicable law." (J.A. 387.)

3. Lieutenant Skogerboe's wife's sexual assault "ten or fifteen years ago," his feelings about sex assault, and his positive opinion of law enforcement, did not affect his ability to hear the case fairly. He would follow the Military Judge's instructions.

a. Lieutenant Skogerboe said he could keep his role as husband separate from his duties as a Member.

Lieutenant Skogerboe's wife was sexually assaulted "ten or fifteen years ago," before they met. (J.A. 417, 426–27.) He only knew that his wife's "ex-boyfriend . . . rap[ed] her . . . after like intoxication [and] drinking." (J.A. 441.) He learned about it two or three years after they started dating. (J.A. 439.) His

role was limited to "emotional support." (J.A. 426–27.) But he "would [not] automatically believe" "someone [who] responded" like his wife had. (J.A. 456.)

Lieutenant Skogerboe agreed he could "differentiate" between his "role as a husband" and "role as a member." (J.A. 427.) He had no "doubts in [his] mind" that he would not "try and vindicate [his wife] in any way through this court-martial process." (J.A. 456.) He "could give [Appellant] a fair trial." (J.A. 417.) His wife's assault "would not influence . . . his duties" as a member. (J.A. 417.)

b. Lieutenant Skogerboe talked about his feelings on sexual assault, knew "two sides [exist] to every story," and said hearing "one side doesn't . . . mean that's the truth."

During voir dire he explained "when someone mentions sexual assault . . . it usually brings a cringe or . . . distaste." (J.A. 427.) He said this because "when something like that happens" someone "is usually emotionally or physically hurt in some capacity." (J.A. 427.) He said: "there are two sides of the story; and just because I hear one side doesn't necessarily mean that that's the truth . . . both sides need to be taken into consideration as to whether it's true or not . . . ." (J.A. 427.)

Because of "what [his] wife went through," he said "now I have a more personal feeling towards it, but I would probably say the same thing before I met her." (J.A. 442.) His feelings "towards sexual assault and sexual harassment" were "personal" because it was "something people shouldn't do." (J.A. 442, 456.)

c. Lieutenant Skogerboe explained how sexual assault in the Navy was a problem to be taken seriously.

Asked if the "Naval Academy has a sexual assault problem that must be fixed" he said "everyone has a problem that must be fixed until there are zero cases of sexual assault." (J.A. 410.) He said "we wouldn't necessarily be here if there wasn't an issue" 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 or sexual . . . cases." (J.A. 432.) He "meant that like even if it's just one case, I think it's a big problem the Naval academy needs to take care of." (J.A. 432.) He agreed as a "member [his] job would not be to fix [any potential] sexual assault problem" at the Naval Academy. (J.A. 433.) His "job would be to fairly and impartially receive the evidence" and follow "the judge's instructions on the law." (J.A. 433.)

When he said "the Naval Academy has a problem with sexual assault" he based that "on these questions and the information" in "the questionnaire." (J.A. 447.) He said that whether "there was a thousand cases or just one, it's still a problem." (J.A. 447.) But "[t]hat doesn't mean that I necessarily believe . . . this specific case is a bad case or a good case" but only that "this type of conduct . . . should be taken seriously." (J.A. 447.)

He said that "as a professional" he needed to take sexual assault accusations "seriously" to "make sure that it goes down the right pathway." (J.A. 429.) He explained he would not automatically "believe everything that [an accuser] says."

(J.A. 429.) He understood that his "role wouldn't be to be a part of the [Navy's] response mechanism" to a sexual assault allegation. (J.A. 429.) He knew that as a court-martial member his "role would be to receive the evidence and judge credibility" and he could "distinguish between those two roles." (J.A. 429.)

d. Lieutenant Skogerboe said he would not automatically believe law enforcement testimony, and he would follow the Judge's instructions.

On voir dire, Lieutenant Skogerboe agreed he had a "default" "positive opinion of law enforcement," "kind of like a patriotic belief," that he "held for quite a while," and that is "deeply rooted in [his] identity as a U.S. Naval Officer." (J.A. 446.) He thought law enforcement "as a whole trustworthy" and he "automatically [had] a positive opinion." (J.A. 446.) He was not "automatically going to believe everything [law enforcement] tell[s] me." (J.A. 457.)

He did not find Naval Criminal Investigative Service agents "more credible witnesses by virtue of their affiliation with law enforcement." (J.A. 411.) He had a "hard time saying" they always "conduct good and thorough investigations" "but believe[d] most agents do their best." (J.A. 411.)

He agreed he would "follow the judge's instruction and assess witness credibility" as the Judge instructs. (J.A. 456.) He agreed he could "fairly and impartially determine all the issues in this case in accordance with the evidence, [the Judge's] instructions, and the applicable law." (J.A. 457–58.)

C. Ruling on challenges for actual and implied bias, the Military Judge cited the legal standards for both. He granted six of Appellant's fourteen challenges for cause. He denied Appellant's challenges to Lieutenant Commander Cox, Lieutenant Commander Middlebrook, and Lieutenant Skogerboe.

The Military Judge cited the actual bias standard: "whether a member's bias will not yield to the evidence presented and the judge's instruction" and "is a question of fact." (J.A. 459.) He said implied bias is "when despite a disclaimer, most people in the same position as the court member would be prejudiced." (J.A. 459.) It is determined through "the totality of the circumstances," and is "viewed through the eyes of the public." (J.A. 459.) "Implied bias exists if an objective observer would have substantial doubt about the fairness of the accused's court-martial panel if the challenge were not granted." (J.A. 459.)

Appellant challenged fourteen Members for actual and implied bias, of which the Military Judge granted six. (J.A. 460, 465, 469–70, 475, 478–79, 485, 491, 494, 496, 502, 507, 509–10, 512.)

1. Appellant challenged Lieutenant Commander Cox. The Military Judge entered Findings, considered the liberal grant mandate, and denied Appellant's challenge.

Appellant challenged Lieutenant Commander Cox for actual and implied bias based on his (1) mother "being kidnapped and nearly raped," (2) desire for Appellant to testify, (3) belief something "happened" for the charges to get to

court-martial, (4) involvement with the Fleet mentorship program, and (5) opinion of law enforcement. (J.A. 470–71.)

The Military Judge considered the liberal grant mandate and denied Appellant's challenge. (J.A. 473, 475.) First, the Military Judge found that based on Lieutenant Commander Cox's "demeanor and reactions" and lack of "emotional reaction" discussing "his mother's incident in 1975," it was a "non-issue." (J.A. 473.) He found it unclear "from the voir dire if that incident is . . . closely related to this incident" that it "might have an impact on someone." (J.A. 473.)

Second, Lieutenant Commander Cox's Fleet mentor volunteerism was to "be involved" with students and was not specifically related to sexual assault. (J.A. 47374.) He had no other involvement in "sex assault prevention program[s]." (J.A. 473–74.)

Third, Lieutenant Commander Cox "could think of a lot of possibilities why the accused might choose not to testify" even if innocent, "wouldn't hold it against" Appellant, and understood "the Government's burden." (J.A. 474.)

Fourth, the Member said whatever caused the court-martial might "not necessarily [be] an illegal event." (J.A. 474.) In the Military Judge's view, "this was intended semantically as [he] . . . appeared very literal." (J.A. 474.)

Fifth, his answers ascribing credibility to law enforcement based on their "particular expertise" was reasonable and permissible because he only

"consider[ed] them more credible on matters in which they have expertise" which was "certainly within a member's discretion." (J.A. 474–75.)

2. Appellant challenged Lieutenant Commander Middlebrook. The Judge entered Findings, considered the liberal grant mandate, and denied Appellant's challenge.

Appellant challenged Lieutenant Commander Middlebrook for actual and implied bias based on her (1) statements about "consent," (2) position on believing over disbelieving victims, (3) belief in a sexual assault problem in the military based on her involvement with online groups, (4) position on sentencing, (5) belief something must have happened since the case was at a court-martial, and (6) resistance to a mistake of fact defense. (J.A. 465–66.)

The Military Judge applied "the liberal grant mandate" and denied the challenge. (J.A. 467–68.)

First, the Military Judge found that Appellant mischaracterized Lieutenant Commander Middlebrook's "involvement in Facebook groups" because those groups covered "all sorts of issues." (J.A. 467.) She "doesn't particularly respond" when sexual assault comes up, and "indicated that she does not have a strong opinion" about sexual assault posts in those groups. (J.A. 467.)

Second, the Judge found her position on sentencing was that "it may be appropriate to give a lengthy sentence to someone who's been convicted in the past." (J.A. 467.) She "read multiple convictions to be separate, unique

convictions over time." (J.A. 467.) The sentence would not be automatic. (J.A. 467.) And a goal of sentencing was to make sure the person "would be to ensure that someone didn't not do it again" "in the context of multiple convictions over time." (J.A. 467.) The Judge found that "none of those are inappropriate factors [to] use at sentencing." (J.A. 468.)

Third, he found her definition of consent was provided in the context of nonverbal and verbal questions to show consent. (J.A. 468.) He found that "voir dire is not a law exam" to disqualify members, and what was most important was that neither "her demeanor or answers to the questions provided on voir dire indicated she" would be unable to follow the law and instructions. (J.A. 468.)

3. Appellant challenged Lieutenant Skogerboe. The Judge entered Findings, considered the liberal grant mandate, and denied Appellant's challenge.

Appellant challenged Lieutenant Skogerboe for actual and implied bias based on his (1) wife's previous sex assault and (2) positive opinion of law enforcement. (J.A. 485–86.) The Military Judge applied the liberal grant mandate and denied the challenge. (J.A. 488, 490.)

