USCA Dkt No. 22-0052/AR
Crim.App. No. 20200735

IN THE UNITED STATES
COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee
v.
SAMUEL B. BADDERS,
First Lieutenant (O-2)
United States Army,
Appellant

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	**SUPPLEMENT TO**
Appellee	)	**PETITION FOR GRANT OF**
	)	**REVIEW**
	)	
v.	)	**Crim. App. No. 20200735**
	)	
	)	**USCA Dkt. No. 22-0052/AR**
	)	
SAMUEL B. BADDERS,	)	
First Lieutenant (O-2)	)	
United States Army,	)	**December 20, 2021**
Appellant	)	

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

The Appellant, First Lieutenant Samuel B. Badders, respectfully submits this Supplement to his Petition for Grant of Review. Good cause exists to show that the errors listed below occurred and materially prejudiced 1LT Badders' substantial rights.

Introduction and Reasons for Granting Review

This case is factually and procedurally unusual. After a hearing and written briefing, the military judge granted a post-trial motion for mistrial based on her findings that 1LT Badders did not receive a fair

trial, and that an objective member of the public would not perceive that the trial was fair.

The underlying facts that prompted these findings center around a meeting that occurred the night before deliberations began. A sitting panel member, the Public Affairs Officer for 1LT Badders' command, met with the Staff Judge Advocate (SJA), Deputy Staff Judge Advocate (DSJA), and Chief of Military Justice (CoJ) to discuss a response to a press inquiry. During the meeting and via emails the lawyers advised the member on the content of his response, to include unsolicited information about "Operation Pegasus Strength," the commander's initiative to "eradicate corrosives" – to include people who commit sexual harassment and sexual assault – from his command. The next morning, while the members were deliberating, the Defense saw a news article quoting the member regarding the initiative and asked the military judge to stop deliberations to conduct additional voir dire. Neither the military judge nor the Defense knew about the meeting, and apparently trial counsel did not know, either. The military judge denied the request. The

CoJ was in the courtroom during this exchange and did not volunteer information about the meeting.

The Defense filed a post-trial motion and just before the hearing on the motion, learned about the meeting. In granting the mistrial, the military judge found that had she known about the meeting at the time the Defense moved to reopen voir dire, she would have granted the request. These circumstances led to her finding of implied bias.

The military judge also found that two of her evidentiary rulings at trial were erroneous. Based on all of these errors, she determined that, "Taken together, these circumstances cast a substantial doubt on the fairness of the proceedings. Therefore, this court finds that the granting of a mistrial is manifestly necessary in the interest of justice."

The Government appealed under Article 62, Uniform Code of Military Justice (UCMJ), and the Army Court of Criminal Appeals (Army Court) set aside the mistrial order.

The Army Court found no clear error in any of the military judge's findings of fact, but simply disagreed with her determination that based

on those facts, a reasonable member of the public would perceive the trial as unfair.

The three issues in this case that warrant the Court's review are:

1. Did the Army Court have jurisdiction to hear the Government's appeal?

   No. There was no jurisdiction. The military judge's mistrial order withdrew the charge and specification from the court-martial and returned the case to the convening authority, who could elect to retry the case. The mistrial order did not "terminate the proceedings with respect to a charge or specification" within the meaning of Article 62, UCMJ. Lower courts have addressed this issue, one with a strong and persuasive dissent, but this Court has not but should settle the issue.

   This Court should grant review because the Army Court decided a question of law which has not been, but should be, settled by this Court. C.A.A.F. R. 21(b)(5)(A).

2. Did the military judge abuse her discretion in finding implied bias of a member?

   No. The military judge properly found that the Government failed to disclose information regarding the mid-trial meeting of a sitting member, the SJA, DJSA, and CoJ and that had she known about the meeting, she would have granted the Defense request to reopen voir dire during deliberations. Based on the facts, supported by the record, she correctly found that a reasonable member of the public would have a doubt about the fairness of the trial. The military judge applied the correct law. The Army Court simply disagreed

with her assessment, which does not warrant finding an abuse of discretion.

This Court should grant review because the Army Court decided a question of law in a way that conflicts with applicable decisions of this Court. C.A.A.F. R. 21(b)(5)(B).

3. Do adequate grounds exist to uphold the military judge's mistrial order?

Yes. The military judge found cumulative error based on two erroneous trial rulings and implied bias. The record establishes that actual unlawful command influence, apparent unlawful command influence, actual member bias, implied member bias, and/or significant evidentiary error occurred in this court-martial. Each of these grounds warrants upholding the military judge's mistrial order.

This Court should grant review because the Army Court decided a question of law in a way that conflicts with applicable decisions of this Court. C.A.A.F. R. 21(b)(5)(B).

"In an Article 62, UCMJ, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial, which in this case is Appellant." *United States v. Becker*, No. 21-0236, 2021 WL 4256595, at *4 (C.A.A.F. Sept. 14, 2021) (quoting *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017). The Court will not reverse a military judge's ruling on

a motion for mistrial unless it finds a clear abuse of discretion. *United States v. Carter*, 79 M.J. 478, 482–83 (C.A.A.F. 2020) (citation omitted).

"An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *Becker*, 2021 WL 4256595, at *4 (citation omitted). This Court is "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous." *Becker*, 2021 WL 4256595, at *5 (citation omitted). The clearly erroneous standard is a "very high one to meet." *United States v. Leedy*, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007) (citations omitted). "The abuse of discretion standard calls for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (internal quotes and citations omitted). "If there is 'some evidence' supporting the military judge's findings," they are not "arbitrary, fanciful, or clearly erroneous." *Leedy*, 65 M.J. at 213 (citation omitted).

The military judge did not abuse her discretion in ordering a mistrial. The record supports her findings of fact and she correctly

applied the law. The Army Court erred in setting aside the mistrial order. This Court should grant review, reverse the Army Court, and return the case to the convening authority.

Errors Assigned for Review

I.

THE ARMY COURT DID NOT HAVE JURISDICTION OVER THIS GOVERNMENT APPEAL OF THE MILITARY JUDGE'S POST-TRIAL ORDER GRANTING A MISTRIAL.

II.

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION WHEN SHE FOUND IMPLIED BIAS OF A MEMBER WHO, UNBEKNOWNST TO THE MILITARY JUDGE DURING TRIAL, MET WITH THE SJA, DSJA, AND COJ ON THE NIGHT BEFORE DELIBERATIONS BEGAN TO DISCUSS THE COMMAND'S EFFORT TO RESPOND TO SEXUAL ASSAULT BY "ERADICATING CORROSIVES" FROM THE UNIT.

III.

THE MISTRIAL ORDER WAS JUSTIFIED BASED ON THE CUMULATIVE ERROR OF TWO EVIDENTIARY RULINGS THE MILITARY JUDGE MADE AT TRIAL AND/OR THE EXISTENCE OF ACTUAL UNLAWFUL COMMAND INFLUENCE, APPARENT UNLAWFUL COMMAND INFLUENCE, ACTUAL BIAS OF A MEMBER, AND IMPLIED BIAS OF A MEMBER.

Statutory Jurisdiction

The Army Court reviewed this case under Article 62, UCMJ. This Court has jurisdiction under Article 67(a)(3), UCMJ.

Statement of the Case

On September 24, 2020, a panel sitting as a general court-martial convicted 1LT Badders, contrary to his pleas, of a charge and one specification of sexual assault in violation of Article 120, UCMJ. R. at 570. The military judge acquitted 1LT Badders of fraternization in violation of Article 134, UCMJ in accordance with Rule for Courts-Martial (R.C.M.) 917. R. at 510. The military judge sentenced 1LT Badders to twelve months of confinement and dismissal. R. at 596. The convening authority took no action on November 20, 2020. Convening Authority Action.

Appellate and trial defense counsel filed a motion pursuant to R.C.M. 1104 seeking, *inter alia*, a mistrial, and the military judge held a post-trial hearing on November 19, 2020. On February 16, 2021, the military judge granted the motion for mistrial, finding two erroneous evidentiary rulings and implied bias of a member. App. Ex. LXV. The

ruling is based on the cumulative effect of two erroneous evidentiary rulings she made during the trial and the fact that the Government failed to inform her that the SJA, DSJA, and CoJ met with a member sitting in this case during an evening recess the night before closing arguments, instructions, and deliberations, which created implied bias on the part of the member. App. Ex. LXV. The military judge found that, "Taken together, these circumstances cast a substantial doubt on the fairness of the proceedings. Therefore, this court finds that the granting of a mistrial is manifestly necessary in the interest of justice." App. Ex. LXV, p. 32.

The Government appealed. First Lieutenant Badders filed a Motion to Dismiss, arguing that the Army Court did not have jurisdiction to hear the Government's appeal. He also filed an Answer and a Motion for Oral Argument. On September 30, 2021, the Army Court denied the motions and issued a memorandum opinion setting aside the military judge's mistrial order. *United States v. Badders*, ARMY MISC 20200735 (A. Ct. Crim. App. Sept. 30, 2021) (mem. op.).

First Lieutenant Badders filed his Petition for Grant of Review, a Motion for Leave to File Supplement to the Petition for Grant of Review Separately from the Petition, and a Motion to Stay Proceedings with this Court on November 29, 2021. The Court granted both motions.

Statement of Facts

This was a hotly contested case with a strong consent defense. SPC DM and 1LT Badders met on Tinder, an online dating forum. R. at 328, 387. They were involved in a mutually consensual sexual relationship that lasted approximately two months at the end of 2018 while they were both on active duty with the Army in Germany. R. 330-37, 341-42, 401-02, 465-66.

In April 2019 SPC DM filed an unrestricted report alleging that on December 31, 2018, during otherwise consensual sexual activity in a hotel room she had secured for New Year's Eve, 1LT Badders inserted his penis into her anus without her consent. R. at 346-49, 362. At trial, she testified that the sexual assault took place after the famous New York New Year's Eve ball dropped at midnight.[1] R. at 425, 461. She also

1 That ball dropped at 0600 local time in Germany, not at midnight, impeaching this testimony.

claimed that the assault caused such injury to her that she was bruised and bleeding. R. at 350, 357, 359, 361, 430-31. However, on cross-examination she was reminded that she told the Army Criminal Investigative Division (CID) that at 0300, after they awoke, she and 1LT Badders laughed and joked about the rough sex they had had the night before. R. at 425. One of them left to get breakfast from a nearby Burger King and they had breakfast in bed together. There was conflicting evidence on who went to get the food – she testified on direct that 1LT Badders went, but admitted on cross that she went based on a text message she sent 1LT Badders at 0326 about being order number 69. R. at 357-58, 428-29, 461.

Although she had her cell phone, at no time did SPC DM call anyone for help. Nor did she leave the hotel, ask 1LT Badders to leave, lock him out of the room, or in any other way express any displeasure with or fear of 1LT Badders. Also, she admitted she liked taking "selfies," but did not take any photos of blood or injuries. R. at 370, 431.

Finally, beginning the day immediately after the alleged brutal attack and for weeks thereafter, she continued to send text messages to

1LT Badders. Specifically, she told him, "It was great hanging out with you on New Year's Eve," she missed him, and even that she wanted him to "fuck her brains out again" a month later in the same hotel where this alleged anal rape occurred. R. 361, 439, 442-44.

At trial, the Defense asked SPC DM about a series of text messages from just after the alleged assault where SPC DM stated, "thank you for your service" with a "thumbs up" emoji; she said she did not remember the text. R. at 432. Before the Defense could refresh her recollection about the texts, the military judge sustained a Government hearsay objection. R. at 433. In her Order granting the post-trial mistrial, the military judge found this evidentiary ruling erroneous. App. Ex. LXV, p. 17.

Also, over Defense objection, the Government elicited an expert opinion from a brigade surgeon that the Government purported to be a lay witness to the effect that SPC DM's conduct in wanting to continue a sexual relationship with 1LT Badders after he sexually assaulted her was not unusual. R. at 480-490. In her Order granting the post-trial mistrial,

the military judge found this evidentiary ruling erroneous. App. Ex. LXV, p. 20.

Additional facts relevant to specific issues are included below.

Argument – the Court Should Grant Review

I.
THE ARMY COURT DID NOT HAVE JURISDICTION OVER THIS GOVERNMENT APPEAL OF THE MILITARY JUDGE'S POST-TRIAL ORDER GRANTING A MISTRIAL.

The Army Court decided a question of law which has not been, but should be, settled by this Court. C.A.A.F. R. 21(b)(5)(A).

Facts

Without comment or separate opinion, the Army Court denied 1LT Badders' Motion to Dismiss based on lack of jurisdiction. Ruling, Motion to Dismiss (Sept. 29, 2021). In a footnote in its Memorandum Opinion, the Court found jurisdiction to hear the Government's appeal under Article 62. *Badders*, ARMY MISC 20200735 at 17-18 n.5.

Standard of Review

"This Court reviews issues of statutory interpretation and jurisdiction de novo." *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017) (citation omitted).

Argument

A. The Army Court only had jurisdiction under Article 62 if the mistrial order "terminated the proceedings *with respect to a charge or specification*"; it did not do so.

The relevant section of the statute only permits a Government appeal from, "An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification." Art. 62(a)(1)(A), UCMJ. As a matter of statutory construction and common sense, a mistrial order does not meet this definition. Congress and the President set forth the provisions governing Government appeals, and neither Article 62 nor the applicable R.C.M. indicate that such an appeal lies when a military judge orders a mistrial. Instead, the Government's remedy is to re-refer the case.

1. Plain language analysis and the effect of mistrial and dismissal orders

The first step in analyzing a statute is to examine what it says. This Court has held that, "From the earliest times, we have held to the 'plain meaning' method of statutory interpretation. Under that method, if a statute is unambiguous, the plain meaning of the words will control, so long as that meaning does not lead to an absurd result." *United States v.*

Ortiz, 76 M.J. 189, 192 (C.A.A.F. 2017), *aff'd on other grounds*, 138 S. Ct. 2165 (2018) (citations omitted).

"The Supreme Court has stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The Court should "give meaning to each word of the statute," and only if ambiguity exists, does the statute's legislative history become relevant. *Id.* (citations omitted). "There is no rule of statutory construction that allows for a court to append additional language as it sees fit." *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014) (citation omitted).

These concepts are especially important in the context of Article 62, which, "shall be liberally construed to effect its purposes." Article 62(e), UCMJ. Regardless of this liberal construction, "Government appeals in criminal cases are disfavored and may only be brought pursuant to statutory authorization." *Jacobsen*, 77 M.J. at 84 (citations omitted). In fact, "There is a presumption against federal subject-matter jurisdiction."

Id. at 85 (citing *Kokkonen v. Guardian Life Ins. of America*, 511 U.S. 375, 377 (1994).

Article 62 contemplates only orders that end judicial action on *a particular "charge or specification*." Art. 62(a)(1)(A), UCMJ (emphasis added). While an order dismissing a charge or specification, either with or without prejudice, *does* meet that definition, a mistrial order does not. Congress could have specifically stated that the Government can appeal orders that "terminate *a particular court-martial*"; but it did not.

Examining the relevant Rules for Courts-Martial makes this point even clearer. A mistrial order has two effects: 1) it withdraws the charge and specification from the court-martial and immediately returns the case to the convening authority; and 2) the convening authority may immediately refer it to another court-martial without re-preferral, a new preliminary hearing under Article 32, UCMJ, or other preliminary actions. R.C.M. 915(c)(1), (2), Discussion. R.C.M. 915 contains no language stating that a mistrial "terminates the proceedings."

On the other hand, "When charges are dismissed, the R.C.M. contemplates that reinstitution of charges requires the command to start

over. The charges must be re-preferred, investigated, and referred as though there were no previous charges or proceedings." *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014) (citations omitted). Significantly, the applicable rule specifically states, "A motion to dismiss is a request to *terminate further proceedings as to one or more charges and specifications* . . ." R.C.M. 907(a) (emphasis added). The Discussion further makes the point clear: "A dismissal of a specification *terminates the proceeding with respect to that specification*. . . ." R.C.M. 907(a) Discussion (emphasis added). Such language could, but does not, appear in the rule pertaining to mistrials, R.C.M. 915.

