IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE RESPONSE TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
First Lieutenant (O-2) **SAMUEL L. BADDERS,** United States Army, Appellant	)	Crim. App. No. ARMY Misc 20210735
	)	USCA Dkt. No. 22-0052/AR

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Index of Brief

Table of Cases, Statutes and Other Authorities

Supreme Court

United States Court of Appeals for the Armed Forces

Military Courts of Criminal Appeals and Review

Service Courts

Federal Courts

Uniform Code of Military Justice

Manual for Courts-Martial, United States

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,		
Appellee	)	BRIEF ON BEHALF OF APPELLEE
	)	
	)	
v.	)	
	)	
First Lieutenant (O-2)	)	Crim. App. No. ARMY 20210310
SAMUEL L. BADDERS,	)	
United States Army,	)	USCA Dkt. No. 22-0052/AR
Appellant	)	
	)	

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

Issues Presented

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.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this case pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. §862 (2012) [UCMJ]. This Honorable Court has jurisdiction pursuant to Article 67(a)(3), UCMJ, which mandates review in all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, this Court grants review.

Statement of the Case

On September 24, 2020, a panel convicted Appellant, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2019) (UCMJ).[1] (R. at 570). The military judge sentenced Appellant to twelve months of confinement and a dismissal. (R. at 596). The convening authority took no action on November 20, 2020. (Action).

On February 16, 2021, the military judge granted Appellant's post-trial motion seeking dismissal, mistrial, or new trial in part by granting a mistrial.

[1] Appellant was also charged with one specification of fraternization in violation of Article 134, UCMJ. (Charge Sheet). The military judge entered a finding of not guilty to this charge pursuant to Rule for Courts-Martial (R.C.M.) 917. (R. at 510).

(App. Ex. LXV). The United States appealed. (App. Ex. LXVII). On September 30, 2021, the Army Court set aside the military judge's mistrial ruling and remanded for actions consistent with its decision. *United States v. Badders*, ARMY MISC 20200735, 2021 CCA LEXIS 510 (Army Ct. Crim. App. Sep. 30, 2021) (mem. op.). On November 29, 2021, Appellant filed his petition for grant of review. On December 20, 2021, Appellant filed the supplement to the petition for grant of review.

Statement of Facts

Appellant was charged with violating Article 120, UCMJ, for penetrating the anus of Specialist (SPC) DM[2] with his penis without her consent on January 1, 2019. (Charge Sheet). The selection of members for Appellant's court-martial began on September 22, 2020. (App. Ex. LXV, p.4). During the week of Appellant's court-martial, "there was national media attention into the 1st Cavalry Division's handling of a [separate] case involving a Soldier [(Sergeant (SGT) EF)] who committed suicide after allegedly being informed that his allegations of sexual harassment were unsubstantiated." (App. Ex. LXV, p. 4).

A. Voir dire of Lieutenant Colonel (LTC) CB.

Lieutenant Colonel CB was the Public Affairs Officer (PAO) for the 1st Cavalry Division. (App. Ex. LXV, p. 4). As part of his duties as PAO, LTC CB

[2] In her ruling, the military judge referred to SPC DM as "AV." (App. Ex. LXV).

"handled all media inquiries involving high profile cases." (App. Ex. LXV, p. 4). During group voir dire, LTC CB said he knew both trial counsel detailed to the case. (R. at 63). After group voir dire concluded, the trial counsel and defense counsel both requested to conduct individual voir dire of LTC CB to explore LTC CB's relationship with personnel in the 1st Cavalry Division Office of the Staff Judge Advocate (OSJA) as indicated in his questionnaire. (R. at 95, 108).

During individual voir dire, LTC CB clarified his response and stated that he has seen both trial counsel in passing while at the OSJA, but never received any type of legal advice from either of those counsel. (R. at 195). When LTC CB was asked about his relationship with members of the OSJA, LTC CB stated, "I work closely with members of the team, specifically the administrative law team as well as the SJA, Deputy SJA themselves, both for community outreach activities . . . as well as legal reviews on various press statements that we have to issue out of my office." (R. at 195–96). Lieutenant Colonel CB also stated he would not "give any more weight to government's argument or evidence simply because [he] [is] advised by members of the [OSJA]" and that, to the extent the legal advice he previously received differs in any way from the military judge's instructions, he would follow the military judge's instructions and disregard any such previous legal advice. (R. at 196–97).