The Judge found his testimony about separating his wife's history from this case "very credible [and] saw no reason to disbelieve him." (J.A. 490.) The Judge found that he (1) had known about the rape for "seven or eight years," (2) did not know all the details, (3) was more focused on emotional support and "was not

affected by the source of that emotional journey," (4) did not seek "to vindicate her," and (5) "wouldn't automatically believe [other] victims." (J.A. 489–90.)

The Judge found he had a "generally positive view . . . of law enforcement, but that some law enforcement taint[ed] that opinion." (J.A. 489.) He "could evaluate [their] testimony independently of that [positive opinion]." (J.A. 489.) He found that "none of those statements indicate some sort of long-term overriding connection to law enforcement that would bias him." (J.A. 489.) But, instead they were "reasonable opinions" that reserved his ability to make "independent judgments on individuals." (J.A. 489.)

Argument

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING APPELLANT'S CHALLENGES FOR CAUSE. HIS THOROUGH FINDINGS, ASSESSMENT OF CREDIBILITY, AND APPLICATION OF THE LIBERAL GRANT MANDATE WARRANT DEFERENCE. THE TOTALITY OF CIRCUMSTANCES SHOW NO ACTUAL OR IMPLIED BIAS. THE MEMBERS PROMISED TO FOLLOW INSTRUCTIONS AND FAIRLY WEIGH THE EVIDENCE. NO MEMBER OF THE PUBLIC WOULD DOUBT THAT APPELLANT HAD A FAIR AND IMPARTIAL PANEL.

A. Standard of review.

Issues of actual bias are reviewed for abuse of discretion. *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F 2000) (citation omitted) "[I]ssues of implied bias are reviewed under a standard less deferential than abuse of

discretion, but more deferential than *de novo*." *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015) (citations omitted).

B. Military judges are afforded considerable deference in ruling on challenges for cause.

1. A member must be excused for actual bias if he will not yield to instructions and evidence presented at trial. A military judge is given great deference in determining if members have actual bias after considering their demeanor and answers in voir dire.

Actual bias is defined as "bias in fact." *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020) (internal citation omitted). "Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial." *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012). Whether a prospective juror is biased is "determined through voir dire culminating in a finding by the trial judge concerning the [prospective juror's] state of mind." *Wainwright v. Witt*, 469 U.S. 412, 428 (1985).

A "military judge is given great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member." *Napolitano*, 53 M.J. at 166 (citation omitted). A judge's determination of actual bias is "plainly [a question] of historical fact; did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

2. Members should be excused for implied bias when, despite actual impartiality, their presence would cause the public to believe the appellant did not receive a fair, impartial panel. Judges receive more deference for considering the liberal grant mandate and placing reasoning on the record.

a. Implied bias arises where a member causes "substantial doubt as to legality, fairness, and impartiality."

A member "shall be excused" for implied bias "whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). "Substantial doubt exists where the presence of a member on the panel would cause the public to think that the accused received something less than a court of fair, impartial members, injuring the public's perception of the fairness of the military justice system." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017).

Implied bias is "bias conclusively presumed as [a] matter of law." *United States v. Wood*, 299 U.S. 123, 133 (1936). It is "bias attributable in law to the prospective juror regardless of actual partiality." *Id*. at 134.

Judges apply an "objective standard," considering the "totality of the circumstances." *United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016). Though implied bias is legally imputed regardless of actual partiality, it can nonetheless sometimes involve questions of fact and demeanor, not just law. *See United States v. Woods*, 74 M.J. 238, 243 n.1 (C.A.A.F. 2015).

b. A judge's exercise of discretion regarding an implied bias challenge is rarely overturned if (1) there is no actual bias, (2) the judge recognizes the liberal grant mandate, and (3) the judge places his reasoning on the record.

"[I]n the absence of actual bias, where a military judge considers a challenge based on implied bias, recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed will indeed be rare." *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007) (citation and internal quotations omitted).

Military judges receive deference in their implied bias rulings because "what might appear a close case on a cold appellate record, might not appear so close" to "a military judge observing members in person and asking the critical questions . . . ." *Id.* "A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one who does not." *Id.* Military courts "do not expect record dissertations but, rather, 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).

C. The Military Judge deserves increased deference: he put reasoning on the Record for each Ruling and applied the correct law.

The Military Judge deserves increased deference for his Rulings on the challenges to each Member. He cited the correct law, put his reasoning on the

Record, and considered the liberal grant mandate. *Downing*, 56 M.J. at 422; *Clay*, 64 M.J. 277; (J.A. 467–68, 470, 473–475, 488–90).

D. The Military Judge did not err in denying the challenge against Lieutenant Commander Cox. He had no actual bias: he promised to set aside personal beliefs and follow the Judge's instructions. No implied bias should be found because the public, aware of his responses, would not think Lieutenant Commander Cox's inclusion made the panel less than fair and impartial.

1. Lieutenant Commander Cox had no actual bias. He understood the burden of proof, would not hold Appellant's refusal to testify against him, and indicated he would follow instructions.

In *Nash*, this Court found a member had actual bias when he asked the accused's wife whether "a pedophile can be rehabilitated" during her testimony. 71 M.J. at 88–89. Although the military judge attempted to rehabilitate the member, "the colloquy that resulted was ineffectual" because it consisted of "leading questions which led to predictable answers but also some irrelevant and problematic responses." *Id.* at 89. While the member insisted he had kept an open mind, "the plain language of his question indicates a conclusion as to Appellee's guilt and the subsequent voir dire did not otherwise dispel the possibility." *Id.*

In *United States v. Ovando-Moran*, 48 M.J. 300 (C.A.A.F. 1998), a member was challenged for stating he would find it "unnatural" if the accused chose not to testify. *Id.* at 303. The member "also said that he would not hold the accused's silence against him, that he would not view the accused's silence as an indication of guilt, and that he could follow all of the military judge's instructions." *Id*. at 304.

Since the military judge "was in the best position" to evaluate the member's responses and ascertain whether he was capable of following instructions, the Court found no abuse of discretion in denial of the challenge. *Id.*

As in *Ovando-Moran*, Lieutenant Commander Cox affirmed he would give Appellant a fair trial and follow instructions—this demonstrated a lack of actual bias. 75 M.J. at 272, 274–75; (J.A. 294, 303–04, 310, 315). Moreover, he correctly understood that Appellant did not have to testify, (J.A. 320–21), would not hold it against him if he did not, (J.A. 315), nor would he hold it against Appellant if he chose not to present any evidence, (J.A. 310, 315).

Unlike the *Nash* member, whose proffered rationale for asking a question about pedophiles was "inadequate" to dispel concerns of actual bias, here Lieutenant Commander Cox articulated that he understood and would apply the proper burden of proof while following the Judge's instructions. *Nash*, 71 M.J. at 88. Lieutenant Commander Cox explained that he (1) understood Appellant had no obligation to present any evidence to disprove the elements of the offense, (J.A. 310, 321, 328); (2) would not hold it against Appellant if he put on no evidence or cross-examined witnesses, (J.A. 315, 320–21, 327–28); and (3) would "absolutely" wait to hear all the evidence to make a decision, (J.A. 322). Furthermore, the Military Judge correctly instructed him on the law. (J.A. 517, 527–29).

2. The Military Judge correctly found no implied bias. As in *Schlamer*, questionnaire responses that "might cause concern" can be remedied by "thoughtful and forthright responses on voir dire."

In *United States v. Schlamer*, 52 M.J. 80 (C.A.A.F. 1999), the judge did not err in denying a challenge to a member who said in her questionnaire that an "accused should testify" because "both sides should be heard." *Id.* at 86–87, 92–94. The member made clear in voir dire that "she thought an accused ought to have the opportunity to be heard, but that she would not draw an adverse inference if the accused elected not to testify or present evidence." *Id.* at 93. While the member's questionnaire "might cause concern if standing alone," her "thoughtful and forthright responses on voir dire" would not "cause a reasonable person to question the fairness of the proceedings[.]" *Id.* at 94.

Here, as in *Schlamer*, Lieutenant Commander Cox provided forthright responses on his questionnaire. These included his opinions that "a flimsy or easily proven-false accusation would have been dropped by now," and "The fact that there are charges suggests that something happened." (J.A. 303.) When asked if Appellant "must be hiding something" if he decided not to testify, Lieutenant Commander Cox answered, "No, but it would help to see some other sort of evidence or witness to corroborate his innocence." (J.A. 303.) Likewise, Lieutenant Commander Cox repeatedly stated his preference to hear Appellant's

side of the story, noting during voir dire, "I do want to hear from [Appellant], and I do think he should testify." (J.A. 320.)

Appellant invites this Court to conclude that Lieutenant Commander Cox believed Appellant "was probably guilty." (Appellant Br. at 18.) Since there is a considerable difference between thinking an accusation was not "flimsy or easily proven-false" and concluding the accused is probably guilty, there is no reason to make such an inferential leap. Similarly, there is a logical difference between stating a preference to hear from Appellant and holding a decision not to testify against Appellant—Lieutenant Commander Cox certainly did the former, but never even hinted he would do the latter.

Even if the questionnaire responses are considered a cause for concern, Lieutenant Commander Cox's explanations were every bit as "thoughtful and forthright" as those in *Schlamer*. Regarding the presumption of innocence, he stated, "Whether or not [Appellant] is guilty remains to be seen in the trial" and that he "absolutely" believed that innocent people can be charged with serious crimes. (J.A. 303.) Though he believed an allegation should "be taken seriously," he did not "automatically lean one way or the other." (J.A. 322.) He said he "absolutely" would wait until "he heard all the evidence" to decide the case. (J.A. 322.)