Ironically, in a previous case, the Army Court itself held that mistrial and dismissal are not the same. *United States v. McClain*, 65 M.J. 894, 898 (A. Ct. Crim. App. 2008). Specifically:

> Our jurisprudence has long recognized that *mistrial and dismissal are not the same. . . . The distinction between mistrial and dismissal is more than mere semantics.* After mistrial, affected charges remain "alive" for purposes of further proceedings; after dismissal, affected charges no longer exist. After dismissal, any further proceedings can only be initiated as to the conduct underlying the affected charges by starting anew, with preferral of different charges.

Id. at 899 (emphasis added). Although quoted in the Motion to Dismiss, the Army Court did not distinguish, overrule, or even acknowledge this case.

The significant legal difference between mistrial and dismissal is evident when considering the statute of limitations. Because the charge and specification are still "alive" after a mistrial, there is no need to present them again to the summary court-martial convening authority. Therefore, assuming the original charge sheet was so received, there is no statute of limitations problem when the Government re-refers and tries the case again. In contrast, however, after a charge and specification are dismissed, the Government must prepare a new charge sheet and only after the summary court-martial convening authority receives the charge sheet containing the new charge and specification is the statute of limitations tolled. If the statute of limitations expires between the dismissal and the new charge, the charge is time-barred. *United States v. Adams*, No. 20-0366, 2021 WL 4138998, at *5 (C.A.A.F. Sept. 9, 2021), *reconsideration denied*, No. 20-0366/AR, 2021 WL 5811292 (C.A.A.F. Nov. 2, 2021). Thus, the Government should be able to

immediately appeal a dismissal to prevent this result. On the other hand, there is no statute of limitations issue after a mistrial; the Government may simply re-refer the initial, timely charge and specification to another court-martial.

The plain language of the statute and applicable rules indicate that Article 62 only pertains to a military judge's order dismissing a charge or specification, which terminates the proceedings as to that charge or specification, not an order of mistrial. A mistrial leaves the charge and specification intact, but returns the case to the convening authority, who may decide to retry it or take some other disposition action.

2. Legislative intent

Even if the Court decides that the statutory language is ambiguous, analysis of the legislative intent yields the same result. This Court has held, "Congress clearly intended that the military statute be interpreted and applied as the federal statute, except where the particulars of military practice dictate a different approach." *United States v. True*, 28 M.J. 1, 3 (C.M.A. 1989) (citations omitted).

The Criminal Appeals Act provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court *dismissing* an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

18 U.S.C. § 3731 (emphasis added).[2]

The civilian statute plainly and unambiguously only permits Government appeals from dismissals, not mistrials. Counsel could not find a single civilian federal case purely adjudicating jurisdiction of a Government appeal of a mistrial order; instead, the Government appeals uniformly involved dismissals ordered subsequent to a mistrial declaration, exclusion of evidence at a retrial after a mistrial declaration, or whether the defendant could be retried after a mistrial consistent with the Double Jeopardy Clause. *See United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008) (discussed *infra*); *United States v. Harshaw*, 705 F.2d 317 (8th Cir. 1983) (discussed *infra*). To effectuate Congressional

2 The term *new trial* as used in the Criminal Appeals Act is not the same as a mistrial. *See* Fed. R. Crim. P. 26.3, 33; R.C.M. 1210.

intent to interpret Article 62 consistently with the civilian statute, it must similarly apply to dismissals, but not mistrials.

While Congress enacted both 18 U.S.C. § 3731 and Article 62 to allow the Government to appeal certain decisions by trial judges, there are several significant differences between the two statutes and between the civilian and military criminal justice systems. *See Jacobsen*, 77 M.J. at 86-87 (listing examples). For example, the Federal Rules of Criminal Procedure do not provide for a post-trial mistrial, but the R.C.M. do. *Compare* Fed. R. Crim. Proc. 26.3 ("Mistrial," found in the "trial" section of the Rules), with R.C.M. 915 ("Mistrial"). This is because once the jury returns a verdict and is dismissed, the district judge has no power to declare a mistrial. To illustrate, when a civilian district judge declares a mistrial (such as when the jury cannot unanimously agree whether the Government has met its burden to prove guilt beyond a reasonable doubt), the Government may retry the defendant. There is no appeal of this decision. If, on retrial, the defendant convinces the district judge that the double jeopardy clause prevents retrial, the judge will dismiss the charge, and then a Government appeal lies.

While trial judges in both systems may order mistrials, a federal district judge may order a new trial but a military judge may not (only a service Judge Advocate General or a military appellate court may do so). *Compare* Fed. R. Crim. Proc. 33 ("New Trial," found in the "post-trial" section of the Rules) with R.C.M. 1210 ("New Trial"). Therefore, the civilian statute permits a Government appeal of dismissals and grants of a new trial after verdict, which are terms of art. Article 62, on the other hand, does not apply to new trials. Neither statute, however, authorizes a Government appeal of a mistrial.

B. This Court has not addressed the question, but should.

Relying on cases from two sister Courts of Criminal Appeals, the Army Court found that the military judge's post-trial mistrial order "terminated the proceedings." *Badders*, ARMY MISC 20200735 at 17-18 n.5 (citing *United States v. Flores*, 80 M.J. 501 (C.G. Ct. Crim. App. 2020); *United States v. Dossey*, 66 M.J. 619, 624 (N.-M. Ct. Crim. App. 2008)). The Army Court did not address the concerns raised by the strong dissent in *Dossey*, nor the arguments that undersigned counsel made as to why the Coast Guard and Navy-Marine Corps Courts' decisions were

erroneous. In fact, despite a separate Motion to Dismiss for lack of jurisdiction, the Army Court's opinion only addressed the jurisdictional question in a footnote. *Id.*

Respectfully, the lower courts' majority opinions finding jurisdiction for a Government appeal of a mistrial order are erroneous, and this Court should settle the issue.

1. Supreme Court case law supports a lack of appellate jurisdiction after a mistrial

In interpreting an earlier version of the Criminal Appeals Act, the Supreme Court determined the nonappealability of a trial court's mistrial ruling was consistent with Congressional action and policy. *United States v. Jorn*, 400 U.S. 470, 476 (1971). The Government's ability to file an interlocutory appeal did not arise until the trial judge, after resumption of the prosecution following the mistrial declaration, barred re-prosecution due to double jeopardy. *Id.* at 476-77. While it is true that the civilian statute was amended to include a liberal construction concept subsequent to this decision, the logic remains valid, especially in the military context, where the controlling rules explicitly state that a mistrial returns the case to the convening authority for further action.

The Government should only be able to appeal an order from a military judge who, upon retrial, orders dismissal. Prior to that, the Government appeal is not ripe. Undersigned counsel are unaware of any civilian or military case addressing this issue in the context of a military judge's mistrial order other than *Flores, Dossey,* and *Badders*, discussed below.

2. Military Courts of Criminal Appeals decisions finding jurisdiction are erroneous

The Army Court should not have relied on *Flores* and *Dossey* to find jurisdiction in this case. The lower courts' holdings in *Dossey, Flores,* and *Badders* not only are not binding on this Court, they are also unpersuasive.

In *Dossey*, the Navy-Marine Corps Court of Criminal Appeals, in a split decision reversing its prior ruling on reconsideration, held it had jurisdiction to review a mistrial declaration under Article 62(a)(1)(A), UCMJ. *Dossey*, 66 M.J. at 621. The Navy court considered whether *terminates the proceedings* means *before the particular court-martial* or all proceedings *on the charge*, and interpreted the term to mean *before the particular court-martial* because it concluded the term "proceedings" is mostly used elsewhere in the UCMJ to mean before a particular court-

martial. *Id*. at 623-24. The Navy court also relied on its analysis of the Criminal Appeals Act and Congressional intent to support its conclusion. *Id*. at 624. We respectfully disagree with both rationales.

The dissent in *Dossey* concluded the court lacked jurisdiction to hear an appeal of a mistrial order. *Dossey*, 66 M.J. at 626 (Vollenweider, J., dissenting). In analyzing R.C.M. 915 and distinguishing mistrials from dismissals, the dissent reasoned that a mistrial terminates the *trial*, but does not terminate the *proceedings*, meaning final prosecution. *Id*. at 628. The dissent also distinguishes the Criminal Appeals Act as permitting appeals from dismissals but not mistrials. *Id*. In finding retrial instead of appeal as the appropriate remedy for the Government, the dissent reasoned that retrial is "a more efficient mechanism…. An appeal can take many months, particularly where the decision of the Court of Criminal Appeals is then appealed to the Court of Appeals for the Armed Forces. The convening authority, on the other hand, can immediately refer the charges to a new court-martial." *Id*. This reasoning is more persuasive.

In *Flores*, the Coast Guard Court of Criminal Appeals also held it had jurisdiction under Article 62(a)(1)(A), UCMJ to review a mistrial declaration. *Flores*, 80 M.J. at 503. The Coast Guard court considered the meaning of the term *terminates the proceedings*. *Id*. at 505. The court reached its conclusion by finding a mistrial tantamount to a dismissal. *Id*. It also based its ruling on its interpretation of Congressional intent and two Federal Circuit cases. *Id.* (citing *Harshaw*, 705 F.2d 317; *Chapman*, 524 F.3d 1073). We respectfully submit that the court's rationales are flawed.

The Army Court below erroneously relied on *Dossey* and *Flores* to find jurisdiction in the instant case.

a. The lower courts incorrectly defined "proceedings"

The basic flaw in the lower courts' analysis is the misreading of the plain language of the statute. The lower courts purported to analyze the term "terminates the proceedings." However, by its express language, the statute does not apply just to *the proceedings*, it applies to *the proceedings with respect to a charge or specification*. The term "proceedings" should be defined broadly to mean the Government's

judicial action against an accused on a specific charge and specification alleging criminal conduct, and not to mean the specific court-martial that originally heard the case.

A survey of the term "the proceedings" throughout the UCMJ demonstrates that it is broad in meaning and applicable to many types of happenings, not just events or activities occurring before a particular court-martial. *See* Article 1(14) (*proceedings* of a court-martial); Articles 2(d)(1), 15 (addressing *proceedings* under Article 15); Article 6b (public *proceeding* of the service clemency and parole board); Article 6b(a)(7) (right to *proceedings* free from unreasonable delay); Article 30 (*proceedings* conducted before referral); Article 35(b)(1) ("no trial or other *proceeding* of a general court-martial…"); Article 39(d)(1) (hearing, trial, or other *proceeding*); Article 49(c) (a court-martial or other *proceeding*); Article 63(a) (original *proceedings*); Article 66 (additional *proceedings*); Article 131f (*proceedings* before, during or after trial of an accused).

Despite its use in varied contexts, other grammatical indicators support a broad reading of the term "*proceedings*." It is used in both its singular and plural forms, as well as with an indefinite and definite

article. A broader type of proceeding may encompass more narrow and specific types of proceedings. Trials and courts-martial have proceedings, but the term "proceedings" is not synonymous with a trial or a court-martial.

Congress' use of the plural "proceedings" in Article 62(a)(1)(A), as opposed to the singular "proceeding," is logically read to capture multiple proceedings instead of just the present proceeding. This same conclusion also flows from the statute's use of the definite article "*the*" proceedings, as opposed to "*a*" proceeding, which supports a broad interpretation that it is applicable to all types of proceedings instead of a specific proceeding.

Moreover, and most importantly, the only qualifying language for the type of proceeding to which the statute applies is the proceedings *with respect to a charge or specification*. Unlike many other provisions in the UCMJ, Article 62(a)(1)(A) does not specify court-martial or trial proceedings. This omission supports a broader interpretation of the term "proceedings" and requires that the proceedings pertain to a certain charge or specification.

Outside of the UCMJ, the term "proceedings with respect to a charge or specification" is found in the Rules. In R.C.M. 907, a dismissal clearly terminates the proceedings with respect to a charge or specification. Again, this language is conspicuously absent from R.C.M. 915, which we can presume was intentional. *See Bates v. United States*, 522 U.S. 23, 29–30 (1997) (an established rule of statutory construction provides that, "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, Congress intentionally and purposely intended the disparate inclusion or exclusion."). Therefore, we must presume that Congress intended the statute to pertain only to dismissal and not mistrial.

b. Dismissals and mistrials are different

This Court held many years ago, "it is settled principle that the grant of a mistrial does not constitute a dismissal of the charges." *United States v. Platt*, 44 C.M.R. 70, 72 (C.M.A. 1971). As discussed earlier, a mistrial order does not have the same legal meaning or effect as a dismissal. Ultimately, the charge and specification are still alive after mistrial, but only the underlying offense still exists after a dismissal.

This distinction is important, because the language of the statute indicates that Congress only intended to give the Government the right to appeal a military judge's order terminating the prosecution of a specific charge or specification. The *Flores* court did not correctly apply this principle, in holding that, just like a specification that survives a mistrial order, "a dismissed specification too can ordinarily be re-referred as long as the grounds for dismissal no longer exist." *Flores*, 80 M.J. at 505 (citing R.C.M. 907(a), Discussion). Dismissed charges cannot be re-referred; allegations must be re-preferred on a new charge sheet, even for the same underlying offenses alleged in the first, dismissed charge and specification. The convening authority may refer *that* new charge and specification to a court-martial, but this is not "re-referral" as contemplated by R.C.M. 915.

The *Dossey* majority reasoned – incorrectly – that the absence of "mistrial" language in both the military and civilian statutes pertaining to Government appeals did not control. Without any substantiation, the Court stated the reason Article 62 does not mention mistrials is that "Congress gave no thought at all to mistrials when enacting Article 62,

and had no discernable intent on that matter." *Dossey*, 66 M.J. at 624 n.13.

With respect to the civilian statute, the Court found, "the absence of mistrial from the list of appealable orders in the Criminal Appeals Act is likely due to a difference between civilian and military practice." *Id*. However, neither of these rationales justifies the conclusion that Congress intended the Government have the right to appeal a military mistrial order.

The plain language analysis of Article 62, R.C.M. 907, and R.C.M. 915 establishes that Congress and the President are very aware of both mistrials and dismissals. Further, the broad conclusion that mistrials in the civilian and military justice systems are so different as to justify Government appeals in the military justice system even though they are not permitted in the civilian justice system is faulty, especially in cases like the one at bar, where the military judge declared the mistrial months after the panel members were excused. The Navy court's rationale is based on the fact that military panel members are detailed and theoretically, can be reassembled to continue a court-martial if a mistrial

order is reversed, while civilian jurors are excused, never to be recalled to hear the case again. *Id.*

The instant case proves this theory invalid for two reasons. First, that rationale (reassembling the same members to continue hearing the case) only applies in the situation where the military judge grants a mistrial prior to findings, so that after a successful Government challenge, the case can continue. In this case, the panel members returned a verdict prior to the mistrial. The military judge excused them on September 24, 2020. It is now 15 months later. After the passage of over a year, the presumption that the convening authority could simply order the original panel members to report to the court to hear the case again is invalid. At this late date it is highly unlikely that all of the original members are still subject to military jurisdiction and thus able to be recalled – many of them have likely transferred to other duty stations (some to overseas combat deployments, with which the convening authority likely would not want to interfere), transferred to a Reserve component, or separated from the service altogether. Instead, it makes more sense that after dismissal, the convening authority may

refer the case to a *new* panel, which supports the logic that the Government may appeal dismissal but not mistrial.

Second, the theory is based on the idea that the same members always must sit on the case after a successful challenge to a mistrial order. Even setting aside the implied bias issue, the military judge found that she improperly excluded Defense evidence and improperly admitted Government evidence; it is unlikely that the parties would agree that all of the members should hear the case again. But, if that is the Government's intent, it is best accomplished by an immediate re-referral, not an appeal.

In other words, there is no significant difference between a civilian and military mistrial that would justify interpreting Article 62's omission of "mistrial" differently than the civilian statute's omission, and thus finding jurisdiction over a Government appeal in the military context vice a civilian mistrial. The military judge's mistrial order in this case returned the charge and specification to the convening authority, who may re-refer them to another court-martial or take other disposition

action. Only if the military judge dismisses the charge and specification at a new court-martial may the Government appeal.

c. Improper reliance on federal cases

The Coast Guard court erroneously relied on two federal cases, incorrectly concluding they based jurisdiction on the mistrial declaration. In *Harshaw*, the Court of Appeals for the Eighth Circuit found jurisdiction based upon the provision of 18 U.S.C. § 3731 authorizing Government appeals from trial orders suppressing evidence. *Harshaw,* 705 F.2d at 319 ("We conclude that § 3731 places only two limitations on the government's ability *to appeal suppression orders* in criminal cases." (emphasis added)). Prior to verdict, the trial judge declared a mistrial based on the improper admission of evidence; the Eight Circuit found a functional equivalent of dismissal. *Id*. at 319-20 and n.2. The discussion, then, turned to whether the Double Jeopardy clause forbade retrial if the Government prevailed on appeal. *Id*. at 319-20. Even the Navy court found *Harshaw* unpersuasive on the issue of jurisdiction, explaining the case, "despite language suggesting it concerns appeal from a mistrial,

actually involves review of an evidentiary ruling by the trial court." *Dossey,* 66 M.J. at 623, n.12.

Similarly, while the *Chapman* case discusses the mistrial declaration, ultimately its jurisdiction is derived from the district court's subsequent dismissal. *Chapman,* 524 F.3d at 1080. The civilian cases do not provide support for the lower courts' finding of appellate jurisdiction after a mistrial order.

3. The Government's remedy for the mistrial order is re-referral, not an appeal

The *Dossey* dissent outlines a sensible explanation for the nonappealability of mistrial declarations that is consistent with the issues in the present case. Since a mistrial declaration is an interlocutory trial ruling, the Government has an avenue for relief by re-referring the existing charge and specification to a new court-martial, or otherwise disposing of them as the convening authority sees fit. During re-prosecution of the charge and its specification, if a military judge seeks to bar prosecution based on double jeopardy, the Army Court could then review such an order under Article 62(a)(1)(A). This interpretation is more expedient, requires trial issues to be resolved at the trial level,

provides the Government with recourse, and comports with the language of the statute.

4. Conclusion

The term *terminates the proceedings with respect to a charge or specification* is properly interpreted to broadly apply to all proceedings on the charge or specification, not just the immediate court-martial proceeding. The military judge's mistrial order withdrew the charge and specification from the court-martial and returned the case to the convening authority, who could elect to re-refer it. The mistrial order did not "terminate the proceedings with respect to a charge or specification" within the meaning of Article 62; thus, the Army Court lacked jurisdiction. Lower courts have addressed this issue, one with a strong and persuasive dissent, but this Court has not but should settle the issue.

II.

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION WHEN SHE FOUND IMPLIED BIAS OF A MEMBER WHO, UNBEKNOWNST TO THE MILITARY JUDGE DURING TRIAL, MET WITH THE SJA, DSJA, AND COJ ON THE NIGHT BEFORE DELIBERATIONS BEGAN TO DISCUSS THE COMMAND'S EFFORT TO RESPOND TO SEXUAL ASSAULT BY "ERADICATING CORROSIVES" FROM THE UNIT.

The Army Court decided a question of law in a way that conflicts with applicable decisions of this Court. C.A.A.F. R. 21(b)(5)(B).

Facts

On the evening the evidence closed during this sexual assault trial, a sitting member had a meeting with the SJA, the DSJA, and the CoJ regarding sexual assault issues and 1LT Badders' commander's intended response to sexual assault issues in his unit – "eradicating" them. The member then communicated the results of that meeting, including the "eradicating corrosives" language, to a member of the press, who broadcast it on the internet, quoting the member by name. The CoJ not only was aware of this issue during deliberations when trial counsel brought it to his attention after the Defense requested additional voir dire, but then advised trial counsel how to address the situation when

court resumed. R. at 687.[3] However, he sat silently in the gallery during the Government's proffer about the press release and did not inform the Defense or the military judge about the meeting. R. at 633.

The military judge who granted the mistrial in this case presided over the court-martial on the merits (another judge conducted arraignment). She also considered multiple post-trial written pleadings from 1LT Badders and the Government that were submitted both before and after an in-person hearing. At the hearing, which lasted several hours, the military judge heard live and telephonic witness testimony and considered written exhibits. Over two months later, the military judge issued a 32-page, single-spaced written ruling analyzing the facts and the law.

The military judge ruled that had she known about the meeting at issue, she would have granted the Defense request to re-open voir dire. App. Ex. LXV, p. 23. She further ruled that, "Since the court did not have this information, a perception was created that could lead members of

[3] Note also that on several occasions Civilian Defense Counsel asserted at the post-trial hearing that the CoJ was physically present in the courtroom during the litigation of the Defense request and the CoJ, who was counsel for the post-trial hearing, never once denied being there.

the public to believe that the Accused did not receive a fair trial." App. Ex. LXV, p. 23.

In determining that a mistrial was appropriate, the military judge stated:

> [B]ecause this court did not have the information that an in-person conversation occurred between the SJA, CoJ and a panel member at the OSJA while this court martial was recessed for the evening, it did not voir dire the panel member. Had the court been aware of this information, it is likely this court would have permitted voir dire thus allowing defense to develop the information in question to determine whether a valid challenge for cause existed. Without the voir dire of the panel member, this meeting created an implied bias that would raise doubt in the eyes of the public that the Accused received a fair trial.

App. Ex. LXV, p. 31-32. The military judge further concluded, "The two evidentiary errors combined with the implied bias calls for a mistrial." *Id.*, p. 32.

These findings and conclusions are supported by the record, apply the law correctly, and do not constitute an abuse of discretion.

Standard of Review

"[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. Downing, 56 M.J. 419, 421–22 (C.A.A.F. 2002). The Court will apply "an objective standard, viewed through the eyes of the public," to determine what a reasonable member of the public will perceive, or in other words, the "appearance of fairness of the military justice system." *Id.* (citations omitted). "Where the military judge places on the record [her] analysis and application of the law to the facts, deference is surely warranted." *Id.*

Argument

The military judge did not abuse her discretion in finding implied bias.

A. The military judge's findings of fact are supported by the record

There really is no dispute about the relevant facts. The witness testimony and documents indicate that the mid-trial meeting happened, the Government did not disclose it, and that because of this, the military judge did not grant the Defense request to re-open voir dire.

B. The military judge correctly applied the applicable law regarding implied bias

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel. Indeed, impartial court-members are a sine qua non for a fair court-martial." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (internal quotes and citations omitted).

"A member shall be excused for cause whenever it appears that the member. . .: should 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). There are two types of bias that could disqualify a member: actual and implied. R.C.M. 912 applies to both. *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017).

This Court has explained that:

> Implied bias challenges stem from the historic concerns about the real and perceived potential for command influence in courts-martial. Implied bias exists when most people in the same position as the court member would be prejudiced. It is evaluated objectively under the totality of the circumstances and through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system. The core of that objective test is the consideration of the public's

> perception of fairness in having a particular member as part of the court-martial panel.

Dockery, 76 M.J. at 96 (internal quotes and citations omitted). "While cast as a question of public perception, this test may well reflect how members of the armed forces, and indeed the accused, perceive the procedural fairness of the trial as well." *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015). The Court is interested not only in whether the trial actually *is* fair, but *appears* to be fair. *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015); *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985).

Military judges are "mandated to err on the side of granting a challenge. This is what is meant by the liberal grant mandate." *Peters*, 74 M.J. at 34 (citations omitted). In other words, if it is a close question, the military judge should grant the challenge. The mandate is based on the unique way military panels are selected – the convening authority's involvement, which may implicate unlawful command influence issues – and the fact that peremptory challenges are limited. *Id.*

The military judge's lengthy and thorough ruling indicates she understood and applied these legal principles. A valid challenge for cause

to LTC CB existed based on implied bias based on the mid-trial meeting. This is especially so due to the SJA's active involvement. *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986). The SJA (with his Deputy and Chief of Military Justice) was front and center of the mid-trial meeting with the member which focused on a press release – which went above and beyond the reporter's inquiry – intended to reassure the public that the First Cavalry Division (1CD) was taking aggressive action against sexual assault.

Had the parties and the military judge addressed the issue immediately, there would have been time to conduct additional voir dire, handle potential challenges, and have the members continue deliberations either with or without LTC CB. It was Government conduct – meeting with a sitting member, failing to disclose the meeting, objecting to re-opening voir dire, and an incomplete proffer to the Court regarding the press release – that precluded the Defense from having the opportunity for full, effective voir dire and the military judge from taking appropriate action. The result is that under these circumstances, a reasonable member of the public, even (or especially) one familiar with

the military justice system, would have a serious concern about the fairness of this trial based on this Government conduct and the fact that LTC CB sat on this panel. As the military judge correctly found, "The optics of the SJA, chief prosecutor and sitting panel member meeting after hours while the court martial is ongoing does not give the perception of fairness." App. Ex. LXV, p. 24. The military judge did not abuse her discretion in finding implied bias.

C. The Army Court's decision contains erroneous conclusions and constitutes mere disagreement with the military judge

The Army Court asserted that, "The military judge's post-trial 39(a) session and the unrebutted facts developed therein establish that the meeting that occurred between LTG (sic) B and members of the legal office was a time sensitive meeting between primary staff officer's (sic) performing their normal duties, duties unrelated to either appellee's court-martial or LTG (sic) B's service as a panel member." *Badders*, ARMY MISC 20200735 at 23. This assertion is incorrect. The Government presented no compelling evidence explaining why the member himself, as opposed to his staff or even the SJA, had to respond to the reporter, or why it was "time sensitive." Further, the subject of the

press release was not "unrelated" to the court-martial – the member and SJA inserted the issue of the convening authority's intended "eradication of corrosives" into the response, despite the fact that at that very moment the member was in the middle of a sexual assault trial involving an alleged "corrosive."

Another mischaracterization the Army Court's decision contains is the claim that the military judge found the in-person meeting inappropriate but would have found a telephone conference acceptable. *Badders*, ARMY MISC 20200735 at 27. The mistrial ruling does not state that. Instead, the military judge correctly distinguished the meeting that occurred, where the issue of sexual assault was involved, from conversations regarding "legal issues pertaining to the brigade or a panel member who is a brigade commander or staff primary speaking with the SJA on the telephone *regarding an administrative law issue*." App. Ex. LVX, p. 25 (emphasis added). In other words, it is the substance of the conversation, rather than the mode, that is important. In the alternative, a finding that a telephone conference between one lawyer and a member

is less prejudicial than the meeting in this case which included the SJA, DSJA, and CoJ meeting with the member, is not clearly erroneous.

D. Conclusion

The military judge did not abuse her discretion in ordering the mistrial. The military judge's "findings of fact and conclusions of law were thorough, based upon an application of the correct legal principles . . . and were supported by the evidence provided in the record." *Becker*, 2021 WL 4256595, at *6. Thus, they are entitled to deference. *United States v. Hendrix*, 76 M.J. 283, 288 (C.A.A.F. 2017); *United States v. Briggs*, 64 M.J. 285, 287 (C.A.A.F. 2007).

The Army Court relied on the same correct facts but merely disagreed with the military judge's determination that a reasonable member of the public would doubt the fairness of the trial. This does not justify a finding that the military judge abused her discretion; the decision setting aside the mistrial order conflicts with decisions from this Court. The Court should grant review, reverse the Army Court, and return the case to the convening authority.

III.

THE MISTRIAL ORDER WAS JUSTIFIED BASED ON THE CUMULATIVE ERROR OF TWO EVIDENTIARY RULINGS THE MILITARY JUDGE MADE AT TRIAL AND/OR THE EXISTENCE OF ACTUAL UNLAWFUL COMMAND INFLUENCE, APPARENT UNLAWFUL COMMAND INFLUENCE, ACTUAL BIAS OF A MEMBER, AND IMPLIED BIAS OF A MEMBER.

The Army Court decided a question of law in a way that conflicts with applicable decisions of this Court. C.A.A.F. R. 21(b)(5)(B).

General facts

The Army Court found that the military judge erred in considering implied bias as part of the "cumulative error math." *Badders*, ARMY MISC 20200735 at 19. However, the Army Court did not address the erroneous evidentiary rulings and whether they, together, constituted cumulative error sufficient to uphold the mistrial order. The Court also failed to address the other errors raised and argued in the post-trial motion for relief and in the Answer (actual and apparent unlawful command influence and actual and implied bias by the same member), and decide whether together, they constituted error justifying a mistrial. Additional facts relevant to each error are included in the discussion below.

Standard of Review

Generally, this Court reviews the military judge's mistrial order directly, viewing the evidence in the light most favorable to 1LT Badders, and will not reverse unless it finds a clear abuse of discretion. *Becker*, 2021 WL 4256595, at *4 (citation omitted); *Carter*, 79 M.J. at 482–83 (citation omitted).

Additionally, this Court should uphold the order if it agrees with the military judge that a mistrial was appropriate under any theory. *See United States v. Bess*, 80 M.J. 1, 11–12 (C.A.A.F. 2020), *cert. denied*, 141 S. Ct. 2792 (2021) (citing *United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003) (affirming a military judge's denial of a motion to suppress evidence where "the military judge reached the correct result, albeit for the wrong reason"); *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995) (citations omitted) ("When the Government appeals an adverse ruling, the defense may assert additional or alternate grounds for affirming the ruling.").

Specific standards of review are contained in the argument for each error below.

Argument

A. The military judge properly applied the cumulative error doctrine; the two evidentiary errors constituted cumulative error

1. Standard of review

This court will review whether evidence is admissible, whether prejudice resulted, and whether cumulative error exists de novo. *Becker*, 2021 WL 4256595, at *4; *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019); *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011).