With regards to Appellant testifying, Lieutenant Commander Cox clarified, "Yes . . . I do think he should. But, again, I understand he doesn't have to." (J.A. 328.) He repeatedly stated that he understood it was Appellant's "right not to" testify, "that he does not have to," "I do understand why he wouldn't," and "I don't hold that against him if he does not." (J.A. 320, 327–28.) He said his original responses meant he "would be interested to hear what the Defense had to say." (J.A. 328.) He could "think of reasons" why a "completely innocent" person would not "testify in their own defense." (J.A. 320–21.)

Lieutenant Commander Cox's responses during voir dire were not "monosyllabic responses acquiescing to leading questions from trial counsel or the military judge." *Schlamer*, 52 M.J. at 93. He was "thoughtful and forthright" instead of simply parroting what he believed the right answer was. When the entire Record is considered, rather than individual quotations, Lieutenant Commander Cox's answers "would not cause a reasonable person to question the fairness of the proceedings." *Id.* at 94.

Appellant's reliance on *Woods* is unavailing. There, a member flipped the burden of proof on its head and said she believed "the enforcement of 'you are guilty until proven innocent' . . . is essential because the military needs to be held to a higher standard just for reasons of our mission." 74 M.J. at 238. This Court held "a panel member's mistake as to the proper burden of proof in a criminal trial,

without more," does not require a finding of implied bias. *Id.* at 244. "Members are not and should not be charged with independent knowledge of the law." *Id.* Nevertheless, in that case there was "too high a risk that the public would question the fairness" of the trial for three reasons: 1) the convening authority "had access to" the member's questionnaire "for over two months before she was detailed," but decided to select her anyway; 2) there was doubt as to whether her voir dire responses "convincingly demonstrated a departure" from her erroneous views; and 3) the military judge dismissed the member's mistaken belief as "a technical legal matter." *Id.*

Here, none of those three factors are present. The supplemental questionnaires were filled out after the members were detailed, not before. (J.A. 292.) As noted above, Lieutenant Commander Cox repeatedly showed an understanding of the law and a willingness to abide by the Military Judge's instructions. There is also no indication that the Military Judge was dismissive of the importance of the presumption of innocence or Appellant's right not to testify. Far from being "a clearer example of both actual and implied bias" than *Woods*, (Appellant's Br. at 23), this case actually shares none of the facts that the *Woods* court found dispositive.

Clay, another case cited by Appellant, is also distinguishable. There, a member stated that he had two daughters and would "be merciless within the limit

of the law" if he believed the appellant "were guilty of raping a young female." 64 M.J. at 275. When trial counsel sought to rehabilitate him, the member agreed the appellant was presumed innocent but also "returned to his earlier theme" and volunteered that rape "was as serious an offense as I can think of" and said he had "moral convictions" about that particular crime. *Id.* at 278. Those statements "dilute[d] [the member's] agreement that he would to consider the entire range of punishments if the military judge directed him to do so as a matter of law." *Id.* (internal quotations omitted.) Moreover, in *Clay* there was nothing in the record to show "that the military judge considered implied bias or the liberal grant mandate." *Id.* at 278.

Here, the Military Judge explicitly considered both implied bias and the liberal grant mandate, thus earning greater deference for his Ruling (J.A. 473, 475); *Clay*, 64 M.J. at 277. In addition, the voir dire of Lieutenant Commander Cox was distinguishable from what occurred in *Clay*. There, the member's explanatory statements were all problematic, and could only be weighed against the perfunctory assurances he gave during rehabilitation. Here, by contrast, Lieutenant Commander Cox provided thorough and thoughtful responses to clarify his questionnaire responses and show that he understood Appellant's presumption of innocence and right not to testify. (J.A. 320–322.)

An objective member of the public who was familiar with the entire Record would have no reason to doubt the fairness of the panel due to Lieutenant Commander Cox's inclusion.

3. The Military Judge did not err in denying a challenge for cause based on Lieutenant Commander Cox's mother being the victim of a kidnapping and attempted rape in 1975.

a. As in *Terry*, Lieutenant Commander Cox had no actual bias despite what happened to his mother decades ago.

In reviewing for actual bias, "that a member was close to someone who had been a victim of a similar crime is not grounds for per se disqualification." *United States v. Terry*, 64 M.J. 295, 303 (C.A.A.F. 2007)

In *Terry*, a judge properly found no bias where a rape trial member was close to a rape victim. 64 M.J. at 303–04. The rape of his longtime girlfriend and the resulting pregnancy ended their relationship, yet the child was named after the member because of how close they were. *Id.* Despite the similarity of the charged crime, the *Terry* court found no abuse of discretion where she "assess[ed] the member['s] demeanor and truthfulness during voir dire" and his "answers disclaimed any bias or partiality." *Id.* (internal quotations and citation omitted).

So too here. The Military Judge correctly found no actual bias because: (1) Lieutenant Commander Cox agreed to follow instructions, (J.A. 310, 324, 331); and (2) the Judge assessed his demeanor and found no bias, (J.A. 472). *See Terry*, 64 M.J. at 303–04.

b. The Judge properly declined to find implied bias due to the kidnapping of Lieutenant Commander Cox's mother, given the five-decade separation in time and dissimilarity to Appellant's charges.

In *United States v. Castillo*, 74 M.J. 39 (C.A.A.F. 2015), a judge correctly found no implied bias for a member who was a sexual assault victim, where the appellant was charged with rape. *Id.* at 41. The *Castillo* court relied on the fact the member's sexual assault was "almost thirty years ago," and the member's testimony it would not impact his ability to judge the case because he did not view it "as the same issue at all." *Id.* at 41–42.

No objective member of the public would believe this Member was unfair given the five decades between the mother's kidnapping and attempted rape experience, and the dissimilarity to Appellant's offenses—sexually assaulting multiple women in their sleep on different occasions. *See Castillo*, 74 M.J. at 42; (*see* J.A. 275, 277–78, 289). Further, "the Court observed no particular emotional reaction to [Lieutenant Commander Cox's] recitation of having learned that his mother was kidnapped by someone somewhere in 1975." (J.A. 473.)

c. Lieutenant Commander Cox's description of his mother's story as "indelible" does not indicate error when the incident was decades old and bore no similarity to the charged offenses. Appellant's reliance on *Richardson* is inapt.

In *United States v. Richardson*, 61 M.J. 113 (C.A.A.F. 2005), a judge erred when he prevented appellant from inquiring into the members' relationship with

trial counsel and nobody fully inquired or rehabilitated the members. *Id.* at 119–20. One of the members saw trial counsel as "a trusted legal advisor," and the judge never provided reasoning for rejecting the implied bias challenge. *Id.*; *see also Terry*, 64 M.J. at 305 (implied bias where a member's girlfriend's rape trauma was "notable and lasting" and judge failed to conduct implied bias analysis).

Appellant suggests that the Military Judge similarly erred by failing to ask Lieutenant Commander Cox "any questions" about his mother's experience to establish "how closely related the alleged offenses are[.]" (Appellant's Br at 16.) The Record, however, reflects that the event involving Lieutenant Commander Cox's mother took place in 1975 and involved her and another woman being "kidnapped" "by a man at gunpoint." (J.A. 289, 324.) The man "intend[ed] to rape" them, but they were "rescued by police." (J.A. 289, 324.) This limited inquiry was more than sufficient to show that the incident happened a long time ago and bore no similarity to the offenses committed by Appellant, i.e., sexually assaulting women who were asleep.

The Military Judge did not err in declining to find implied bias, given that the "indelible" conversation with Lieutenant Commander Cox's mother was about an event five decades before, the Member lacked emotion and details about the event, and given the lack of similarity between it and the charged offenses. (J.A. 324.) The Military Judge here warrants deference: he provided reasoning on the

Record for rejecting the implied bias challenge, cited the correct legal standard, and considered the liberal grant mandate. *See* (J.A. 470, 473, 475); *Downing*, 56 M.J. at 422; *Clay*, 64 M.J. 277.

4. Lieutenant Commander Cox's service as a Fleet mentor does not support a claim of error: his involvement was limited to supervising student discussions about professionalism. The public would not see him as less than fair or impartial.

In *United States v. Miles*, 58 M.J. 192 (C.A.A.F. 2003), a judge erred in failing to find implied bias when, at a drug offense trial, a member had written an article about the negative effects of drug use and his "traumatic experience" losing a family member to drug use. *Id.* at 193–95. Asking the member to set aside his experience and views was "asking too much of him and the system" because of the traumatic nature of the death and its evident effects on the member. *Id.* at 195.

Unlike *Miles*, nothing in this Record suggests Lieutenant Commander Cox's experience as a Fleet mentor influenced his views on sexual assault such that it would "ask[] too much of him and the system" to have him as a fair and impartial member. 58 M.J. at 195. The Judge properly found no implied bias: (1) nothing in the Record supports he was involved in the program for a significant period of time, (J.A. 318–19, 326); (2) his responses showed he used his position to mentor students to prevent or avoid sexual assault, not that he had a particular stance on the issue, (J.A. 326); and (3) he volunteered with the program not to engage on sex assault issues but because he wanted to be involved with students, (J.A. 318–19).

Appellant's claims that this Member's involvement as a Fleet mentor shows "a bias in favor of alleged victims" is belied by the Record and is unsupported by any case law. (Appellant's Br. at 25–26.) Lieutenant Commander Cox demonstrated he had no bias in favor of alleged victims as he (1) discussed with students how sexual assault is a problem "among other problems in the military," (J.A. 316–17); (2) Midshipmen ran and led the seminar which discussed a variety of topics, not just sex assault, (J.A. 317–18, 325); and (3) he personally believed alleged victims should not be believed until proven at trial, (J.A. 301).