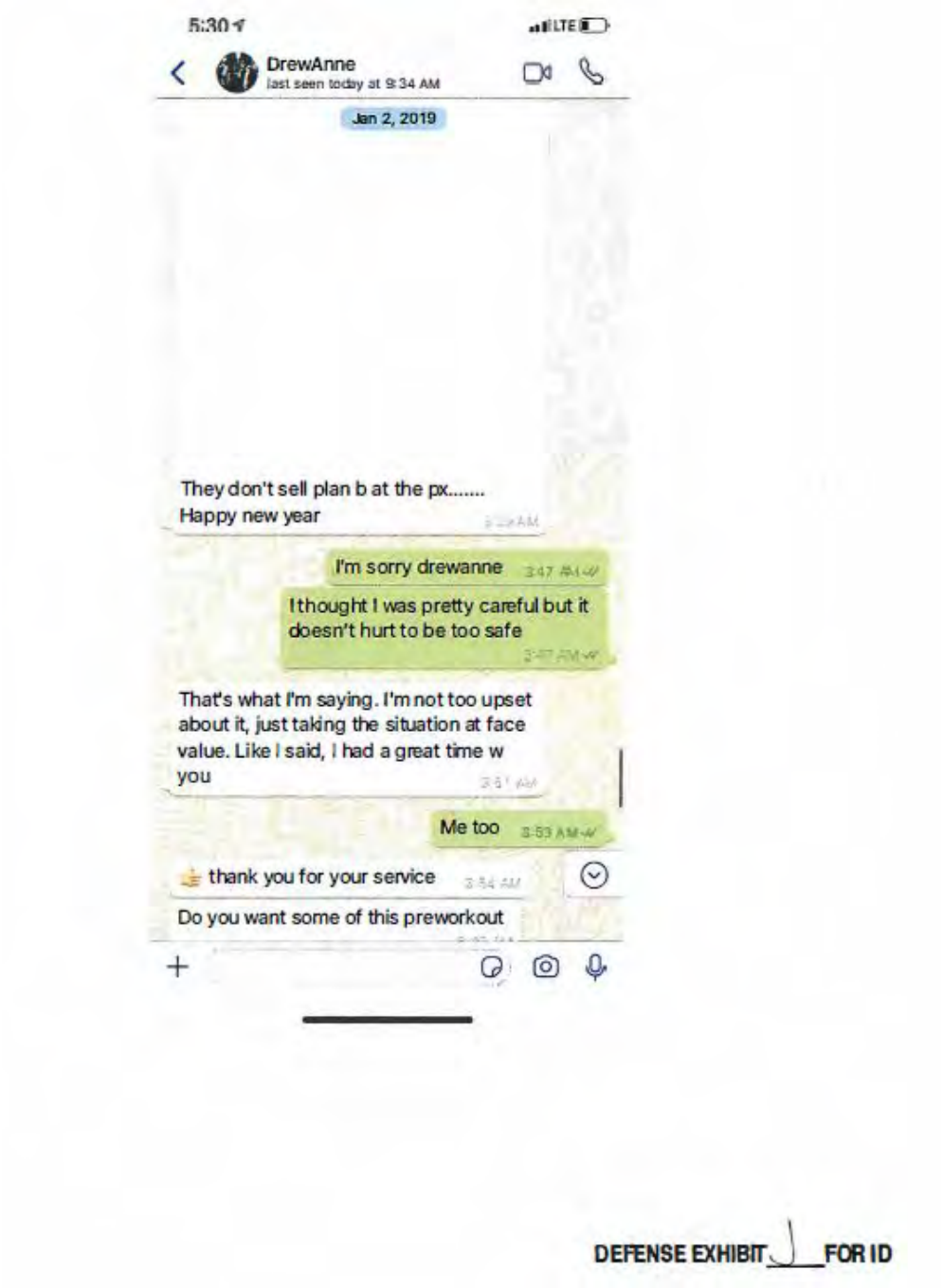
2. The military judge correctly determined the exclusion of text message evidence was error

At trial, the following cross-examination of SPC DM took place:

Q. You made the affirmative action of saying--of texting the words "I had a good time with you" correct?
A. Yes, I did.
Q. On not only on January 1st but also on January 2nd; right?
A. I don't recall saying that on the 1st, sir; can you show it to me, please?
Q. No. You also thanked him for his service and put a thumbs up emoji in the text message; didn't you?
A. I don't remember that, sir.
Q. Would reviewing that text message refresh your recollection?
A. If I could review the other one as well, please.

R. at 432 (emphasis added).

The text message traffic at issue was:



Def. Ex. J FID.

The Government lodged a hearsay objection, which the military judge sustained. R. at 433. However, in her post-trial ruling, she recognized that the evidence was, in fact, admissible under Military Rule of Evidence (M.R.E.) 803(3) (state of mind/emotional condition). App. Ex. LXV, p. 17.

a. The text message traffic was admissible

The excluded text message traffic was admissible: to refresh the witness' recollection; pursuant to the hearsay exception; or as a prior inconsistent statement. Although the military judge did not address all three of these bases, this Court should find no abuse of discretion if it agrees the evidence was admissible under any theory. *Bess*, 80 M.J. at 11–12.

(i) To refresh the witness' recollection

When Defense Counsel asked SPC DM whether she sent the text at issue, she responded, "I don't remember that, Sir." R. at 432. He then asked her, "Would reviewing that text message refresh your recollection?" and she said yes. R. at 432. Defense Counsel should have

been able to show her the text message to see if it refreshed her recollection; if it did, she could then testify that she had, in fact, sent it.

(ii) Under a hearsay exception

Generally, statements made out of court offered for the truth of the matter asserted are not admissible. M.R.E. 801, 802. However, there are several exceptions.

1) then-existing state of mind/emotional condition (M.R.E. 803(3))

This exception involves the "then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)." M.R.E. 803(3). As argued and as the military judge correctly found post-trial, the statement that SPC DM "thanked" 1LT Badders for his "service" indicated how she was feeling right after the night they engaged in sexual activity that she later alleged was without her consent.

2) recorded recollection (M.R.E. 803(5))

The text also served as a recorded recollection, because it was "on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; was made or adopted by the witness when

the matter was fresh in the witness's memory; and accurately reflects the witness's knowledge." M.R.E. 803(5). She wrote the text message about how she was feeling right after the night in question but did not remember at trial whether she wrote the message.

3) As a prior inconsistent statement

A witness's prior inconsistent statement may be admissible either for impeachment or for impeachment *and* substantively. When a witness testifies that she cannot remember the answer to a question, counsel may introduce extrinsic evidence of the witness' prior statement containing the requested information as a prior inconsistent statement, admissible to impeach the witness. *United States v. Harrow*, 65 M.J. 190, 199 (C.A.A.F. 2007) (citations omitted). If the prior statement itself is admissible, such as under an exception to the hearsay rule, the statement is admissible substantively. *United States v. Taylor*, 44 M.J. 475, 480 (C.A.A.F. 1996); *see* Dep't of Army, Pam. 27-9, Legal Services: *Military Judges' Benchbook*, para. 7–11–1, note 2 (an inconsistent statement may be admitted as substantive evidence . . . when . . . (3) it is a statement of the witness otherwise admissible as an exception to the hearsay rule").

SPC DM testified she did not remember making the statement contained in the text message. R. at 432. Therefore, the statement itself was admissible to impeach her. Further, because the statement itself was a statement of then-existing emotional condition, it also was admissible as substantive evidence that she was, in fact, thankful for his service (and thus, 1LT Badders did not sexually assault her because one would not be thankful for being assaulted).

Finally, even if SPC DM remembered making the statements in the text messages, but for the military judge's erroneous ruling sustaining the objection, the Defense could have argued that the evidence was so compelling – that its appearance (including the use of an emoji) – was so unusual, testimony about it alone was insufficient to convey its full meaning. "While extrinsic evidence of the prior inconsistent statements is generally not admissible when the witness admits making the inconsistent statements, that evidence can be admissible where 'the interests of justice otherwise require.'" *United States v. Gibson*, 39 M.J. 319, 324 (C.M.A. 1994) (quoting M.R.E. 613(b)).

b. 1LT Badders was harmed by the exclusion of the texts

The military judge's conclusion that her erroneous ruling "did not prejudice" 1LT Badders is not binding on this Court. *Kohlbek*, 78 M.J. at 334. And, her conclusion was based only on her contention that the panel already had heard "similar evidence." App. Ex. LXV, p. 17. She did not articulate any analysis under M.R.E. 403 or the *Roberson* factors. *United States v. Roberson*, 65 M.J. 43, 47–48 (C.A.A.F. 2007) (citations omitted). Therefore, her finding of "no prejudice" is not entitled to any deference. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

Applying the relevant factors, this Court should find prejudice:

(1) The Government's case against 1LT Badders was weak. It consisted effectively of the uncorroborated testimony of one witness – the complainant – who had significant credibility issues and acknowledged a consensual, sexual relationship with 1LT Badders before the alleged offense and wanting to continue it after the alleged offense. The Defense Counsel's excellent closing argument set forth the many significant weaknesses of the Government's case. R. at 528-40.

(2) The Defense rested behind the Government. R. at 496. However, the cross-examination of SPC DM, constrained as it was by the erroneous rulings, was nevertheless strong.

(3) The text message traffic was material to the defense in this case – consent.

(4) The quality of the evidence was high. The message SPC DM sent to 1LT Badders shortly after the alleged sexual assault was in her own words and went directly from her phone to his phone. Contrary to the military judge's post-trial conclusion, while the members did hear about other messages SPC DM sent to 1LT Badders saying, for example, she had a good time, they did *not* hear or see evidence that only two days later, she *thanked* him for his *service*, meaning that she not only enjoyed, but was grateful to him, for the sexual conduct with him. Especially in context with the language from SPC DM about not being upset about a potential pregnancy from the sex they had the night before that preceded the comment and the use of the "thumbs up" emoji, this text conversation is qualitatively different from the other evidence the members heard.

Further, when the military judge erroneously sustained the Government's objection, she not only prevented the members from learning about the text message either through SPC DM's testimony, extrinsic evidence, or both – but she cut off further related inquiry. The entire conversation was highly probative. Based on her trial ruling, any attempts to introduce the whole series of text messages would have been futile and 1LT Badders would have suffered additional prejudice from the military judge's certain sustaining of additional Government objections that would have followed.

c. The military judge properly found error, the error was harmful, and the mistrial was appropriate

R.C.M. 915 provides that, "The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceeding." The military judge's post-trial ruling finding error in excluding the text message evidence was correct. Her finding that the error was not prejudicial was incorrect, but not only is it not binding on this Court, whether the error was independently prejudicial is not

dispositive, because the military judge properly found that under a cumulative error theory, a mistrial was manifestly necessary in the interest of justice. Her ruling granting a mistrial was not an abuse of discretion.

3. The military judge correctly determined error in admitting MAJ SS's testimony regarding her opinion of SPC DM's conduct

At trial, the Government called MAJ SS, a highly educated brigade surgeon with specialized training in sexual assault forensic examinations. R. at 474, 477. She was the senior medical advisor to her brigade commander. R. at 475. MAJ SS first physically met SPC DM in April 2019 when she performed the SAFE exam. R. at 478-79. During direct examination, the Government asked, and the Defense objected to, the following question:

> [TC]. Did she [SPC DM] make you aware that she was continuing to communicate with the alleged perpetrator?
>
> [MAJ SS]. I was aware that she had after the incident had occurred, or the event occurred. And again I'm not sure if it was her or the SARC who told me that.
>
> [TC]. *Did that seem unusual to you, ma'am?*

R. at 480 (emphasis added).

The Defense objected because the question called for an expert opinion. R. at 480. MAJ SS was never offered or qualified as an expert. R. at 474-80. The Government incorrectly responded that the question was for her lay opinion based on her assessment as a sexual assault forensic examiner and not an expert opinion. R. at 480. The military judge erroneously overruled the objection. R. at 489. When the members were recalled, the Government presented the following testimony.

> [TC]. Going back to my last question, and just a yes or no answer is fine; did that behavior seem unusual to you?
>
> [MAJ SS]. No.

R. at 490.

In her post-trial mistrial ruling, the military judge correctly determined she erred in overruling the Defense objection, because the testimony was improper lay opinion. App Ex. LXV, p. 19-20.

a. MAJ SS's testimony was inadmissible

Opinion testimony of a lay witness is limited to one 1) rationally based on the witness' perception, 2) helpful to clearly understanding the witness' testimony or to determining a fact in issue, and 3) not based on

scientific, technical, or other specialized knowledge within the scope of M.R.E. 702. M.R.E. 701. Lay opinion is improper when offered to interpret the meaning of or provide conclusions to certain communication, but the "terms [of the communication] are capable of being understood by the layman, and where the [panel] is capable of interpreting the language or slang involved." *United States v. Byrd*, 60 M.J. 4, 7 (C.A.A.F. 2004) (internal quotation marks and citation omitted).

MAJ SS had no lay knowledge of SPC DM's behavior with alleged perpetrators enabling her to opine whether it was usual. Her relationship with SPC DM was strictly professional, and she had no specific knowledge about the alleged offense. App. Ex. LXV, p. 20; R. at 493. The only basis on which she could opine on this issue was specialized expert knowledge of victim behavior. However, since the Government never qualified her as an expert and she was only a lay witness, she was therefore prohibited under M.R.E. 701 from providing this opinion.

Furthermore, her opinion sought to interpret SPC DM's behavior, to include communications. The plain meaning of these communications was clear – they demonstrated SPC DM enjoyed the sexual encounter

underlying the allegation and desired a continued sexual relationship with 1LT Badders. Under *Byrd*, MAJ SS's lay opinion providing a counterintuitive explanation was improper, because the panel could already have easily understood the plain meaning of these communications.

b. 1LT Badders was harmed by MAJ SS's inadmissible testimony

The military judge did not explicitly make a determination regarding prejudice,[4] although her analysis makes it apparent that the error was harmful.[5] The admission of MAJ SS's lay opinion was prejudicial for numerous reasons:

(1) The Government's case against 1LT Badders was weak and the cross-examination by Defense was strong.

(2) The erroneously admitted lay opinion improperly neutralized strong, highly probative and material defense evidence that SPC DM

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[4] The military judge's ruling on the issue of MAJ SS's testimony ended mid-sentence. App. Ex. LXV, p. 20 ("Additionally, the court should have instructed the panel").

[5] The military judge addressed the impact of the ruling on the legal sufficiency of the findings, which is not equivalent to prejudice. *Id.*

actually consented to the conduct underlying the charge and she sought a continued sexual relationship with 1LT Badders after that incident. The Defense's extensive cross examination of SPC DM is an aggravating factor for the harm 1LT Badders suffered from this error since MAJ SS's improper opinion directly undermined its entire effect.

(3) Further, the admission of MAJ SS's lay opinion is directly related to SPC DM's communications with 1LT Badders, to include the text messages underlying the military judge's other erroneous evidentiary ruling. The combination of the two evidentiary errors therefore amplify the harm to 1LT Badders. The excluded text message demonstrates continued communication as well as inconsistent behavior and state of mind of SPC DM after the alleged incident. The erroneously admitted lay opinion then neutralized the evidence of consent and impeachment value of the unadmitted text message by improperly opining that SPC DM's communication and behavior was not unusual for a victim.

(4) The impact of the improper lay opinion was high. Prior to eliciting the prohibited testimony, the Government improperly bolstered

MAJ SS as a lay witness. App. Ex. LXV, p. 20. The Government extensively questioned MAJ SS regarding her specialized medical and sexual assault forensic examination experience, and specifically emphasized her role as a brigade surgeon, a position of trust and expertise in advising brigade commanders. Two of the panel members were brigade commanders – including the President – which intensified the harm of this testimony. Since the Government never sought to qualify her as an expert, the testimony regarding her qualifications was irrelevant. It only served to bolster the impact of MAJ SS's improper lay opinion, to give it an air of authority without subjecting MAJ SS to the crucible of expert qualification or expanded expert cross-examination.

(5) The court provided no instruction to correct its own error, so the full effect of the error manifested when the panel members deliberated considering the improper evidence.

c. The military judge properly found error, the error was harmful, and the mistrial was appropriate

R.C.M. 915 gives military judges the discretion to declare a mistrial in the interest of justice. The military judge's post-trial ruling finding error regarding the improperly admitted testimony was correct. Whether

the error was independently prejudicial is not dispositive, because the military judge properly found that under a cumulative error theory, a mistrial was manifestly necessary in the interest of justice. Her ruling granting a mistrial was not an abuse of discretion.

4. The military judge's findings of fact are supported by the record

The military judge correctly set forth the facts underlying the two evidentiary rulings that she found erroneous. App. Ex. LVX. The Army Court found no error in the findings of fact. *Badders*, ARMY MISC 20200735 at 2.

5. The military judge correctly applied the law

The military judge properly stated the applicable law: "Under the cumulative- error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'" App. Ex. LXV, p. 31 (citing *Pope*, 69 M.J. at 335; *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992)).

As mentioned, this was a hotly contested, "he said – she said" case with strong evidence of consent but a sympathetic complaining witness. The two evidentiary errors the military judge acknowledged were

significant. The members were improperly prevented from hearing that not only did SPC DM want to see and have sex with 1LT Badders again after he allegedly sexually assaulted her, but she was *thankful* for the sexual activity that she later deemed assaultive. Also, when trying to determine whether SPC DM's belated claim of sexual assault was credible, the members (including two brigade commanders and two division staff members) improperly heard what can only be described as an expert opinion from a brigade surgeon – that such post-"assault" conduct was not unusual. This opinion gutted the defense argument that SPC DM's continued interest in a sexual relationship with 1LT Badders indicated that all of the sexual activity between them had been consensual. Even excluding the implied bias, cumulative error occurred.

We respectfully submit that both of these errors were prejudicial independently, but even if the Court disagrees, the military judge – who was there and able to observe the demeanor of the parties, witnesses, and members at trial and during post-trial proceedings – found that in combination with each other, the errors deprived 1LT Badders of a fair trial. Her evaluation is correct and supported by the record. The

evidence of guilt was far from overwhelming. *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996) ("[C]ourts are far less likely to find cumulative error . . . when a record contains overwhelming evidence of a defendant's guilt."). Especially in such a close case, it is clear that these evidentiary errors affected the integrity of the findings and the military judge properly acted within her discretion to grant the mistrial.

B. Actual and apparent unlawful command influence

1. Standard of review

This Court reviews the issue of unlawful command influence (UCI) de novo. *United States v. Bergdahl*, 80 M.J. 230, 234 (C.A.A.F. 2020).

2. Facts

On Saturday, August 30, 2020, the Commanding General of 1CD, the convening authority in this case, called a meeting of senior leaders and others to discuss his new initiative – Operation Pegasus Strength. The SJA, the Division Chaplain, the Public Affairs Officer (PAO), all division brigade commanders, and others attended the meeting. R. at 691.

For the next week, Operation Pegasus Strength was a dominant event; tasks involved with the planning and implementation of Operation Pegasus Strength were a priority and took up a great deal of time for members of the planning team. *See* R. at 723.

On September 7, 2020 the convening authority signed the order establishing Operation Pegasus Strength. He formally announced its creation and mission to the division on September 14. Despite the fact that the program "kicked off" the very week this court-martial took place, there was no mention of it during voir dire.

Trial defense counsel were not aware of the order, the announcement, or the fact that the Operation went into effect on September 21. This court-martial began the next day. Members of the panel selected included the PAO (LTC CB), the Division Chaplain, and two brigade commanders in the division.

On September 23, at approximately 1430, LTC CB received an email from a reporter inquiring about the case involving Sergeant (SGT) EF, a Trooper within 1CD who committed suicide after his claim of sexual assault was unsubstantiated. R. at 697. Less than 30 minutes after he

got the email from the reporter, LTC CB forwarded the email to the SJA and other public affairs personnel, asking for assistance in drafting a response. At the time LTC CB forwarded the email, he was at the courthouse before court recessed for the day. R. at 697-98. Neither the SJA nor anyone on his staff replied to LTC CB's email.

The evidence closed that afternoon. Arguments, instructions, and deliberations were set for the next day. After court recessed for the day, LTC CB went to his office and began working on his reply to the reporter. He then went to the SJA's office where he, the SJA, the DSJA, and the CoJ met in the SJA's office space to discuss the issue. R. at 659-60, 667, 682, 686, 700.

The SJA suggested edits to LTC CB's draft reply. R. at 667-68. At no time did the SJA, the DSJA, or the CoJ suggest to LTC CB that he should: not reply to the reporter; delegate the reply to another member on his staff who had experience interacting with the press (such as his NCOIC, a Master Sergeant, R. at 689); be excused from the panel in this case; or report the email traffic and meeting to the military judge. R. at 707.

At approximately 2045 that night, LTC CB replied to the reporter's inquiry by email, including the language from Operation Pegasus Strength regarding "eradicating corrosives" from the unit (referring, in part, to people who commit sexual assault). R. at 704.

On September 24, while the members were deliberating on guilt or innocence in this case, the Defense saw an online article published by Task and Purpose regarding the 1CD's efforts to combat sexual assault in light of recent media and Congressional attention on Fort Hood. The article quoted LTC CB: "[CB], the Fort Hood spokesperson, said the 1st Cavalry Division is 'leading the way' for the Army and Fort Hood through Operation Pegasus Strength, 'which aims to eradicate corrosives in the 1st Cavalry Division.'" App. Ex. XXXII.

Defense counsel immediately brought the article to the military judge's attention. He asked her to stop deliberations and re-open voir dire. The military judge recessed the court to permit trial counsel to investigate the factual background of the article.

During the recess, trial counsel consulted the CoJ and the DSJA regarding Operation Pegasus Strength. When the court came to order,

the CoJ was present in the courtroom. Trial counsel opposed the request to re-open voir dire. The military judge stated, "I find that the quotes do not establish either actual or implied bias" and denied the request for additional voir dire.

Later that same day, the panel convicted 1LT Badders of sexual assault.

Trial counsel provided numerous documents in response to the Defense's post-trial discovery requests, including "Talking Points" that LTC CB sent to the convening authority on September 21 (the day before this trial began). One of the talking points was, "Operation Pegasus Strength is a Division operation aimed at eradicating corrosives from our Army while simultaneously building cohesive teams. Suicide, sexual assault, sexual harassment and extremism have no place on our team."

On November 9, the Defense filed a post-trial motion requesting, *inter alia*, that the military judge reconsider her ruling denying a Defense request to re-open voir dire during deliberations, and declare a mistrial based on the discovery of the email that LTC CB sent to a reporter during the trial that led to the article in question. The motion also raised the

issue of unlawful command influence based on the development and implementation of Operation Pegasus Strength.

On November 10, defense counsel interviewed the Division SJA regarding Operation Pegasus Strength and the post-trial motion. The SJA told counsel he had "no responsibility" for Operation Pegasus Strength. *See* R. 675-76. He did not mention the email from or the mid-trial meeting with LTC CB.

On November 11, the Defense requested production of the SJA and LTC CB, among others, at the post-trial hearing. On November 13, the military judge docketed the case for a post -trial hearing to take place on November 19, 2020. Later that day, the Government denied the Defense request for production of witnesses in its entirety.

On the morning of November 17, the Defense filed a motion to compel production of the witnesses, including the SJA and LTC CB. Later that day, trial counsel informed the Defense that she believed the appropriate witness to call would be the DSJA vice the SJA.

Late in the day on November 17, defense counsel interviewed the DSJA, and heard for the first time that a meeting took place on the

evening of September 23, in the middle of trial, attended by LTC CB, the SJA, and the DSJA.

On November 18, the Defense interviewed LTC CB and learned three important new facts: 1) LTC CB forwarded the email from the reporter to the SJA from the courthouse before the military judge recessed for the day; 2) there was email traffic between LTC CB and the SJA regarding edits to LTC CB's reply to the reporter; and 3) not only were the SJA and DSJA present at the meeting with LTC CB in the middle of trial, but the CoJ also was there.

At some point prior to the hearing, the SJA detailed the CoJ to act as assistant trial counsel at the post-trial hearing. R. at 672.

3. Actual UCI

"Actual unlawful influence occurs when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018). Certainly that occurred in this case. The convening authority himself was directly involved; he called a meeting on a Saturday to discuss Operation Pegasus Strength with his

subordinate leadership, *which included LTC CB and three other members who sat on this panel*, and he was being kept informed of the status of the press release at issue. His lawyer, the SJA, was at that initial Saturday meeting and also discussed Operation Pegasus Strength with LTC CB at the improper meeting with LTC CB in the middle of trial. And finally, the CoJ was aware of all of this yet failed to bring it to the military judge's or the Defense's attention, even after he was actually aware it was an issue in the case.

This Court has held:

> Like the majority of courts, this Court has accepted the doctrine of chances as a viable theory of logical relevance. This doctrine posits that it is unlikely a defendant would be repeatedly, innocently involved in similar, suspicious circumstances. 2 Wigmore on Evidence § 242 at 45 (Chadbourne rev. 1979) ("The doctrine of chances and the experience of conduct tell us that accident and inadvertence are rare and casual; so that the recurrence of a similar act tends to persuade us that it is not to be explained as inadvertent or accidental.").

United States v. Tyndale, 56 M.J. 209, 213 (C.A.A.F. 2001) (additional citations omitted). The doctrine of chances, when applied to this case, dictates that at a certain point, the Government's evasive conduct regarding the meeting with the member constituted an improper

manipulation of the criminal justice process, and accordingly, negatively affected the fair handling and disposition of this case. *Barry*, 78 M.J. at 77. From the incomplete proffer to the Court regarding the facts and circumstances surrounding the creation of the mid-trial press release, to the CoJ's silence during the proffer, to the SJA's lack of candor regarding the meeting (or "engagement," as he called it during his testimony, R. at 678), to the Government's denial of the relevant Defense witnesses for the post-trial hearing, to the detailing of a material witness (the CoJ) as assistant trial counsel for the post-trial 39(a), the Government continuously, deliberately, and improperly sought to manipulate the criminal justice process by preventing the light of truth from shining upon the facts of the OSJA's involvement with the member during the court-martial. These repeated actions constitute actual UCI.

4**. Apparent UCI**

"The appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Boyce*, 76 M.J. 242, 248 (C.A.A.F. 2017). "The question whether there is an appearance of unlawful command influence

is similar in one respect to the question whether there is implied bias, because both are judged objectively, through the eyes of the community.... Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system'" or in other words, "the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.*

It is significant that the Defense need not show knowledge or intent by the SJA, DSJA, CoJ, or trial counsel to show apparent unlawful command influence. "The key to our analysis is effect—not knowledge or intent." *Id.* at 251. If we give the benefit of the doubt to the remarkable, continuous usurpations of the criminal justice process by the OSJA, and thereby strip any knowledge or intent from the OSJA's actions, we are nonetheless left with their actions, which give rise to apparent UCI because of the effect on 1LT Badders' case. The OSJA's actions resulted in incomplete and inaccurate information relayed to the military judge

about the real-time relationship between a panel member and the OSJA during the court-martial when a material fact, the circumstances surrounding the press release, was at issue. By withholding accurate and complete information from the military judge, whatever the reason or for no reason at all, the OSJA's actions would cause a disinterested observer, fully informed of all the facts and circumstances, to harbor significant doubt about the proceedings simply because the meeting occurred, and no member of the Government told the military judge or the Defense about the meeting. The effect of this conduct was to deprive 1LT Badders of a fair trial, and cause a member of the public to have grave doubts about the fairness of the process in this case.

C. Actual and implied bias of the member

1. Actual bias

"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). Even when a member claims to be able to properly evaluate the evidence and apply the law, this Court has held that, "in certain contexts mere declarations of impartiality, no

matter how sincere, may not be sufficient." *Id.* at 89. The record supports a finding of actual bias based on multiple grounds.

a. The mid-trial meeting

There was direct and uncontroverted evidence that a sitting member of this court-martial panel was discussing with the press, on behalf of Fort Hood and the convening authority for 1LT Badders' trial, a 1CD program with a stated intent of "eradicating corrosives" from the unit. "Corrosives" were specifically defined to cover sexual harassment and sexual assault. The member issued this press release during the court-martial, just hours before he began deliberating whether the Government had proved its case that 1LT Badders was a corrosive who had committed sexual assault. Based on LTC CB's involvement in Operation Pegasus Strength (including working with the convening authority, other command leadership, and the DSJA), there is a good faith argument that regardless of his claim to keep an open mind, he was unable to fully and fairly evaluate the evidence in this case and therefore a valid challenge for cause existed based on actual bias.

b. People as "Corrosives" and "two levels of truth"

During voir dire in another court-martial that took place the week following 1LT Badders' trial, LTC CB testified that *people* who commit sexual assault are "corrosives" within the context of Operation Pegasus Strength, not just the *conduct*. R. at 723-24; App. Ex. XXXVII, Ex. 9 (approx. 4:50). He also testified, in response to questions from the trial counsel, that there are "two separate levels of truth" regarding claims of sexual assault: those that are "true" and those that are "true but not true to a legal perspective."

While it is true that LTC CB did admit during voir dire that some claims are false, 1) the Court is not bound by his assertions, *Nash*, 71 M.J. at 89; and 2) it is his predisposition to believe that a claim is true without hearing any evidence at all that indicates his inability to follow the military judge's instructions. The fact that a sitting member starts a trial with the mindset of "corrosives" and the preconception that all sexual assault claims are true to some extent should cause serious concern, despite any claim he made to keep an open mind.

2. Implied bias

"Implied bias exists when most people in the same position as the court member would be prejudiced. It is evaluated objectively under the totality of the circumstances and through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system. The core of that objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel." *Dockery*, 76 M.J. at 96.

For the same reasons explained above, the mid-trial meeting and the member's views on "corrosives" and the "truth" of sexual assault claims would each, independently, cause the public to doubt the fairness in having him on this panel. In combination with each other, the proof of bias is overwhelming.

We acknowledge that the member's previously-existing professional relationship with the SJA and his staff was not a per se ground for challenge. However, we respectfully disagree with the military judge and the Army Court regarding the "routine" nature of the mid-trial meeting.

If the PAO, SJA, DSJA, and CoJ were meeting about one of the many other topics the PAO deals with, such as an upcoming event on post, or a press release about a new commissary opening, or even a military justice issue regarding a larceny case, perhaps the "unrelated" characterization would be valid. But instead, *the meeting involved the convening authority's directive regarding how to handle sexual assault*. The SGT EF case did involve suicide, but it was no secret that many believed his suicide was due to the fact that his sexual assault claim was unsubstantiated. Before this meeting took place, the member had heard quite a bit of evidence in the instant case that the complaining witness suffered mental health issues. R. at 382-87. The issues discussed in the meeting and the issues in the case in progress (this one) were *very* much related.

Even if the subject of such a conversation had been "about legal matters unrelated to appellant's case, . . . and, therefore, did not violate the letter of law, it was contrary to the spirit of both legal and ethical prohibitions against improper contact with a member." *United States v. Hamilton*, 41 M.J. 22, 26-27 (C.M.A. 1994). The Government has a

"burden to make a clear and positive showing that the improper communication from a third person or witness did not and could not operate in any way to influence the decision." *Id.* at 27 (internal quotes and citations omitted). In that case, the trial counsel promptly brought the matter to the military judge's attention, who then conducted a full inquiry on the record and took the remedial step of excusing the member. *Id.* That procedure should have, but did not, take place in 1LT Badders' case. The Government has not met its burden.

The Court should take particular note of this issue, particularly in light of the liberal grant mandate and current events. It is common knowledge that the military justice system as a whole – and its procedures for selecting members in particular – has come under severe scrutiny in recent years. There already is enough skepticism that a panel can be fair when its members are personally selected by the convening authority. A member of the public who heard about what happened in this case with respect to LTC CB certainly would "harbor a significant doubt about the fairness of the proceeding." *Boyce*, 76 M.J. at 248.

Finally, it is important to note that even had the military judge granted a challenge to LTC CB, the court-martial could have continued without his improper participation in the deliberations and verdict. R.C.M. 912B(c)(1)(A) (trial can proceed as long as there are six members). Instead, 1LT Badders was convicted by a panel that included a member who, after meeting personally with the convening authority and consulting with the convening authority's lawyers, spoke publicly about 1CD's bold new initiative to eradicate corrosives, including those involved in sexual assault, from the unit. There is no way to know or assess the impact of LTC CB's influence on the other panel members, especially considering the fact that he served on the convening authority's staff with three other senior officers who were on the panel. M.R.E. 606.

D. Conclusion

Several grounds exist to justify a mistrial. The Army Court's decision setting it aside conflicts with applicable decisions of this Court. This Court should grant review, reverse the Army Court, and return the case to the convening authority.

Conclusion:
This Court Should Grant Review

The Army Court's opinion finding appellate jurisdiction over this Government appeal decided a question that has not, but should be, settled by this Court. Furthermore, the decision, which sets aside the military judge's mistrial order, decided questions of law in conflict with applicable decisions of this Court. All of these grounds constitute good cause to grant review.