Looking at the Member's questionnaire answers and voir dire responses shows this is not a "close question." (Appellant's Br. at 28.) The Judge did not \ err in his Findings regarding Lieutenant Commander Cox and no objective member of the public would believe the panel was anything less than fair and impartial. *See Clay*, 64 M.J. at 277.

E. The Military Judge did not err by denying Appellant's challenge for cause against Lieutenant Commander Middlebrook. She said she could follow the Judge's instructions and fairly weigh the evidence, and no member of the public would believe Appellant received less than a fair trial because she was on the panel.

1. Lieutenant Commander Middlebrook clarified that her questionnaire responses about believing a victim only concerned the investigative phase. At trial, she would hold the government to its burden. There is no bias.

a. Lieutenant Commander Middlebrook had no actual bias.

Even if a member has "extensive exposure to the same sort of crime that the member is being asked to adjudge at court-martial" this Court will not find "actual bias when the military judge [judge's the member's credibility]" and "the member was neither inflexible nor resistant to the evidence or the military judge's instructions." *Terry*, 64 M.J. at 303.

Here, like *Terry*, this Member agreed to follow the Judge's Instructions, (J.A. 345, 387) and to put aside any previous experience and judge Appellant's case fairly. (J.A. 345, 374.) The Military Judge found her demeanor showed no actual bias. (J.A. 485.) Any argument to the contrary fails to account for the Member's willingness to follow the Judge's instructions on the law and set aside her previous experiences. (J.A. 345, 374, 387; Appellant's Br. at 30–32.)

b. The Judge properly declined to find implied bias.

In *United States v. Daulton*, 45 M.J. 212 (C.A.A.F. 1996), the judge erred in not finding implied bias when a member's relatives were victims of highly similar

crimes as those on trial, the member felt guilty over not initially believing their accusations, and her statements during rehabilitation were uncertain. *Id.* at 214, 218. When asked if that experience would "have any bearing" on whether she believed these victims she said "[n]o, it shouldn't." *Id.* at 218. She responded "I believe so" when asked if she could separate her family's experience from the case at trial. *Id.* This Court held that, based on those circumstances, asking that member to be impartial was "asking too much of her and the system." *Id.*

In *United States v. Ai*, 49 M.J. 1 (C.A.A.F. 1998), the court declined to find plain error when a member candidly disclosed a prior professional relationship with a prosecution witness, the relationship had been limited in scope, and the member unequivocally denied he would be influenced by it. *Id.* at 5. No evidence came out in voir dire that the member would "naturally favor or believe" the witness's testimony, leading the *Ai* court to also reject an actual bias challenge. *Id.*

Unlike the burden of proof error in *Woods* or the emotionally-involved member in *Daulton*, here the Military Judge did not err in rejecting an implied bias challenge. Lieutenant Commander Middlebrook shared a general sentiment about sex assault reporting, but her belief that during the "initial stages" of the investigative phase people "should err on the side of believing" a report and "should investigate"—had no relation to her understanding of the burden of proof at trial. (J.A. 368–70, 373.) Likewise, as in *Ai*, the Member here had no actual

bias, supporting the perception of fairness despite the questionnaire comments. The voir dire showed this Member could be impartial toward victim testimony. (Appellant's Br. at 30–31; J.A. 351, 369, 374.)

Taken in context, her sentiments on investigating a victim's initial report would not lead a member of the public to believe that Appellant received anything less than a fair and impartial panel. *See Daulton*, 45 M.J. at 218; *Commisso*, 76 M.J. at 321; (Appellant's Br. at 29–32).

2. Lieutenant Commander Middlebrook had no bias regarding sentencing as she did not hold an inelastic attitude toward sentencing and would follow the Judge's instructions.

a. Lieutenant Commander Middlebrook had no actual bias about sentencing.

"Holding an inelastic attitude toward the appropriate punishment to adjudge if the accused is convicted is grounds for an actual bias challenge under R.C.M. 912(f)(1)(N)." *Hennis*, 79 M.J. at 385 (citation omitted). "However, a mere predisposition to adjudge some punishment upon conviction is not, standing alone, sufficient to disqualify a member. Rather, the test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." *United States v. McGowan*, 7 M.J. 205, 206 (C.M.A. 1979).

In *United States v. Schlamer*, 52 M.J. 80 (C.A.A.F. 1999), a member disclosed her severe notions of punishment, including "'[a]n eye for an eye.' Example: rape—castration," and "[i]f you take a life, you owe a life." *Id.* at 86.

This Court held that judge did not err in finding no actual bias because the member had not made up her mind in that case, believed in the presumption of innocence, and indicated she would follow the judge's instructions. *Id.* at 93. *See also Hennis*, 79 M.J. at 385 (bias challenge properly denied when member said during child murder voir dire he knew "what [his] views are, but [he] would be open-minded to listen to other panelists" during sentencing).

Like the open-minded members in *Schlamer* and *Hennis*, Lieutenant Commander Middlebrook did not demonstrate an inflexible attitude toward sentencing. She did not have an actual bias because she (1) demonstrated a willingness to follow the Judge's instructions; (2) did not have a specific sentence in mind and would be open-minded; (3) understood the presumption of innocence; and (4) "clearly read the question differently from that intended by the parties in that she read multiple convictions to be separate, unique convictions over time." (J.A. 369–70; 467); *see Schlamer*, 52 M.J. at 93.

b. The Judge correctly found no implied bias for Lieutenant Commander Middlebrook's sentencing position.

In *United States v. Elfayoumi*, 66 M.J. 354 (C.A.A.F. 2008), a judge did not err in finding no implied bias, even though a member disclosed strong objections to homosexuality in a case alleging forcible sodomy involving two men. *Id.* at 355. The member initially said "he would have a hard time" not discharging the accused if he was convicted. *Id.* But then agreed he could "consider it" and

"wouldn't categorically exclude" the possibility of no discharge. *Id.* The judge did not err by finding no implied bias: the member could "distinguish between that which he might find immoral and that which the law might deem criminal" and "separate his personal views from the facts of the case." *Id.* at 357.

As in *Elfayoumi*, Lieutenant Commander Middlebrook stated she could set aside her views on lengthy confinement and be open to other sentences including no punishment. (J.A. 369–70, 384). And she did not feel compelled to vote for any sentence based on the charges. (J.A. 358.)

In *Schlamer*, this Court also did not find implied bias regarding the member's answers on sentencing. *Id*. at 93–94. This was because her answers on the questionnaire, "did not accurately reflect her views." *Id*. at 94. Likewise, Lieutenant Commander Middlebrook's answers on the supplemental questionnaire did not accurately reflect her views regarding automatic prison sentences. (*Compare* J.A. 351 *with* J.A. 358, 369–70, 384.) Taken in context, no member of the public would believe Appellant had an unfair member in Lieutenant Commander Middlebrook based on her sentencing position. (Appellant's Br. at 32–33.)

3. Lieutenant Commander Middlebrook explained her open-minded views on consent on voir dire, leaving open the possibility for Appellant's mistake of fact defense. She said she would follow the Judge's instructions on this issue, and no member of the public would believe her unfit to sit on Appellant's panel.

a. Lieutenant Commander Middlebrook had no actual bias.

Unlike the member in *Ovando-Moran*, who had a view contrary to the law but had no bias because he agreed to follow the judge's instructions, Lieutenant Commander Middlebrook had a personal view that was not inconsistent with the law. 48 M.J. 303–04. While initially she agreed people "should" give unequivocal consent to sex, her views on voir dire were more nuanced. (J.A. 381.) She believed: (1) that "what yes [or no] means" for consent depends on context because "that is definitely [a] topic of conversation in our culture;" (2) sex assault could occur through ignoring "verbal" or "non-verbal" cues or when someone is unable to consent; and (3) that "consent is a hard thing" because it can be "uncertain." (J.A. 381.)

These views are not contrary to the law. Regardless, Lieutenant Commander Middlebrook agreed to follow the Judge's instructions and the Judge gave the proper instruction for consent and mistake of fact, unlike the erring judge in *Rogers*. (J.A. 387, 517–18, 520); 75 M.J. at 271–72.

b. The Judge did not err in finding no implied bias for Lieutenant Commander Middlebrook based on her views of consent.

Unlike *Elfayoumi*, Lieutenant Commander Middlebrook's nuanced views about consent did not conflict with Appellant's defense. *Id.* at 355. Rather, her nuanced views that "consent is a hard thing" and that a "yes" helps remove ambiguity shows she could be open minded regarding consent and a reasonable mistake of fact defense. (J.A. 381, 387, 517–18, 520.) Therefore, her answers on consent did not "cast substantial doubt as to the legality, fairness, and impartiality of [a]ppellant's court-martial." *Commisso*, 76 M.J. at 318–20.

Her inability to think of an example "off the top of her head" for nonverbal consent does not show an improper understanding of consent, but only that she could not think of an example in the moment—any argument to the contrary ignores her statements about consent during voir dire. (Appellant's Br. at 32–34.)

The Military Judge did not clearly err in his findings and no objective member of the public would believe that this Member could not fairly judge Appellant's case. *See Clay*, 64 M.J. at 277; Napolitano, 53 M.J. at 166.

F. The Military Judge did not err by denying Appellant's challenge for cause against Lieutenant Skogerboe. His responses showed he would follow the Judge's instructions, and no member of the public would believe his presence on the panel would give Appellant an unfair trial.

1. Lieutenant Skogerboe did not demonstrate actual bias: nothing in his responses indicated he would be unable to abide by the Judge's instructions and fairly weigh the evidence.