We respectfully submit that the Army Court did not have jurisdiction, that the military judge did not abuse her discretion, and that cumulative and/or other error existed justifying the mistrial. The errors, individually and especially in conjunction with each other, were materially prejudicial to 1LT Badders' substantial right to a fair trial.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was sent via email to this Honorable Court and the Army Government Appellate Division on December 20, 2021.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This Supplement does not comply with the type-volume limitation of Rule 24(c) because it contains 14, 965 words. Counsel filed a Motion for Leave to File Supplement in Excess of Volume Limits contemporaneously with this Supplement.

2. This Supplement complies with the typeface and type style requirements of Rule 37.

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APPENDIX

United States v. Badders, ARMY MISC 20200735

(A. Ct. Crim. App. Sept. 30, 2021) (mem. op.)

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ, WALKER, and PARKER
Appellate Military Judges

UNITED STATES, Appellant
v.
First Lieutenant SAMUEL B. BADDERS
United States Army, Appellee

ARMY MISC 20200735

Headquarters, 1st Cavalry Division
Douglas K. Watkins and Maureen A. Kohn, Military Judges
Colonel Howard T. Matthews, Jr., Staff Judge Advocate

For Appellant: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Lieutenant Colonel Craig J. Schapira, JA; Captain Allison L. Rowley, JA (on brief and reply brief).

For Appellee: Captain Andrew R. Britt, JA; Jack B. Zimmermann, Esquire; Terri R. Zimmermann, Esquire (on brief).

30 September 2021

MEMORANDUM OPINION AND ACTION ON APPEAL
BY THE UNITED STATES FILED PURSUANT TO
ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ALDYKIEWICZ, Senior Judge:

Appellant asserts the military judge erred when she granted defense counsel's post-trial motion for a mistrial. We agree and reverse the military judge's ruling.

I. OVERVIEW

An officer panel sitting as a general court-martial convicted appellee, contrary to his plea, of sexual assault, in violation of Article 120, Uniform Code of Military

Justice; 10 U.S.C. § 920 (2019) [UCMJ].[1] In a judge alone sentencing hearing, the military judge sentenced appellee to a dismissal and confinement for twelve months. Post-trial, the defense filed a motion requesting, *inter alia*, entry of a finding of not guilty to the Charge and Specification, dismissal of the Charge and Specification with prejudice, or a mistrial.

Following a post-trial Article 39(a), UCMJ, session to address the defense's post-trial motion, the military judge declared a mistrial. In reaching her decision, the military judge relied on the "cumulative error doctrine," citing the cumulative effect of two evidentiary rulings she determined were erroneous yet non-prejudicial and her post-trial finding of implied bias linked to one panel member, Lieutenant Colonel (LTC) B, the 1st Cavalry Division Public Affairs Officer (PAO).

Under the provisions of Article 62, UCMJ, the government appealed the military judge's decision to grant a mistrial.

II. FACTS

The factual findings as set forth by the military judge in Appellate Exhibit LXV are not clearly erroneous and thus, we adopt them herein. *See United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007) ("Findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record."). As our decision herein is based upon and limited to the military judge's implied bias finding, only facts and conclusions relevant to that ruling are reproduced herein.

Factual Findings[2]

> 1. On 19 December 2019, the 1CD CG referred one specification of sexual assault without consent in violation of Article 120, UCMJ and one specification of fraternization in violation of article 134, UCMJ. On 24 September 2020, contrary to his pleas, an officer panel convicted the Accused of the sexual assault.
>
> 2. In 2017, AV and the Accused met on a social networking dating application (Tinder). Near the end of

[1] Appellant was also charged with and acquitted of fraternization in violation of Article 134, UCMJ, an acquittal due to a successful defense motion for a finding of not guilty under the provisions of Rule for Court-Martial [R.C.M.] 917.

[2] The footnotes from the military judge's ruling have been omitted.

2018, while deployed to Germany, they reconnected and began a consensual sexual relationship.

3. In April 2019, AV filed an unrestricted report alleging that on 1 January 2019, during otherwise consensual sexual activity, the Accused inserted his penis into her anus without her consent.

4. On or about 28 July 2020, the "U.S. Secretary of the Army appointed the Fort Hood Independent Review Committee (FHIRC) and directed it to 'conduct a comprehensive assessment of the Fort Hood command climate and culture..., and its impact, if any, on the safety, welfare and readiness of our Soldiers and units.'"[] Specifically the Secretary of the Army tasked the FHIRC to review the compliance of certain commands and units with applicable policies and regulations regarding sexual assault prevention and response, sexual harassment, and equal opportunity.

5. On or about 30 August 2020, the 1CD CG held a briefing with brigade commanders regarding Operation Pegasus Strength, a readiness operation to address the Chief of Staff of the Army's number one priority of taking care of people. The audience included the SJA, and four other individuals, to include LTC [B], who all later sat on the Accused's court-martial panel.[3]

6. On 7 September 2020 1CD published 1st CAV DIV Trooper Readiness Order 20Ll-188 (Operation Pegasus Strength).

a. The stated mission is to build "upon existing programs to engage Troopers, Leaders and Families in order to enhance individual and family readiness, build cohesive teams and improve the personal welfare of every Trooper in the Division."

[3] The SJA did not sit on appellee's court-martial. Rather – the four individuals, beyond the SJA, "all later sat on the Accused's court-martial panel."

b. Key tasks focus on engagement between leaders and troopers; training; and, identifying "all stressors affecting Troopers across" the formation.

c. The published end state is: "Troopers, Leaders and Families understand their purpose in life, feel belonging to something bigger than themselves and develop trust between each other; while stressors are identified, communication improved and resources required to increase readiness and build trust leveraged resulting in the reduction of corrosives on our formation."

. . .

8. The CG formally announced the creation of Operation Pegasus Strength and its mission to the Division.

9. The trial and defense counsel at the time of the Accused's trial were not aware of Operation Pegasus Strength.

10. 21 September 2020, LTC [B] emailed the CG, talking points to send to the Sergeant Major of the Army (SMA) for his consideration regarding Operation Pegasus Strength. These stated points are:

a. "Operation Pegasus Strength is a deliberate part of our training to enable Troopers, Leaders, and Families to build purpose, belonging and trust that builds cohesive teams."

b. "Operation Pegasus Strength is a Division operation aimed at eradicating corrosives from our Army while simultaneously building cohesive teams. Suicide, sexual assault, sexual harassment and extremism have no place on our team."

c. "Take the time to truly know and learn about the people in our team! Take the time to learn where they're from, what they want to accomplish in the Army, and how they want to make a difference. We owe it to each other, to care of one another and help any teammate in need. We owe it to each other, to treat one another with dignity and respect."

d. "We challenge you to build trust and confidence in each other; ensure everyone is always treated with dignity and respect."

11. On 22 September 2020, the Accused's court-martial began. The FHIRC members were at Fort Hood conducting interviews and sensing sessions. The 1CD OSJA provided attorney and court reporter support to the FHIRC.

12. Also during this week, there was national media attention into the 1CD handling of a case involving a Soldier who committed suicide after allegedly being informed that his allegations of sexual harassment were unsubstantiated.

. . .

14. At the time of trial LTC [B] was the 1CD Public Affairs Officer; a position he was serving in at the time of the court-martial. LTC [B] is on the 1CD CG's personal staff and is rated by the 1CD Chief of Staff.

. . .

16. During group *voir dire*, LTC [B] answered in the affirmative to the defense question "Do you believe we have a problem with sexual assault in the Army?"

17. During individual *voir dire* LTC [B] went into extensive detail regarding his duty position as the PAO. He explained that part of his duties included completing press releases for 1CD; developing the Division's social media presence; and, assisting the CG with statements to the public.

18. The trial and defense counsel also questioned him about his response during group *voir dire* regarding his agreement that the Army has a problem with sexual assault. LTC [B] stated that that one sexual assault is one too many. LTC [B] also stated the Army takes allegations seriously; but this must be balanced against due process. LTC [B] further stated that not all allegations are true or meet the evidentiary standards required by law to convict

a person of sexual assault. He affirmatively responded that he could follow the military judge's instruction and that he could be fair and impartial.

19. Neither party made a challenge against LTC [B].

. . .

51. At some point on 23 September, LTC [B] received an email request from a journalist, Mr. [CS], to respond to comments made by the Massachusetts Congressional Delegation who recently visited Fort Hood. LTC [B] was familiar with Mr. [S] from previous press inquiries surrounding a high profile Soldier suicide.

52. After trial recessed for the evening, LTC [B] went to see the 1CD SJA, DSJA and CoJ around 1900-1930 regarding Mr. [S's] media inquiry. The OSJA is located in the same building as the PAO where LTC [B] works. LTC [B] asked the SJA and CoJ to describe the legal process regarding the administrative investigation's unsubstantiated findings regarding a sexual harassment claim made by the deceased Soldier.

53. The SJA and CoJ were aware that LTC [B] was a panel member in this case.

54. At no time was there any discussion or reference to LTC [B's] duties as a panel member or the Accused's trial.

55. The SJA is involved in all high profile media inquiries for 1CD. Assisting the PAO with these inquires would be normal for the SJA.

56. During the trial, the SJA did not tell the trial counsel that he and the CoJ had an in-person conversation with LTC [B] because he believed at the time it was not relevant since all the discussions centered on LTC [B's] capacity as PAO.

57. LTC [B] responded to Mr. [S's] email that evening using talking points from Operation Pegasus Strength.[]

. . .

59. On 24 September, Mr. [S] published his article in the Patriot Ledger, Quincy, Massachusetts. In the article, Mr. [S] attributes some of the responses and quotes to LTC [B]. The article was published on-line and was picked up by other on-line news organizations to include Task & Purpose – Military News, Culture, and Analysis.

60. While the panel was in deliberations for findings, the defense saw Mr. [S's] on-line article published in Task & Purpose and brought the article to the court's attention.

61. The article contained the line "[B], the Fort Hood spokesperson, said the 1st Cavalry Division is 'leading the way' for the Army and Fort Hood through Operation Pegasus Strength, 'which aims to eradicate corrosives in the 1st Cavalry Division.'"

62. In an Article 39(a) the defense requested that the court stop the panel's deliberations and reopen *voir dire* .

63. The court heard arguments from both parties, reviewed the article and the quotes made by LTC [B], and reviewed its notes regarding LTC [B's] initial *voir dire.* The court denied the defense request to stop the panel's deliberations to re-open *voir dire*.

64. The court ruled that the quotes attributed to LTC [B] in the article did not establish actual or implied bias. The court found that the comments "were not tied to the court martial in way." In the court's stated findings of fact, it determined that: LTC [B's] quoted comments were in reference to a high profile investigation involving the suicide of a Soldier; that during *voir-dire*, the government and defense counsel questioned LTC [B] about the media attention regarding the Soldier's suicide; LTC [B] explained during *voir dire* that as part of his duties as PAO, he has provided press releases and answered press inquiries regarding high profile cases that were currently in the national news; LTC [B] affirmatively stated that his knowledge of that case [involving the deceased Soldier] would not impact his ability to be impartial; and he felt no pressure to make a finding one way or another in this case.

The court also stated that LTC [B] answered in the affirmative that sexual assault is an issue in the Army because "one assault is too many," but that he also stated that an allegation of sexual assault could be unfounded or false.

. . .

73. LTC [B] was set to serve as a panel member on a case the following week after the conclusion of the instant case. During individual *voir dire* of that case, LTC [B] was questioned by counsel about his statements regarding Operation Pegasus Strength.

74. During the colloquy, LTC [B] indicated that not all allegations are true or meet the evidentiary standards required by law to convict a person of sexual assault. He also stated that he could follow the court's instruction. The court granted the defense challenge and he did not sit on that court-martial.

75. FRAGO 2 was published on 1 October 2020.

a. The wording of the mission changed to: "1st Cavalry Division executes Operation Pegasus Strength in order to build cohesive teams, leaders, and families to eradicate corrosives in our military."

b. A "Purpose" statement added: "Operationalize how we put "People First" in the 1st Cavalry Division to identify stressors and communication skills that enable Troopers, Leaders and Families to build purpose, belonging and trust that build cohesive teams."

c. A new first key task added: "Know your team on the individual level to build inclusion, understanding, and trust." Task number 5 is added "Leaders holding others accountable for results."

d. Other changes were made that are not relevant to this motion.

. . .

77. The defense made several post-trial discovery requests to include "Official Army-created or maintained documents relevant to the creation and execution of Operation Pegasus Strength, including any documents that define important terms such as "corrosives," all press releases regarding the operation, and all correspondence between the convening authority and LTC [B] concerning the operation."

. . .

79. On 15 October 2020, the government provided to the defense the PAO response along with the trial counsel's email request to PAO.

. . .

82. On 10 November 2020, the defense interviewed the 1CD SJA.

a. The defense informed the SJA that they were interested in information regarding Operation Pegasus Strength. They also provided background and context for the post-trial motion, discussed the nature of the defense's post-trial discovery request, and told the SJA that the defense had listed him as a witness.

b. The SJA informed the defense that he had "no responsibility" for Operation Pegasus Strength.

c. The SJA did not disclose to the defense the 30 August meeting the CG held with his brigade commanders that the SJA attended regarding Operation Pegasus Strength.

d. The SJA did not inform the defense about the 23 September email from LTC [B] regarding the suicide of a Soldier's press inquiry or the face-to-face- discussion he and LTC [B] had that evening regarding the same topic

83. On 17 November 2020 the defense interviewed the DSJA. During that interview he informed the defense about the face-to-face conversation between LTC [B], the SJA and CoJ on 23 September 2020.

84. On 18 November 2020 the defense interviewed LTC [B]. During that interview the defense learned:

a. That LTC [B] had forwarded the email from the reporter to the SJA from the courthouse before the court recessed for the day.

b. That on 23 September, LTC [B] spoke with the SJA, DSJA, and CoJ regarding the press inquiry.

85. LTC [B] forwarded to the defense emails between him and the SJA that had not been previously requested by the defense and therefore not sought by the government.

. . .

87. On 19 November 2020, the court held the post-trial Article 39(a).

. . .

89. During the hearing, LTC [B] testified that in an earlier court-martial during *voir dire*, a counsel had asked him if he had concerns about sitting on a court martial panel. He stated that he responded in the affirmative and explained that he was concerned that he could have prior knowledge of a case due to his position as the PAO.

90. LTC [B] testified that the term "corrosives" as used in the news article by Mr. [S], other press releases, and in Operation Pegasus Strength refers to the conduct of sexual assault, sexual harassment, and bullying and not to people. LTC [B] believes that type conduct does not help build teams.

91. The SJA testified that individual members within his office are on a need to know basis. He explained that this allows for separation within the office due to the various sections working on issues that may overlap and conflict.

92. 25 November 2020, the defense filed a supplemental post-trial motion seeking dismissal, mistrial or new trial. On 3 December 2020, the government filed its response.

Based on the above facts, the military judge found no "actual bias" on the part of LTC B, noting in part:

> The defense argues that LTC [B's] involvement in Operation Pegasus Strength and his personal views regarding sexual assault in the Army demonstrate his actual bias. This court disagrees. Furthermore, the government did not have a duty to notify the defense of Operation Pegasus Strength.