As in *Terry* and *Schlamer*, the Military Judge did not err by denying Appellant's actual bias challenge against Lieutenant Skogerboe. *See* 64 M.J. at 303–04; 52 M.J. at 93. His "cringe or kind of like a distaste" for sexual assault was insufficient to show actual bias because "[m]ere distaste for certain offenses is not automatically disqualifying." *Schlamer*, 52 M.J. at 92 (strong feelings about murder in homicide case not disqualifying). Moreover, he confirmed there was no reason he would be unable to "fairly and impartially determine all the issues in this case in accordance with the evidence, [the Judge's] instructions, and the applicable law." (J.A. 457–58); *see United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987).

2. Lieutenant Skogerboe's presence on the panel would not cause the public to think Appellant received something less than a fair trial: his wife's rape was too attenuated and he had a permissible level of respect for law enforcement.

In *Terry*, a judge correctly found no implied bias, in a rape case, when a member's wife was a rape victim. 64 M.J. at 304. This Court relied on the facts that (1) the rape occurred ten to twenty years prior to trial; (2) it was before the

member knew his wife; (3) they had only spoken of the rape a few times; and (4) it was never reported to law enforcement. *Id.* Those factors "ameliorate[d] his exposure to the crime, dispelling the appearance of implied bias." *Id.*

In *United States v. Townsend*, 65 M.J. 460 (C.A.A.F. 2008), a judge did not err when he denied a challenge against a member whose father was a police officer, who wanted to be a prosecutor, held law enforcement in high esteem, and disliked civilian defense counsel. *Id.* at 462–64. The member's "respect" for law enforcement "did not translate into any objectively discernable bias" as he only ascribed greater weight to police testimony if they had a "good record." *Id.* at 464.

a. The Judge correctly denied the implied bias challenge for Lieutenant Skogerboe as his statements about his wife's fifteen-year-old rape would not lead any member of the public to believe he would give Appellant an unfair trial.

Here, like *Terry*, the Military Judge did not err by denying the implied bias challenge against Lieutenant Skogerboe. His testimony during voir dire showed he had no implied bias as (1) the ten-to-fifteen-year-old rape, which he learned of four years before trial, was too attenuated to have an effect, (J.A. 397, 417, 426, 439); (2) he agreed he could keep his support role and experience as a husband to his wife separate from being a Member, (J.A. 417, 426–27, 456); (3) there was no doubt in his mind he would not try "to vindicate her," (J.A. 427, 456); and (4) he would not automatically believe an alleged victim of sex assault, (J.A. 436, 440–41, 456).

The Military Judge was supported by the Record in finding that Lieutenant Skogerboe "made a significant distinction" between his wife's "emotional journey" and the rape—which would not affect him. (J.A. 490.) Further, he "would not automatically believe victims solely because of his wife's 15-year-old experience." (J.A. 490.) Given the totality of the circumstances, no member of the public would believe Appellant had an unfair member in Lieutenant Skogerboe. (Appellant's Br. at 34–35.)

b. The Judge did not err when he found no implied bias for Lieutenant Skogerboe's feelings about sexual assault.

As in *Schlamer*, where that member exhibited strong feelings toward certain offenses but did not have a bias, Lieutenant Skogerboe's statement that sexual assault made him "cringe" did not call for a finding of implied bias. *See* 52 M.J. at 93. He clarified he felt this way because someone is "usually emotionally hurt," but "there are two sides of the story and just because I hear one side doesn't necessarily mean that that's the truth." (J.A. 427.) His responses "would not cause a reasonable person to question the fairness of the proceedings, when considered in the context of the entire record," including his "thoughtful and forthright responses on voir dire." *Schlamer*, 52 M.J. at 93–94; (Appellant's Br. at 34–35).

c. The Judge correctly found no implied bias for Lieutenant Skogerboe's positive opinion of law enforcement.

Similar to the nonbiased member in *Townsend* who had a positive view of law enforcement, Lieutenant Skogerboe's positive opinion of law enforcement did not constitute implied bias because he was not "automatically going to believe everything [law enforcement] tell[s] me," and affirmed he would consider all testimony and evidence in assessing credibility. (J.A. 457.) As the Military Judge noted, "none of those statements indicate some sort of long-term overriding connection to law enforcement that would bias him in this particular case." (J.A. 489.); *see also United States v. Napoleon*, 46 M.J. 279, 282–83 (C.A.A.F. 1997) (no actual or implied bias despite member knowing testifying law enforcement agent and stating he was "very credible because of the job he has").

Appellant's reliance on *United States v. Dale*, 42 M.J. 384 (C.A.A.F. 1995) is inapposite as that case involved a member who had implied bias from being the deputy police chief and "intimately involved in the law enforcement function" where the crimes occurred. *Id.* at 386; (Appellant's Br. at 36). While asking that member to serve impartially "ask[ed] too much of both him and the system," Lieutenant Skogerboe had no such source of bias. *Dale*, 42 M.J. at 386; (Appellant's Br. at 35–36.).

d. The Judge did not err in finding no implied bias given Lieutenant Skogerboe's statements on sexual assault at the Naval Academy.

While Lieutenant Skogerboe stated that sexual assault generally was a problem at the Naval Academy, he also said (1) it only meant that accusations should be taken seriously; (2) it was not his job to fix the problem at Appellant's trial; and (3) Appellant was innocent until proven guilty. (J.A. 432–433, 448–50, 457). This showed the Judge did not err in finding no implied bias. (J.A. 447–50; Appellant's Br. at 35). Taking Lieutenant Skogerboe's comments in context, no member of the public would believe Appellant had less than a panel of fair and impartial members. *Commisso*, 76 M.J. at 321. Regardless, Appellant did not raise this basis for challenge at the trial level, and therefore waived it for appeal. (J.A. 485–87.)

Under these circumstances, and factoring in the significant deference afforded the Military Judge for his comprehensive Rulings and consideration of the liberal grant mandate, Appellant cannot show the Military Judge erred by denying Appellant's challenges for cause. *See Napolitano*, 53 M.J. at 166; *Clay*, 64 M.J. at 277; (J.A. 467–68, 473–75, 488–90, 499–501).

Conclusion

The United States respectfully requests this Court affirm the lower court's decision.

TYLER W. BLAIR
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433
Bar no. 37601

PAUL S. LAPLANTE
Lieutenant Commander, JAGC, U.S. Navy
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-2479
Bar no. 37861

JOSEPH M. JENNINGS
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 37744

BRIAN K. KELLER
Deputy Director
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

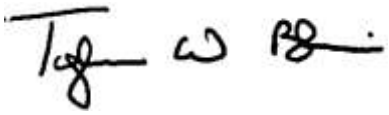
Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 10889 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief was prepared in a proportional typeface using Microsoft Word Version 2016 with 14-point, Times New Roman font.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on May 25, 2023.



TYLER W. BLAIR
Captain, U.S. Marine Corps
Appellate Government Counsel

United States v. Keago

United States Navy-Marine Corps Court of Criminal Appeals

July 5, 2022, Decided

No. 202100008

Reporter
2022 CCA LEXIS 397 *; 2022 WL 2437886

UNITED STATES, Appellee v. Nixon KEAGO, Midshipman, U.S. Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Petition for review filed by *United States v. Keago, 83 M.J. 82, 2022 CAAF LEXIS 765, 2022 WL 16970918 (C.A.A.F., Oct. 28, 2022)*

Motion granted by *United States v. Keago, 83 M.J. 84, 2022 CAAF LEXIS 775, 2022 WL 17532275 (C.A.A.F., Nov. 1, 2022)*

Motion granted by *United States v. Keago, 83 M.J. 99, 2022 CAAF LEXIS 826 (C.A.A.F., Nov. 17, 2022)*

Motion granted by *United States v. Keago, 2022 CAAF LEXIS 871, 2022 WL 18277240 (C.A.A.F., Dec. 5, 2022)*

Review granted by *United States v. Keago, 2023 CAAF LEXIS 113, 2023 WL 2372717 (C.A.A.F., Feb. 23, 2023)*

Motion granted by *United States v. Keago, 2023 CAAF LEXIS 164, 2023 WL 2903970 (C.A.A.F., Mar. 22, 2023)*

Motion granted by *United States v. Keago, 2023 CAAF LEXIS 274 (C.A.A.F., Apr. 28, 2023)*

Prior History: [*1] Sentence adjudged 14 August 2020 by a general court-martial convened at Washington Navy Yard, District of Columbia, consisting of officer members. Sentence approved by the convening authority: confinement for 25 years, forfeiture of all pay and allowances, and a dismissal. Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judges: Ryan J. Stormer (arraignment, motions). Aaron C. Rugh (trial) Angela J. Tang (Entry of Judgment.

Counsel: For Appellant: Captain Marcus N. Fulton, JAGC, USN, Lieutenant Megan E. Horst, JAGC, USN.

For Appellee: Captain Tyler W. Blair, USMC, Lieutenant John L. Flynn, JAGC, USN, Lieutenant Gregory A. Rustico, JAGC, USN.

Judges: Before HOLIFIELD, BAKER, and HACKEL Appellate Military Judges.

Opinion

PER CURIAM:

Appellant was convicted, contrary to his pleas, of one specification of attempted sexual assault, two specifications of sexual assault, four specifications of burglary, and one specification of obstructing justice in violation of *Articles 80*, *120*, *129*, and *131b*, Uniform Code of Military Justice [UCMJ],[1] for actions involving fellow Midshipmen, both at the United States Naval Academy in 2018 and onboard a naval vessel in 2019.