In discussing Operation Pegasus Strength, the term "corrosives," LTC B's involvement and association therewith, and his responses regarding "sexual assaults" in the Army, the military judge noted:

> LTC [B] stated during individual *voir dire* that he would weigh all the evidence and would listen to the military judge's instructions. He stated that not all allegations are true and that some allegations are unfounded. He was candid with the court, both during *voir dire* and during the post-trial Article 39(a) session. LTC [B] was direct and forthright in his answers. During his post-trial Article 39(a) testimony, he stated that corrosives refer to conduct and not people and how that conduct does not help to build teams. This court interpreted his reference to "conduct" to mean the conduct of committing a sexual assault, sexual harassment or bullying. This court finds no evidence in his answers or demeanor that indicate that he did not yield to the court's instructions or to the evidence presented at trial.
>
> LTC [B] sat as panel member in another court-martial after the conclusion of this case. During the *voir dire* in the subsequent case, LTC [B] responded to a question from trial counsel with the answer: "there are two separate levels of truth" regarding claims of sexual assault - those that are "true but not true to a legal perspective." LTC [B] followed-up his answer by explaining that it was important to believe a victim to provide that person with the necessary care, to investigate the claim fully, and to ensure due process for the Accused in accordance the Constitution. His answer conformed to what the military justice system requires of an impartial panel member. Military courts instruct the panel members that to convict they must find the accused guilty beyond a reasonable

> doubt. In other words, it is not enough to just believe a crime occurred, a panel member must be convinced beyond a reasonable doubt. LTC [B's] response may have been an unartful description of the government's burden, but it was not incorrect. Therefore his answer did not taint the perception or appearance of fairness of the military justice system.

Having found that LTC B harbored no actual bias, either before or after the 23 September meeting with the SJA, DSJA, and CoJ, the military judge turned to implied bias. Addressing implied bias, the military judge noted:

> When considering whether LTC [B] demonstrated an implied bias, this court considered the totality of his answers, objectively, through the eyes of the public. *See United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004)[.] Based on the facts discussed above, this court does not find that LTC [B's] answers during *voir dire* in the instant case or his answer regarding "true but not true to a legal perspective" in the subsequent, unrelated case to demonstrate actual or implied bias. LTC [B's] answers reflected an open mind, a willingness to apply the court's instructions, and an understanding of the law. An objective observer would not have had a substantial doubt about the fairness of the accused's court-martial based on LTC [B's] answers.
>
> The defense argues that the court erred when it did not interrupt deliberations to *voir dire* LTC [B] regarding Mr. Shepard's article. The defense argues that had the *voir dire* occurred, then LTC [B's] understanding of the "two levels of truth," and his involvement in Operation Pegasus Strength would have been revealed. These views plus his press response as published in Mr. [S's] article, would have led to a valid challenge for cause. This court disagrees.
>
> As discussed above, this court finds that LTC [B's] involvement in Operation Pegasus Strength and his statement of "two levels of truth" did not establish actual or implied bias.
>
> In addition to its arguments concerning the court erring in not interrupting deliberations, the defense argued in the

post-trial Article 39(a) session and in its supplemental pleading that LTC [B's] meeting with the SJA and CoJ to discuss a press inquiry, created an implied bias. At the time of trial, the parties were unaware that LTC [B] had an in-person conversation with the SJA and CoJ on 23 September when court recessed for the evening.

Our higher courts have held that when the SJA or his staff are aware of matters that might lead to a valid challenge, a duty to disclose exists. *United States v. Glenn*, 25 M.J. 278, 280 (C.M.A. 1987) (reversing, holding that "Lieutenant Colonel Stine, the deputy and later acting staff judge advocate in this case, had an affirmative duty to inform the staff judge advocate, trial counsel, and defense counsel that Captain Hamlyn was related to him by affinity. His failure to do so has invited needless appellate litigation in this case."); *United States v. Schuller*, 5 U.S.C.M.A. 101, 17 C.M.R. 101 (1954) (error when the trial counsel and the law officer (now the military judge) failed to disclose to the accused that the law officer had previously served as the staff judge advocate to the convening authority in the accused's case). The Court, in these cases found that the public would not be convinced that the accused received a fair trial.

In this case, once the government made inquiries at the OSJA on 24 September to make its proffer about LTC [B's] statements to the press about Operation Pegasus Strength, the CoJ, DJSA or SJA should have been put on notice that the events surrounding the press inquiry were in issue. At this time the CoJ, DSJA or SJA should have informed the trial counsel about the face-to-face conversation they had with LTC B regarding the press release. Had this occurred, the court would have interrupted deliberations to *voir dire* LTC B. Since the court did not have this information, a perception was created that could lead members of the public to believe that the Accused did not receive a fair trial.

This case is unique due to LTC [B's] position as the PAO, and the high profile events surrounding Fort Hood at the time of this trial. In this case, the court did not issue an instruction prohibiting the panel members from performing their normal duties when the court was in

recess. This is not an instruction normally given to panel members. It is reasonable to believe that many panel members catch up on email and handle other work related issues when court is in recess.

On 23 September, 2020, LTC [B] received an email from a reporter to respond to comments from the Massachusetts Congressional Delegation as it related to the death of Soldier and systematic problems on post to include "Soldiers not getting resources to live safely and in healthy conditions." *See Government's Response to Defense Post Trial Motion*, Exhibit 4, email from Mr. [CS] to LTC [B] dated 23 September 2020 Subject Request for Response to Comments from Members of Massachusetts Congressional Delegation. After court recessed for the evening, LTC [B] began drafting his response and emailed it to the SJA for his input. Since they worked in the same building, LTC [B] walked over to the SJA's office to discuss his initial draft and to ask how to describe the legal process of the investigation. The SJA then included the CoJ into the discussion. They met for approximately 30 minutes and LTC [B] left to complete his response. At no time did anyone mention or refer, directly or indirectly, to the court-martial. However, both the SJA and CoJ knew that LTC [B] was a panel member in this case.

Mr. [S's] article was subsequently published in the "Task and Purpose" and several other on-line news outlets. The article initially addressed the Massachusetts Congressional Delegation's earlier visit to Fort Hood, and the suicide of a Soldier and the investigation regarding sexual harassment allegations made by that Soldier. The article quoted LTC [B] regarding the findings of the investigation. The article then turned to other issues at Fort Hood. It quoted a U.S. Representative: "And several female soldiers told the members of Congress that they wouldn't feel comfortable reporting a sexual assault at the base .... Most significantly, I think what we saw is that we need to address the toxic culture of fear, intimidation, harassment and indifference .... We also know that a majority of victims are harassed by someone in their own chain of command." Immediately following the U.S. Representative quote, was a quote from LTC [B] stating

> that Operation Pegasus Strength "aims to eradicate corrosives in the 1st Cavalry Division."
>
> This court does not find LTC [B's] statements quoted in the article raised an implied bias. The article covered a range of issues at Fort Hood. When the article turned to the issue of sexual assault there was just the one quote from LTC [B] and he did not define the term "corrosives." His comments are that of what the public would expect from the command.
>
> However looking at the totality of the circumstances – not just the article, but more specifically, the meeting with the SJA and CoJ while sitting as a panel member in an ongoing court-martial where the Accused is charged with sexual assault does raise concern. This conduct would raise doubt in the eyes of the public that the Accused received a fair trial. The optics of the SJA, chief prosecutor and sitting panel member meeting after hours while the court martial is ongoing does not give the perception of fairness.
>
> There is no question that LTC [B] was only performing his duties as the PAO and that at no time did anyone speak about this court-martial. Further, it is understandable that the SJA, DSJA, and CoJ may not have thought twice about speaking with LTC [B] due to the urgency and high profile nature of the press release. This ruling pertains to the unique facts in this case, specifically while this court was in recess for the evening, a panel member meeting with the CoJ and SJA at the OSJA. These facts in this case created a perception that would raise doubt in the eyes of the pubic which cause an implied bias. This court does not imply that all contact between a panel member and a member of the OSJA automatically creates an appearance of bias. For example a panel member who is a brigade commander speaking with their brigade judge advocate on legal issues pertaining to the brigade or a panel member who is a brigade commander or staff primary speaking with the SJA on the telephone regarding an administrative law issue would likely not cause implied bias. The analysis is fact dependent.

In granting the mistrial, the military judge noted:

> A mistrial is a disfavored and unusual remedy. *United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2005). It is a drastic remedy of last resort. *United States v. Dancy*, 39 M.J. I (C.M.A. 1993). "A military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." *United States v. Flores*, 80 M.J. 501, 507 (C.G. Ct. Crim. App. 2020) (quoting R.C.M. 915(a); *United States v. Short*, 77 M.J. 148, 151 (C.A.A.F. 2018)) (finding no abuse of discretion when military judge declared mistrial based on members receiving inadmissible evidence).
>
> Under the cumulative- error doctrine, "a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding." *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992) (citation and quotation marks omitted). *See also United States v. Pope*, 69 M.J. 328,335 (C.A.A.F. 2011).
>
> This court agrees that there were two identified errors in this case. . . . [4] Additionally, because this court did not have the information that an in-person conversation occurred between the SJA, CoJ and a panel member at the OSJA while this court martial was recessed for the evening, it did not *voir dire* the panel member. Had the court been aware of this information, it is likely this court would have permitted *voir dire* thus allowing defense to develop the information in question to determine whether a valid challenge for cause existed. Without the *voir dire* of the panel member, this meeting created an implied bias that would raise doubt in the eyes of the public that the Accused received a fair trial. The two evidentiary errors combined with the implied bias calls for a mistrial.
>
> This court is mindful that declaring a mistrial is a drastic remedy. Nonetheless this court has concerns about the

[4] The omitted text pertains to the two evidentiary trial ruling that the military judge determined, post-trial, were erroneous and non-prejudicial.

> perceived fairness of this trial based on the above stated errors and bias. Taken together, these circumstances cast a substantial doubt on the fairness of the proceedings. Therefore, this court finds that the granting of a mistrial is manifestly necessary in the interest of justice.

III. LAW AND DISCUSSION

We have jurisdiction to consider the government's appeal of this case under Article 62, UCMJ.[5] In so reviewing the case, we find that the military judge, abused

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[5] Appellee asserts we lack jurisdiction over this Article 62, UCMJ appeal, as the military judge's ruling does not "terminate[] the proceedings with respect to" this specification. *See* UCMJ art. 62(a)(1)(A). The government disagrees, arguing "the phrase 'terminates the proceedings' in Article 62 means to terminate the proceeding before the particular court-martial to which a charge has been referred . . . . [I]t is clear that a mistrial declaration terminates the proceedings." For the reasons outlined below, we find we have jurisdiction over this Article 62, UCMJ appeal.

We review issues of statutory interpretation and jurisdiction de novo. *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017) (citing *United States v. Vargas*, 74 M.J. 1, 5 (C.A.A.F. 2014)).

We look first to the text of the statute—if the statutory language is unambiguous, the statute's plain language will control. *Id.* (citation omitted). Under Article 62, UCMJ, the United States may appeal "[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification." UCMJ art. 62(a)(1)(A). Article 62(e), UCMJ, states that "[t]he provisions of this section shall be liberally construed to effect its purposes."

This court is unaware of any binding precedent directly holding a mistrial "terminates the proceedings" for Article 62, UCMJ purposes. There is, however, persuasive authority from our sister court in *United States v. Flores*, 80 M.J. 501 (C.G. Ct. Crim. App. 2020). In *Flores*, the court held, "we are satisfied that a mistrial terminates the proceedings within the meaning of Article 62." *Id.* at 506; *see also*, *United States v. Dossey*, 66 M.J. 619, 624 (N.M. Ct. Crim. App. 2008) (the phrase "terminates the proceedings" in Article 62 means to terminate the proceedings before the particular court-martial to which a charge has been referred). As the *Flores* court noted:

> The purpose of Article 62 is "to provide the Government with a right of appeal similar to that applicable in federal

(continued . . .)

her discretion in her post-trial finding of implied bias and its impact on the military judge's "cumulative error" analysis.[6]

When reviewing matters under Article 62, UCMJ, we may act only with respect to matters of law. *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). We review the evidence in the light most favorable to the prevailing party and are bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous. *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017) (citations omitted). We review conclusions of law de novo. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014).

A. The Cumulative Error Doctrine

"Under the cumulative error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'" *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011) (quoting *Banks*, 36 M.J. at 170-71). In describing the doctrine, the First Circuit stated:

(. . . continued)

> civilian courts under the Criminal Appeals Act, 18 U.S.C. § 3731." *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995). The Criminal Appeals Act, in turn, was "intended to remove all statutory barriers to Government appeals and permit whatever appeals the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975). A narrow interpretation that an order must permanently terminate a proceeding runs counter to this purpose.

80 M.J. at 505.

We agree with and adopt the reasoned analysis of the *Flores* court and likewise conclude that the military judge's ruling is properly reviewable under Article 62, UCMJ. To find otherwise would be contrary to the text of the statute and antithetical to its purpose.

[6] We need not and do not address the two aforementioned evidentiary rulings or any other trial rulings made in appellee's case (e.g., denial of defense's Military Rule of Evidence [Mil. R. Evid.] 513 motion), leaving those for appellate counsel to address in the normal course of post-trial appellate review under the provisions of Article 66, UCMJ.

> Under the cumulative error doctrine, "a column of errors may [] have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." In such rare instances, justice requires the vacation of a defendant's conviction even though the same compendium of errors, considered one by one, would not justify such relief.

United States v. Padilla-Galarza, 990 F.3d 60, 85 (1st Cir. 2021) (internal citations omitted).

As noted *supra*, the military judge's decision to grant a mistrial stemmed from her determination that a mistrial was required under the cumulative error doctrine, finding:

> The two evidentiary errors combined with the implied bias calls for a mistrial.
>
> . . .
>
> This court is mindful that declaring a mistrial is a drastic remedy. Nonetheless this court has concerns about the perceived fairness of this trial based on the above stated errors and bias. Taken together, these circumstances cast a substantial doubt on the fairness of the proceedings. Therefore, this court finds that the granting of a mistrial is manifestly necessary in the interest of justice.

While we agree that non-prejudicial evidentiary errors, when combined, may require a new trial; trial by a biased member, is structural in nature. As we will discuss, the presence of a biased member is not tested for prejudice and as such: 1) will always result in a new trial;[7] and 2) is not part of cumulative error math.

B. Implied Bias as a Structural Error

A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (distinguishing between structural defects

[7] We use the term new trial to encompasses both merits and sentencing where both were decided by a partial panel or sentencing only in cases where guilt was decided by a military judge alone but sentencing was decided by a partial panel.

in the constitution of the trial thus defying analysis under a "harmless-error" standard and trial errors occurring during the case presentation which can be "quantitatively assessed in the context of other evidence presented"); *Weaver v. Massachusetts*, 137 S. Ct. 1894, 1907-08 (2017). They are "errors so affecting the framework within which the trial proceeds, that the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *United States v. McMurrin*, 70 M.J. 15, 19 (C.A.A.F. 2011) (internal citation and quotation marks omitted). Examples of structural error include: trial by a partial (biased) judge, *Tumey v. Ohio*, 273 U.S. 510 (1927); total deprivation of the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); violation of the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-78, n. 8 (1984); deprivation, generally, of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984); unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); and improper jury instruction on "beyond a reasonable doubt" standard, *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Structural errors "defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309.

The presence of a biased member on the panel, whether actually or impliedly biased, is "inherently prejudicial" requiring reversal "without the need for a further showing of prejudice." In other words, the presence of a biased member is structural error, a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, 499 U.S. at 310. To conclude otherwise deprives an accused of a trial by impartial members.

As noted in *Tumey*, the Supreme Court found the presence of a biased judge to be structural error. 273 U.S. at 523; *see also*, *Sullivan*, 508 U.S. at 283 (noting that judicial bias is structural). The rationale underpinning *Tumey* applies equally to a biased member.

> *Reason and logic dictate that a biased juror should be treated the same way.* The constitutional right to have an impartial jury decide the accused's fate would be an empty promise if an appellate court could decide after the fact that, although the jury was not impartial, it would have made no difference in the ultimate decision to convict. There is no basis beyond sheer speculation for such a conclusion. The presence of a biased juror no doubt infects and pervades the entire trial proceedings and influences the jury's deliberations from start to finish. Harmless error analysis is completely inapt and inappropriate under these circumstances.

Williams v. Netherland, 181 F. Supp. 2d 604, 617 (E.D.VA 2002) (emphasis added) (juror deemed biased after failing to reveal varied sources of possible bias to include: significant prior relationship with prosecution witness; relationship with prosecutor; and, exposure to pretrial publicity); *see also*, *United States v. French*, 904 F.3d 111, 119 (1st Cir. 2018) ("we view the presence of a biased juror as structural error -- that is, per se prejudicial and not susceptible to harmlessness analysis"); *United States v. Mitchell*, 690 F.3d 137, 148 (3d Cir. 2012) ("the denial of the defendant's right to an impartial adjudicator, "'be it judge or jury,' is a structural defect in the trial"); *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001) ("presence of a biased juror, like the presence of a biased judge, is a 'structural defect in the constitution of the trial mechanism' that defies harmless error analysis"); *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992) ("presence of a biased jury is no less a fundamental structural defect than the presence of a biased judge"); *United States v. Mitchell*, 568 F.3d 1147, 1150 (9th Cir. 2009) ("'the presence of a biased juror introduces a structural defect' into a criminal defendant's trial") (internal citation omitted).

As a matter of law and logic, a biased member "cannot" be fair and impartial. An impartial trier of fact is required as part of an accused's structural protection for a fair trial; the absence thereof mandates automatic reversal. A review of Court of Appeals for the Armed Forces decisions appears to so hold, albeit stopping short of holding that a biased juror is structural error. In *United States v. Richardson*, finding an abuse of discretion for not applying the correct standard for implied bias and for not further developing the record about three panel members' relationships with trial counsel, the Court of Appeals for the Armed Forces (C.A.A.F.) set aside the findings and sentence without any discussion of prejudice. 61 M.J. 113 (C.A.A.F. 2005). In *United States v. Nash*, the CAAF affirmed the lower court's decision setting aside the findings and sentence after finding a member was biased, a decision that was not tested for prejudice. 71 M.J. 83 (C.A.A.F. 2012). Finally, in *United States v. Peters*, again without testing for prejudice, the CAAF set aside findings and sentence after finding implied bias based on a member's relationship with the prosecution. 74 M.J. 31 (C.A.A.F. 2015)

Whether deemed structural or not, a review of our higher court precedent makes clear that trial by a biased member is not tested for prejudice. That is, if implied bias is found, the only remedy that existed for the military judge was to declare a mistrial. There is nothing "cumulative" about such an error, as, if found, it would require a reversal.

D. The Military Judge Abused her Discretion in Finding Implied Bias Existed

Having reviewed the military judge's findings and conclusions, recognizing this court's fact-finding limitations under Article 62, UCMJ, and cognizant that an abuse of discretion requires more than "disagreement" with the trial judge's ruling,

see generally United States v. Bess, 75 M.J. 70, 73 (C.A.A.F. 2016) (citation omitted), we find that the military abused her discretion in finding implied bias related to LTC B.

Rule for Courts-Martial (R.C.M.) 912 directs excusal for cause whenever it appears that a 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). "This rule includes actual bias as well as implied bias." *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003) (citation omitted); *United States v. Leonard*, 63 M.J. 398, 401-02 (C.A.A.F. 2006); *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017).

A military judge's ruling excluding a member for bias is reviewed for an abuse of discretion. *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) (citing *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)). A military judge's ruling regarding actual bias is afforded great deference "because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire'" and such a challenge involves "judgments regarding credibility." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (quoting *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)). Implied bias, however, is reviewed "pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo." *United States v. Hennis*, 79 M.J. 370, 384-85 (C.A.A.F. 2020) (quoting *Dockery*, 76 M.J. at 96; *see also United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) (citing *United States v. Strand*, 59 M.J. 455 (C.A.A.F. 2004)). "[D]eference is warranted only when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts." *United States v. Briggs*, 64 M.J. 285, 287 (C.A.A.F. 2007) (citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)). A military judge that places his or her implied bias reasoning on the record "warrants increased deference from appellate courts." *Dockery*, 76 M.J. at 96 (citing *Clay*, 64 M.J. at 277). Conversely, one who fails to place sufficient reasoning on the record regarding his or her implied bias ruling is given less deference; "the analysis logically moves towards a de novo standard of review." *Dockery*, 76 M.J. at 96 (quoting *United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016) (internal quotation marks omitted)).

Implied bias is "bias conclusively presumed as [a] matter of law." *Hennis*, 79 M.J. at 385 (quoting *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.* (quoting *Wood*, 299 U.S. at 134); *see Black's Law Dictionary* 198 (10th ed. 2014) ("Bias, as of a juror, that the law conclusively presumes because of kinship or some other incurably close relationship; prejudice that is inferred from the experiences or relationships of a . . . juror . . . .").

Implied bias is "evaluated objectively under the totality of the circumstances and through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system." *Dockery*, 76 M.J. at 96 (internal quotation marks and citations omitted). "'The core of that objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel.'" *Id.* (quoting *Peters*, 74 M.J. at 34; *Rogers*, 75 M.J. at 271; *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015). "Viewing the circumstances through the eyes of the public and focusing on the perception or appearance of fairness in the military justice system, we ask whether, despite a disclaimer of bias, most people in the same position as the court member would be prejudiced." *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006) (citations omitted). "We look to determine whether there is 'too high a risk that the public will perceive' that the accused received less than a court composed of fair, impartial, equal members." *Id.* (citation omitted).

First and foremost, we applaud the military judge for holding a post-trial 39(a) session to address LTC B's mid-trial meeting with the SJA, DSJA, and CoJ. We also agree that "[t]he optics of the SJA, chief prosecutor and sitting panel member meeting after hours while the court martial is ongoing does not give the perception of fairness." If all an objective member of the public knew was that there was an afterhours meeting after a recess and prior to deliberations, with no additional information or facts, we agree that he or she would question the fairness of appellee's proceedings. To use a book analogy, if that is where the story ended, we would find no abuse of discretion. However, the military judge's ruling ignores, staying with our analogy, the epilogue.[8]

The military judge's post-trial 39(a) session and the unrebutted facts developed therein establish that the meeting that occurred between LTG B and members of the legal office was a time sensitive meeting between primary staff officer's performing their normal duties, duties unrelated to either appellee's court-martial or LTG B's service as a panel member.

A review of the military judge's ruling reveals that the government's non-disclosure of the 24 September meeting between the SJA, DSJA, CoJ and LTC [B] prior to adjournment played a significant role in her ruling:

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[8] Epilogue: "1: a concluding section that rounds out the design of a literary work[;] 2 a: a speech often in verse addressed to the audience by an actor at the end of a play also: the actor speaking such an epilogue b: the final scene of a play that comments on or summarizes the main action[;] 3: the concluding section of a musical composition[.]" https://www.merriam-webster.com/dictionary/epilogue.

> In this case, once the government made inquiries at the OSJA on 24 September to make its proffer about LTC [B's] statements to the press about Operation Pegasus Strength, the CoJ, DJSA or SJA should have been put on notice that the events surrounding the press inquiry were in is. At this time the CoJ, DSJA or SJA should have informed the trial counsel about the face-to-face conversation they had with LTC [B] regarding the press release. Had this occurred, the court would have interrupted deliberations to *voir dire* LTC [B]. Since the court did not have this information, a perception was created that could lead members of the public to believe that the Accused did not receive a fair trial.
>
> . . .
>
> However looking at the totality of the circumstances — not just the article, but more specifically, the meeting with the SJA and CoJ while sitting as a panel member in an ongoing court-martial where the Accused is charged with sexual assault does raise concern. This conduct would raise doubt in the eyes of the public that the Accused received a fair trial. The optics of the SJA, chief prosecutor and sitting panel member meeting after hours while the court martial is ongoing does not give the perception of fairness.

However, later, in addressing appellee's post-trial claim of unlawful command influence, another error raised by appellee in his post-trial motion, the military judge noted:

> As discussed in Issue 5: Request for Reconsideration of the Military Judge's Decision in Denying Defense's Request to Re-open Voir Dire during Deliberations, the government's failure to disclose the meeting between the SJA, CoJ, and LTC [B] resulted in the implied bias of LTC [B]. But, there is neither evidence that the government intentionally withheld the information from the defense; nor, the appearance that the government tried to manipulate the military justice system.

In support of her decision finding implied bias, the military judge relied on *United States v. Glenn*, 25 M.J. 278 (C.M.A. 1987) and *United States v. Schuller*, 5 U.S.C.M.A. 101, 17 C.M.R. 101 (1954). That reliance, however, is misplaced.

In *Glenn*,[9] a detailed court member was the sister-in-law of LTC S, the Deputy Staff Judge Advocate and Acting Staff Judge Advocate to the convening authority who convened appellant's court-martial, a fact that was undisclosed to the defense. *Glenn*, 25 M.J. at 279. In setting aside the sentence and authorizing a sentence rehearing, the court noted:

> We find it difficult to believe that either appellant or the public could be convinced that [Glenn] received a fair trial when he was not apprised of the fact that a member of the staff judge advocate's family was sitting on his court-martial.
>
> . . .
>
> Lieutenant Colonel [S's] failure to inform the parties of his familial relationship with Captain [H] precluded effective *voir dire* and made it impossible for either the military judge or counsel to accurately test Captain [H] for bias or determine whether a challenge for cause was necessary.

Id. at 280.

In *Schuller*, the law officer that presided over appellant's court-martial had acted as Acting Staff Judge Advocate in appellant's case, himself signing the Article 34, UCMJ pretrial advice in the case, albeit an advice determined on appeal to be defective. *Schuller*, 17 C.M.R. at 103. At trial, the trial counsel declared that the records in the case "contained no grounds for challenge." The law officer's response regarding any basis for challenge was, "'I know of no reason.'" *Id.* at 105. In post-trial affidavits submitted by the government, the trial counsel, rather than disclaim any knowledge of the law officer's disqualification simply stated that "he made his pretrial file available to the defense counsel, and that the file contained the original [disqualifying] advice." *Id.* The law officer attributed his nondisclosure to forgetfulness, that is, that he forgot the pretrial role he played in appellant's court-martial, a fact questioned but yet accepted by the court. *Id.*

In affirming the Board of Review's reversal of Sergeant Schuller's conviction, the Court of Military Appeals focused on the government's failure to comply with

[9] In *Glenn*, appellant plead guilty before a military judge alone and elected members for sentencing.

Article 34, UCMJ, coupled with the nondisclosure of the basis to challenge the law officer (i.e., the law officer disqualification issue).

> When these deprivations are coupled with the failure of trial counsel and the law officer to disclose the latter's previous connection with the case, we think that reversal of the conviction is proper.

Id. at 107.

Unlike the case at bar, neither the accused nor his defense counsel in *Glenn* or *Shculler* had the benefit of a timely post-trial 39(a) session to address the alleged basis for disqualification. Stated another way, the allegedly biased member was never questioned (i.e., voir dired) about the facts undergirding the alleged bias (e.g., familial relationship with prosecution or prior disqualifying action as Staff Judge Advocate and adviser to the convening authority on the case). The same cannot be said for appellee or his counsel, the latter subjecting both LTC B and the SJA to questioning, albeit post-trial.

> One touchstone of a fair trial is an impartial trier of fact – "a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). *Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

McDonough Power Equip. v. Greenwood, 464 U.S. 548, 554 (1984). In *United States v. Nieto*, our superior court noted that voir dire "provides an opportunity to explore whether a member possesses partiality or otherwise is subject to challenge." 66 M.J. 146, 149-50 (C.A.A.F. 2008). As the Coast Guard Court of Criminal Appeals noted, "[d]isclosure is no inoculation against disqualification. But without full disclosure" . . . "we are left with a record that cannot dispel the reasonable questions of a reasonable observer about the military judge's impartiality." *United States v. Goodell*, 79 M.J. 614, 618 (C.G. Ct. Crim. App. 2019) (internal citation omitted) (appellant denied due process when tried by a military judge who failed to disclose that she concurrently served as trial counsel in another court-martial).

The discovery of a potential basis for challenge left unexplored and unaddressed necessarily leads to a finding of implied bias. An objective observer and member of the public, "familiar with the unique structure of the military justice system," *see Woods*, 74 M.J. at 244, would have "substantial doubt about the fairness of the accused's court-martial panel," *see Rogers*, 75 M.J. at 272, if informed only that a panel member met with the SJA, DSJA, and CoJ during the pendency of a trial. That same is not true when that same objective observer and member of the public is made aware of: the purpose and subject of the mid-trial meeting (i.e., responding to a media query in an unrelated high-profile investigation with Congressional implications); the time constraints involved (i.e., the media response was due the next morning); the fact that the PAO (LTC B) always ran his high-profile media responses by legal (i.e., the SJA; the discussion was standard operating procedure for the PAO); and, the fact that neither appellee's court-martial nor LTC B's role as a member were discussed.

Finally, the arbitrary nature of the military judge's ruling is highlighted by the following excerpt from her ruling:

> There is no question that LTC [B] was only performing his duties as the PAO and that at no time did anyone speak about this court-martial. Further, it is understandable that the SJA, DSJA, and CoJ may not have thought twice about speaking with LTC [B] due to the urgency and high profile nature of the press release. This ruling pertains to the unique facts in this case, specifically while this court was in recess for the evening, a panel member meeting with the CoJ and SJA at the OSJA. These facts in this case created a perception that would raise doubt in the eyes of the pubic which cause an implied bias. This court does not imply that all contact between a panel member and a member of the OSJA automatically creates an appearance of bias. For example a panel member who is a brigade commander speaking with their brigade judge advocate on legal issues pertaining to the brigade or a panel member who is a brigade commander or staff primary speaking with the SJA *on the telephone* regarding an administrative law issue would likely not cause implied bias. The analysis is fact dependent.

(emphasis added). That the SJA, and by implication DSJA and CoJ could have spoken to LTC B, during the pendency of appellee's trial, telephonically and that would have been okay but doing so in person results in implied bias defies logic and reason.

Having considered the totality of the circumstances, recognizing this court's fact-finding limitations under Article 62, UCMJ, and cognizant that an abuse of discretion requires more than "disagreement" with the trial judge's ruling, we find the military abused her discretion in finding implied bias related to LTC B. Lieutenant Colonel B's presence on the court does not create "'too high a risk that the public will perceive' that the accused received less than a court composed of fair, impartial, equal members." *Moreno*, 63 M.J. at 134 (citation omitted); *see also*, *Woods*, 74 M.J. at 243-24 (citations omitted).

C. Standard for a Mistrial

Mistrials are to be granted when "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cause substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). A disfavored remedy, mistrials should be applied as the last resort to protect the sanctity of a fair trial. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003).

A military judge's ruling of a mistrial will not be reversed absent clear evidence of an abuse of discretion. *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009) (citing *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990)). An abuse of discretion occurs "if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law." *Dockery*, 76 M.J. at 96 (quoting *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006)). The abuse of discretion standard calls "for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[10] *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)).

As we have found the military judge abused her discretion in imputing an implied bias to LTC CB, we find error in the military judge's cumulative error math and an abuse of discretion in her mistrial declaration.

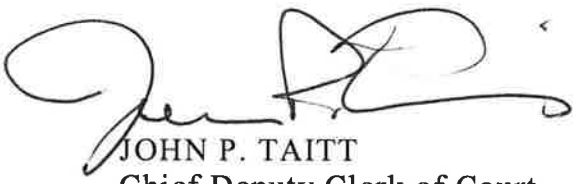
[10] Examples of an abuse of discretion include: when the military judge's ruling is based on findings of fact that are not supported by the record; the military judge uses incorrect legal principles; the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or, the military judge fails to consider important facts. *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017).

CONCLUSION

The appeal of the United States pursuant to Article 62, UCMJ, is GRANTED and the decision of the military judge is therefore **SET ASIDE**. We return the record of trial to the military judge for action consistent with this opinion.

Judges WALKER and PARKER concur.

FOR THE COURT:



JOHN P. TAITT
Chief Deputy Clerk of Court