Appellant asserts 10 assignments of error [AOEs], which we [*2] reorder and combine as follows: (1) the military judge erred by denying defense counsel's challenges to Lieutenant Commander [LCDR] Card,[2] LCDR Masters, Lieutenant [LT] Santero, and LT Rich for actual and implied bias; (2) Appellant's convictions for sexual assault and burglary involving Midshipman [MIDN] Sonntag, MIDN Morse, and MIDN Metcalf are legally and factually insufficient; (3) Appellant's sentence is inappropriately severe; (4) the military judge abused his discretion by admitting the testimony of MIDN Blunk, MIDN Kron, and Ms. Novack under Military Rule of Evidence [Mil. Rule of Evid.] 404(b); (5) the military judge abused his discretion by denying Appellant's motion to dismiss based on failure of law enforcement to prevent the loss of potentially useful evidence; and (6) Appellant, who is African American, was denied due process when the mostly Caucasian venire resulted in his being tried by a panel comprised of Caucasian and Asian members.[3] We find no prejudicial error and affirm.

I. Background

Appellant, a Midshipman at the United States Naval Academy, was charged with crimes against three fellow Midshipmen.

1. Offenses against MIDN Sontag

In February 2018, MIDN Sontag returned to her dormitory room after a night out drinking [*3] with friends. Sometime later, she awoke to Appellant in her bed, naked, with an erect penis. Her shorts were partly pulled down, she felt pain in her vagina, and she knew that she had been penetrated. Midshipman Sontag confronted Appellant, who claimed that she had invited him. She told Appellant to leave, which he did after continuing to argue that he had been invited.

Midshipman Sontag immediately contacted a friend, MIDN Brown, and told her what had happened. During this conversation MIDN Sontag appeared frantic and was crying. Despite describing the assault to MIDN Brown, MIDN Sontag chose not to make a formal report at that time because

[1] *Articles 80*, *129*, and *131b*, UCMJ, *10 U.S.C. §§ 880*, *929*, and *931b (2018)* [UCMJ (2018)], and *Articles 120* and *129*, UCMJ, *10 U.S.C. §§ 920* (2012 and Supp. III 2016) and *929 (2012)* [UCMJ (2012)].

[2] All names in this opinion, other than those of Appellant, the judges, and counsel are pseudonyms.

[3] Appellant personally raised several of these AOEs, in full or in part: (1) as it relates to LT Rich; (2) as it relates to MIDN Metcalf; and (4)-(6) in their entirety. *See* *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. We have reviewed AOEs (4)-(6) and find them to be without merit. *See* *United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987)*.

she wanted to avoid any potential emotional trauma or damage to her military career if people found out what happened. She did, however, go to the hospital the following day for sexually transmitted disease and pregnancy testing.

Two days after the incident, Appellant emailed MIDN Sontag, provided his phone number, and asked if they could talk. (The two had no prior social or romantic relationship.) Midshipman Sontag met with Appellant and told him she did not want to discuss what happened and to stay away from her.

In September 2018, MIDN Sontag [*4] again awoke to find Appellant beside her in her bed, this time clothed, but again uninvited. Midshipman Sontag confronted Appellant and told him to leave. Appellant left after again claiming that she had invited him and that she did not remember because she was drunk. Approximately 30 minutes later, MIDN Sontag awoke to Appellant once more entering her room. She confronted Appellant again, telling him to leave and never come back. After this incident, Appellant emailed MIDN Sontag and apologized, claiming that he was drunk and had misunderstood her.

Midshipman Sontag did not immediately report the incident to law enforcement. But upon being interviewed during the investigation into Appellant's crimes against MIDN Metcalf, she reported Appellant's crimes against her.

2. Crimes against Midshipman Metcalf

Midshipman Metcalf knew Appellant because they were in the same company at the Naval Academy and he was her mentee's roommate. They were cordial, but not friends. The only emails between them were limited to official business.

In October 2018, MIDN Metcalf went out with a group of friends that did not include Appellant. After returning to her dormitory room and going to bed, MIDN Metcalf [*5] awoke to Appellant rubbing his penis against her clitoris and moving toward her vaginal canal. Midshipman Metcalf immediately pushed Appellant off of her and yelled at him. Appellant initially attempted to cover his face and stated his name was "Johnny." But when MIDN Metcalf identified him, Appellant claimed that MIDN Metcalf had told him to come into her room.

Midshipman Metcalf immediately left her room to seek help. She found MIDN Collin, who was standing watch, and reported that Appellant had sexually assaulted her. Midshipman Collin observed Appellant stick his head out of MIDN Metcalf's room, close the door, then reopen the door and exit the room. Midshipman Metcalf went to the hospital and underwent a sexual assault forensic exam. The nurse observed that MIDN Metcalf appeared traumatized, upset, and tearful.

3. Crimes against Midshipman Morse

In May 2019, MIDN Morse deployed on board a Naval Academy Yard Patrol Craft as part of a multi-ship training cruise to

New York City for Fleet Week. While there, Appellant approached her at a bar and the two drank shots of alcohol together. Appellant and MIDN Morse were not in the same company at the Naval Academy and previously had only [*6] briefly communicated via Instagram. Upon leaving the bar, Appellant, MIDN Morse, and MIDN Lieber walked back to MIDN Morse's ship together. Appellant, who was assigned to a different ship, followed MIDN Morse onto her ship, at which point she asked another Midshipman to take Appellant back to his ship. No one witnessed Appellant leave MIDN Morse's ship, but a short time later he entered female berthing and stuck his head through the curtains of MIDN Morse's rack. MIDN Morse told Appellant to leave. She then heard the door to female berthing open and close.

Later that night, MIDN Morse awoke to Appellant in her rack. Appellant was pressing his body against MIDN Morse, kissing her neck, pulling her shorts off, and pressing his erect penis against her skin. MIDN Morse confronted Appellant and again told him to leave.

Thirty minutes later, Appellant returned a third time, awakening MIDN Morse. At this point MIDN Morse, after telling him to leave, texted the ship's group chat asking whomever was on watch to get Appellant out of female berthing.

Appellant returned a fourth and final time. Midshipman Morse again awoke to Appellant in her rack, pressing his body against hers and pressing his [*7] erect penis against her buttocks. Midshipman Morse left her berthing area, found a watchstander, MIDN Arness, and led him to Appellant, who was undressed and hiding in an empty rack. Midshipman Arness escorted Appellant back to his own ship.

Appellant later texted MIDN Morse, advising her not to say anything lest the two of them get in trouble for underage drinking.

4. Lost Video Footage

Prior to trial Appellant moved the Court to dismiss the charges against him relating to MIDN Morse due to the loss of material evidence. Specifically, Appellant argued that the loss of potentially useful surveillance video from the bar that MIDN Morse visited prior to Appellant assaulting her later that night was due to government bad faith.

During the course of the investigation, Special Agent [SA] Conway from the Naval Criminal Investigative Service met with the owner of the bar in an effort to recover any video evidence that may be relevant to the investigation. Special Agent Conway viewed the video footage from the night in question and identified a person she believed to be MIDN Morse, but was unsure due to the video's poor quality. Special Agent Conway testified that she was unable to identify any [*8] of the people MIDN Morse appeared to socialize with due to the poor quality of the footage. Although SA Conway documented her observation of the video in her investigative report, delays in

following up allowed the video to be destroyed before it could be seized.

5. Similar, Uncharged Acts

The same month that Appellant assaulted MIDN Morse, he was caught entering a dormitory room at the Naval Academy in which three female Midshipmen were in their racks preparing to sleep. One of the Midshipmen, MIDN Blunk, heard the room's door open and called out to learn who had entered. Receiving no response, she used the light on her cell phone to sweep the room. She found Appellant standing in a corner. When she asked him what he was doing, he did not answer, nor did he exit the room until MIDN Blunk twice demanded that he leave. Midshipman Blunk immediately reported the incident.

Ms. Novack, the mother of Appellant's child, described a similar event, also in 2019. Appellant and a female friend were staying at her apartment. As Ms. Novack and Appellant lay on a couch in the living room, the friend went upstairs to sleep in Ms. Novack's bedroom. A short time later, Appellant got up and looked intently [*9] down at Ms. Novack, who feigned sleep because she was curious to know what Appellant was doing. Through nearly-shut eyelids, she watched as Appellant left the room, looking back to see if Ms. Novack was asleep. After a few minutes, Ms. Novack went upstairs to her bedroom, where she found Appellant standing near the bed in which the friend slept. An argument ensued; Appellant confessed he had a "lapse in judgment."

II. Discussion

A. The Military Judge did not abuse his discretion by denying Appellant's challenges of panel members LCDR Card, LCDR Masters, LT Santero, and LT Rich.

Courts generally recognize two forms of bias that subject a panel member to a challenge for cause: actual bias and implied bias.[4] "Actual bias is defined as 'bias in fact.'"[5] It is "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality."[6] "Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial."[7]

"Whether a prospective juror 'is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the prospective juror's state of mind.'"[8] "[S]uch a [*10] finding is based upon determinations of demeanor and

---

[4] *United States v. Wood, 299 U.S. 123, 133, 57 S. Ct. 177, 81 L. Ed. 78 (1936)*.

[5] *United States v. Woods, 74 M.J. 238, 245 (C.A.A.F. 2015)* (Stucky, J, concurring) (quoting *Wood, 299 U.S. at 133*).

[6] *Fields v. Brown, 503 F.3d 755, 767 (9th Cir. 2007)* (internal quotation marks omitted) (citation omitted).

[7] *United States v. Nash, 71 M.J. 83, 88 (C.A.A.F. 2012)* (citation omitted).

[8] *United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020)* (quoting *Wainwright v. Witt, 469 U.S. 412, 428, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)* (internal punctuation omitted).

credibility that are peculiarly within a trial judge's province."[9] "It is plainly a question of historical fact; did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed."[10] "[T]he trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.'"[11] We review actual bias-based challenges for an abuse of discretion.[12]

A military judge's resolution of challenges founded in implied bias receive slightly less deference. While we generally give a "military judge's ruling on a challenge for cause . . . great deference,"[13] we review rulings on challenges for implied bias "under a standard less deferential than abuse of discretion but more deferential than de novo."[14] This standard recognizes that implied bias deals with the public's objective perception of the fairness of the military justice system, and not simply the military judge's assessment of whether a challenged member can serve in a fair and impartial manner.[15] "[W]e evaluate implied bias objectively, through the eyes of the public, reviewing [*11] the perception or appearance of fairness of the military justice system."[16]

We will give greater deference where a military judge puts on the record his analysis and basis for denying a defense challenge for cause and indicates that he considered the liberal grant mandate.[17] "Although it is not required for a military judge to place his or her implied bias analysis on the record, doing so is highly favored and warrants increased deference from appellate courts."[18] This is because it provides a "vantage point of a military judge observing members in person and asking the critical questions that might fill any implied bias gaps left by counsel."[19] However, a mere "[i]ncantation of the legal test [for implied bias] without analysis is rarely sufficient in a close case."[20] We "afford a military judge less deference if an analysis of the implied bias challenge on the record is not provided."[21] In applying this standard, we look to the totality of the

---

[9] *Wainwright, 469 U.S. at 428*.

[10] *Hennis, 79 M.J. at 384* (internal citation and quotation omitted).

[11] *Patton v. Yount, 467 U.S. 1025, 1038, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984)* (citation omitted); *see United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017)* (granting great deference to the military judge's ruling on challenges for cause).

[12] *Nash, 71 M.J. at 88-89*.

[13] *United States v. Rolle, 53 M.J. 187, 191 (C.A.A.F. 2000)* (citations and internal quotation marks omitted).

[14] *United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002)* (citations omitted).

[15] *United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008)*.

[16] *United States v. Townsend, 65 M.J. 460, 463 (C.A.A.F. 2008)* (citations and internal quotation marks omitted).

[17] *United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007)*.

[18] *Dockery, 76 M.J. at 96*.

[19] *Clay, 64 M.J. at 277*.

[20] *United States v. Peters, 74 M.J. 31, 34 (C.A.A.F. 2015)*.

[21] *Id.* (citation omitted).

circumstances.[22]

"The test [for implied bias] takes into account, among other distinct military factors, the confidence appellate courts have that military members will be able to follow the instructions of military judges and thus, while it will often [*12] be possible to 'rehabilitate' a member on a possible question of actual bias, questions regarding the appearance of fairness may nonetheless remain."[23] The issue therefore is whether the risk that the public will think the accused received anything less than a fair trial is "too high."[24]

Further, the liberal grant mandate requires the military judge to err on the side of granting a defense challenge.[25] That is, "if after weighing the arguments for the implied bias challenge the military judge finds it a close question, the challenge should be granted."[26] This serves as a logical preventive measure because "it is at the preliminary stage of the proceedings that questions involving member selection are relatively easy to rapidly address and remedy."[27]

In this case, the defense challenged 14 members of the venire panel for cause. The military judge granted six defense challenges and denied the other eight. Of those eight, Appellant argues that the military judge erred in denying challenges of LCDR Card, LCDR Masters, LT Santero, and LT Rich, all of whom subsequently served as members of the court-martial.

Appellant challenged LCDR Card on the grounds of both actual and implied bias based on [*13] his strong beliefs about sexual assault in the military, comments he made regarding the presumption of innocence and an accused's right to remain silent, and the fact that his mother had once been kidnapped and nearly raped.

LCDR Card explained during voir dire that he volunteered as a Fleet mentor for the Naval Academy's Sexual Assault Prevention and Response [SAPR] program. His mentorship included issues related to building healthy relationships, fraternization, and consent, as well as sexual harassment and sexual assault.

On the member's questionnaire, LCDR Card answered affirmatively to questions asking if he wanted to hear from Appellant during the trial and whether Appellant should testify to prove his innocence. When questioned, LCDR Card explained that he took the question literally and answered that he would like to hear from Appellant. However, LCDR Card also explained that he understood that Appellant had no obligation to testify and that, while choosing to remain silent may be "a little self-defeating,"[28] he would not hold it

[22] *Nash, 71 M.J. at 88*.

[23] *Woods, 74 M.J. at 243 (C.A.A.F. 2015)*.

[24] *Id.* (quoting *Townsend, 65 M.J. at 463*).

[25] *Peters, 74 M.J. at 34* (citing *United States v. Rome, 47 M.J. 467, 469 (C.A.A.F. 1998)*).

[26] *Peters, 74 M.J. at 34*.

[27] *Id.* (citing *Clay, 64 M.J. at 277*).

[28] R. at 848.

against Appellant if the latter did not testify.

Regarding a comment that commands should "err on the side of believing" complaints of sexual assault, [*14] he explained that commands should take such allegations seriously and investigate. In other words, all criminal allegations should be investigated.

Lieutenant Commander Card also answered in the affirmative on the questionnaire when asked if he believed that the fact that Appellant had been charged with a crime meant there was some truth to the charges. When asked to explain, LCDR Card said that he believed that for charges to reach the trial stage, there must be more than an issue of "he said/she said" or a simple accusation and denial. He further clarified that he was not leaning one way or another regarding Appellant's guilt, but simply meant that any allegation at trial should be taken seriously. LCDR Card affirmed that he would wait until he had heard all the evidence before determining guilt or innocence.

LCDR Card explained during voir dire that his mother had been kidnapped and almost raped in 1975—before he was born. He described learning of it when his mother described it to him many years after the fact.

The military judge denied Appellant's challenges of LCDR Card for actual and implied bias.[29] The military judge provided his analysis on the record and found that the incident [*15] regarding LCDR Card's mother in 1975 was a non-issue in terms of his ability to serve as a panel member. The military judge noted that he observed no emotional reaction in LCDR Card's recitation of having learned about his mother's kidnapping. The military judge further found that LCDR Card's involvement as a Fleet mentor in the SAPR program was more about finding a way to be involved with students than it was related to the specific content of the program, and that LCDR Card had never been involved in the sexual assault prevention aspects of the program. The military judge also found that LCDR Card affirmatively stated that he would not hold Appellant's silence against him if he chose not to testify, and that LCDR Card's statement that something must have happened in order for the court-martial to take place was a literal answer and did not indicate he believed something illegal must have happened. The military judge denied the challenge while specifically considering the liberal grant mandate.

We conclude that the military judge's findings with respect to LCDR Card are not clearly erroneous. The military judge did not abuse his discretion in denying the challenge for either actual [*16] or implied bias, and we find LCDR Card's inclusion would not cause the public to perceive Appellant's panel as less than fair and impartial.

We have similarly reviewed the challenges to LCDR Masters, LT Santero, and LT Rich, and we similarly find that their responses during individual voir dire disproved any actual bias and dispelled any

[29] R. at 1311.

concerns about apparent bias. In each case, the military judge made specific findings clearly supported by the record and stated that he had considered the liberal grant mandate. Accordingly, we find this AOE to be without merit.

B. Appellant's Convictions are Legally and Factually Sufficient.

Appellant asserts the evidence is legally and factually insufficient to support his convictions. We review such questions de novo.[30]

To determine legal sufficiency, we ask whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[31] In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution."[32]

In evaluating factual sufficiency, we determine "whether, after weighing the evidence in the [*17] record of trial and making allowances for not having personally observed the witnesses, [we] are . . . convinced of the [appellant's] guilt beyond a reasonable doubt."[33] In conducting this unique appellate function, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt."[34] Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free from conflict."[35]

1. Sexual Assault

Appellant was found guilty of sexually assaulting MIDN Sontag on or about February 2018, and MIDN Metcalf on or about 21 October 2018, in both instances by penetrating the vulva of the victim while he knew or reasonably should have known the victim was asleep.[36]

a. Sexual Assault of MIDN Sontag

In order to prove the offense as charged, the Government was required to prove that: (1) Appellant committed a sexual act upon MIDN Sontag by causing penetration,

---

[30] ***Article 66(d)(1), UCMJ***; *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*.

[31] *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*).

[32] *United States v. Gutierrez, 74 M.J. 61, 65 (C.A.A.F. 2015)* (citation and internal quotation marks omitted).

[33] *Turner, 25 M.J. at 325*.

[34] *Washington, 57 M.J. at 399*.

[35] *United States v. Rankin, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006)*.

[36] Appellant was charged with four specifications of sexual assault, alleging two theories of liability (bodily harm and asleep) for each incident. Appellant was found guilty of all four specifications, but the military judge conditionally dismissed the two charges of sexual assault by bodily harm.

however slight, of the vulva by the penis; (2) MIDN Sontag was asleep; and (3) Appellant knew or reasonably should have known that MIDN Sontag was [*18] asleep.[37]

Midshipman Sontag testified that in February 2018, after a night out with friends, she returned to her dormitory room. She had been drinking, and her memory of the night was extremely hazy. Nonetheless, MIDN Sontag testified that she awoke to find Appellant in her rack beside her, naked, his penis erect. She also testified that her shorts were pulled down, she felt pain in her vagina, and she was certain she had been penetrated. Midshipman Sontag explained that she was confused and scared because she did not have any sort of relationship with Appellant. In fact, MIDN Sontag did not know Appellant's first name before this incident. When confronted, Appellant claimed that MIDN Sontag had invited him into her rack. While MIDN Sontag did not immediately report the assault to law enforcement, she did disclose it to her friend, MIDN Brown, and she went to the hospital the day after the assault for sexually transmitted disease and pregnancy testing. Finally, Appellant emailed MIDN Sontag the following day, asking her to meet and talk about what happened.

b. Sexual Assault of MIDN Metcalf

In order to prove the offense as charged, the government was required to prove that: (1) Appellant [*19] committed a sexual act upon MIDN Metcalf, by causing penetration, however slight, of the vulva by the penis; (2) MIDN Metcalf was asleep; and (3) Appellant knew or reasonably should have known that MIDN Metcalf was asleep.[38]

Midshipman Metcalf testified that on the night of 21 October 2018, she had gone out with her friends. After getting back to her dormitory room that night, MIDN Metcalf went to sleep, alone and clothed. She awoke to Appellant on top of her in her rack, rubbing his penis against her clitoris and moving toward her vaginal canal. Midshipman Metcalf immediately pushed Appellant off of her and yelled at him. When MIDN Metcalf questioned Appellant about who he was, Appellant provided a false name. Appellant then claimed that MIDN Metcalf had invited him into her rack. After getting out of her rack, MIDN Metcalf recognized Appellant, though he was trying to cover his face. Midshipman Metcalf immediately reported the assault and underwent a sexual assault forensic examination.

2. Attempted Sexual Assault

Appellant was convicted of attempting to sexually assault MIDN Morse. In order to prove the offense as charged, the Government was required to prove that: (1) Appellant did [*20] a certain overt act; (2) the act was done with the specific intent to

[37] *Art. 120, UCMJ* (2012 and Supp. III 2016).

[38] *Art. 120, UCMJ* (2012).

commit sexual assault of MIDN Morse, an offense under *Art. 120, UCMJ*; (3) the act amounted to more than mere preparation; and (4) the act apparently tended to effect the commission of the intended offense.[39]

Midshipman Morse testified she awoke to Appellant in her rack, pressing his body against her, kissing her neck, pulling her shorts off, and pressing his erect penis against her skin. She confronted him and told him to leave, yet she later awoke to Appellant again in her rack, pressing his body against hers and pressing his erect penis against her buttocks. Appellant's actions of entering MIDN Morse's berthing area and climbing into her rack constitute an overt act that amounted to more than mere preparation and tended to effect the commission of the offense had MIDN Morse not awoken and stopped him.

3. Burglary.

Appellant was charged with burglary in both 2018 and 2019.

a. 2018 Offenses

In order to prove the offenses as charged, the Government was required to prove that: (1) Appellant unlawfully broke and entered into the dormitory rooms of MIDN Sontag and MIDN Metcalf; (2) the breaking and entering occurred at nighttime; and (3) [*21] the breaking and entering was done with the intent to commit sexual assault, an offense punishable under *Article 118 through Article 128*, except *Article 123a, UCMJ*.[40]

Midshipman Sontag testified that in February 2018 Appellant entered her room during the nighttime without her permission. She further testified that he proceeded to sexually assault her in her rack until she awoke and made him stop. Appellant's actions of climbing into MIDN Sontag's rack and sexually assaulting her evidence his intent to commit the offense of sexual assault at the time of the breaking and entering.

Midshipman Sontag further testified that in September 2018, Appellant again entered her room during the nighttime without her permission. As discussed above, Appellant's actions of climbing into MIDN Sontag's rack evidence his intent to commit the offense of sexual assault, and that the breaking and entering was done with that intent.

Midshipman Metcalf testified that on or about 21 October 2018, Appellant entered her room during the nighttime without her permission. She further testified that she awoke to Appellant sexually assaulting her in her rack. Appellant's actions of climbing into MIDN Metcalf's rack and sexually assaulting her evidence his intent [*22] to commit the offense of sexual assault when the breaking and entering was committed.

b. *2019 Offense*

[39] *Art. 80, UCMJ (2018)*. See previous sections for discussion of the elements of sexual assault.

[40] *Art. 129, UCMJ* (2012).

In order to prove the offense as charged, the Government was required to prove that: (1) Appellant unlawfully broke and entered the berthing area of MIDN Morse; (2) the breaking and entering were done with the intent to commit an offense punishable under the UCMJ; and (3) the breaking and entering were done with the intent to commit sexual assault, an offense punishable under *Article 118-120*, *120b-121*, *122*, *125-128a*, or *130, UCMJ*.[41]

Midshipman Morse testified that Appellant entered her berthing area onboard the ship without her permission. She further testified that she told Appellant to leave, but he returned multiple times. After returning, Appellant climbed into MIDN Morse's rack and attempted to sexually assault her while she was asleep, stopping only when MIDN Morse awoke and confronted him. Appellant's actions of attempting to sexually assault MIDN Morse evidence his intent to commit the offense of sexual assault when he unlawfully entered female berthing.

After weighing the evidence in the record of trial, and making every reasonable inference in favor of the prosecution, we are satisfied a reasonable factfinder could have [*23] found all of the essential elements of each charge and specification beyond a reasonable doubt. Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt and find that the evidence is factually sufficient to support Appellant's convictions.[42]

C. Appellant's Sentence is not Inappropriately Severe.

Appellant argues that his sentence of 25 years, total forfeitures, and a dismissal is inappropriately severe, particularly when compared to other cases involving sexual assault. We disagree.

We review sentence appropriateness de novo.[43] This Court may only affirm "the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved."[44] In exercising this function, we seek to ensure that "justice is done and that the accused gets the punishment he deserves."[45] The review requires an "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender."[46] We have significant discretion in determining [*24] sentence appropriateness, but may not engage in acts

[41] *Art. 129, UCMJ* (2018).

[42] We note that Appellant does not challenge the legal and factual sufficiency of his conviction for obstruction of justice. Nonetheless, we have reviewed the record and are satisfied that Appellant's conviction for this offense is legally and factually sufficient, as well.

[43] *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)*.

[44] ***Article 66(d)(1), UCMJ***.

[45] *United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)*.

[46] *United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)* (citation and internal quotation marks omitted).

of clemency.[47]

We may consider other court-martial sentences when determining sentence appropriateness; however, we are only required "to engage in sentence comparison with *specific cases* . . . in those rare instances in which sentence appropriateness can be fairly determined *only* by reference to disparate sentences adjudged in closely related cases."[48] An appellant bears the burden of demonstrating that another case is "closely related" to his case and that the sentences are "highly disparate."[49] If the appellant meets that burden, then the government must show that there is a rational basis for the disparity.[50] But here we find Appellant, in referencing wholly unrelated cases and citing statistics related to sexual assault cases in general, has not met this burden.

In support of his claim that his sentence is inappropriately severe under the specific facts and circumstances of his case, Appellant points to the military judge's recommendation that the convening authority suspend up to 15 of the 25 years of confinement. The record indicates the convening authority properly considered and declined the military judge's tersely explained recommendation. [*25] [51] A careful review of the entire record leads us to the same result.

A court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote discipline and to maintain good order and discipline.[52] Among other factors, the sentence needs to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, promote adequate deterrence of misconduct, protect others from further crimes by the accused, and rehabilitate the accused.[53]

Here, Appellant was found guilty of committing two penetrative sexual assaults against sleeping fellow Midshipmen, an attempted sexual assault of another, four burglaries, and obstruction of justice. He faced a maximum punishment of 125 years. The evidence admitted at trial proved that he engaged in the repeated practice of entering the rooms of women at night with the intent of sexually assaulting them. He victimized multiple fellow midshipmen over the course of 15 months, repeatedly betraying the trust of his classmates, invading their private living spaces, and sexually assaulting them. In several instances he persisted in his actions despite being repeatedly told to stop and leave.

---

[47] *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)*.

[48] *United States v. Wacha, 55 M.J. 266, 267 (C.A.A.F. 2001)* (quoting *United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)*) (emphasis in original).

[49] *Lacy, 50 M.J. at 288*.

[50] *Id.*

[51] The military judge's justification for his significant recommendation simply reads: "In accordance with R.C.M. 1109 and after consideration of the evidence in aggravation, extenuation, and mitigation, the military judge recommends suspending up to but not more than 15 years' confinement for a period of 20 years." Statement of Trial Results at 1.

[52] R.C.M. 1002(f).

[53] R.C.M. 1002(f)(3)(A)-(F).

Further, [*26] his crimes involving MIDN Morse occurred *while he was under investigation* for the crimes against MIDN Sontag and MIDN Metcalf.

As a result of his actions, Appellant's victims have variously suffered significant mental pain and anxiety, paranoia, insomnia, and alcoholism as they have struggled to live with what he did to them. Additionally, evidence presented during the sentencing portion of Appellant's trial showed Appellant to have low rehabilitative potential. These facts greatly outweigh Appellant's case in mitigation.

We find that Appellant's sentence was adjudged with individualized consideration based on both the nature and seriousness of his offenses, and Appellant's character. After reviewing the record as a whole, we find the sentence to be correct in law, that it appropriately reflects the matters in extenuation, mitigation, and aggravation presented, and that it should be approved.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[54]

The findings and sentence are **AFFIRMED**.

End of Document

---

[54] *Articles 59* & ***66, UCMJ***.

United States v. Keago

United States Court of Appeals for the Armed Forces

February 23, 2023, Decided

23-0021/NA.

Reporter
2023 CAAF LEXIS 113 *; __ M.J. __; 2023 WL 2372717

U.S. v. Nixon Keago.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] CCA 202100008.

United States v. Keago, 2022 CCA LEXIS 397, 2022 WL 2437886 (N-M.C.C.A., July 5, 2022)

Opinion

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is ordered that said petition is hereby granted on the following issue:

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

Briefs will be filed under *Rule 25*.

End of Document