Lieutenant Colonel CB was also questioned regarding his role as PAO. "He explained part of his duties included completing press releases for 1st Cavalry Division; developing the Division's social media presence; and assisting the commanding general with statements to the public." (App. Ex. LXV, p. 5; 197–98). Defense counsel asked LTC CB about his role as PAO, and he explained:

> As the public affairs officer I serve as the chief--intake for any media inquiries that come in and the primary spokesman. So I take any media inquiries on any of the various--various topics of public interest whether it's [SGT EF] or, you know, another case that is active and open and that I consult with the Chief of Staff, other various subject matter experts depending on what it is and then then the Staff Judge Advocate makes sure everything is legal and proper and get approval from the Chief of Staff for the commanding general prior to issuing a response or a statement in regards to whatever situation that is.

(R. at 205). Lieutenant Colonel CB stated his work as PAO would not impact his ability to serve impartially, he felt no pressure to find a certain outcome because of his position, and he had no prior knowledge of Appellant's case because of his position. (R. at 197–98). He also indicated he felt no pressure to find a certain outcome because of his relationship with the division commander by virtue of his position, and that he never discussed the case with him. (R. at 197–98).

Defense counsel also questioned LTC CB on his involvement in the SGT EF case. Lieutenant Colonel CB explained that as the PAO, he is responsible for "overseeing the press releases that go out of the headquarters as well as the

division social media presence," and he works with the commanding general and key staff to develop "the language to put out to the public to talk about that case as there was a high public interest in that particular case." (R. at 203). Lieutenant Colonel CB further stated that he did not feel "obligated to come to a certain outcome [in courts-martial cases] to show that Fort Hood takes sexual assault serious" as a PAO because "the Army takes allegations seriously, although this must be balanced against due process, that not all allegations are true or meet the evidentiary standards required by law to convict a person of sexual assault" and that "allegations are reported, investigated, and then as warranted, actually brought to court-martial and then . . . whatever the finding is through the due process to—for this court or any other finds that's the right outcome." (R. at 209–10). Lieutenant Colonel CB also stated, "[N]obody has ever asked me to come to any kind of conclusion with regards to any particular case that I've sat on as a panel member." (R. at 210).

In response as to whether he believed there was problem with sexual assault in the Army, LTC CB explained, "one incident of sexual assault or sexual harassment is too many and that all those incidents should be investigated." (R. at 199). He explained that his "role as a leader is educating and enforcing standards of dignity and respect and ensuring that everybody is treated that way and then in my role as [PAO], to build awareness for that same thing on behalf of the CG,"

ensuring access to various support. (R. at 200). Lieutenant Colonel CB stated that this role does not in any way impact his ability to sit as an impartial member. (R. at 200). He also stated that not all allegations of sexual assault are true, there may be false allegations, that evidence may ultimately show someone is not a victim even if they believe they are, and that he is comfortable with the idea that some investigations are unfounded. (R. at 199–200).

After voir dire concluded, neither the government nor defense challenged LTC CB. (App. Ex. LXV, p. 5; R. at 293, 297). The defense counsel exercised a peremptory challenge against a different member. (R. at 298).

B. Relevant portions of Appellant's court-martial.

1. Specialist (SPC) DM's text messages to Appellant.

On direct examination, SPC DM described the assault. (R. at 345–60). She admitted that she continued to communicate with Appellant after he assaulted her, including flirting with him and indicating she would be interested in engaging in further sexual activity, and she explained why she said these things. (R. at 360–62). During cross-examination, the defense questioned SPC DM on text messages she sent to Appellant on January 2, 2019, indicating that she "had a good time with him on New Year's Day." (App. Ex. LXV, p. 6; R. at 431–32). The messages said:

> SPC DM: "They don't sell plan b at the px……Happy new year"

> Appellant: I'm sorry [SPC DM's first name]
> Appellant: I thought I was pretty careful but it doesn't hurt to be too safe"
> SPC DM: "That's what I'm saying. I'm not too upset about it, just taking the situation at face value. Like I said, I had a great time w you."
> Appellant: Me too
> SPC DM: [thumbs up emoji] thank you for your service.

(App. Ex. LXV, p. 6). Defense counsel asked SPC DM if she "thanked [Appellant] for his service and put a thumbs up emoji in the text." (R. at 432). Specialist DM responded that she did not remember. (R. at 432). When defense counsel attempted to refresh SPC DM's recollection with the text, the government objected on the basis of hearsay. (App. Ex. LXV, p. 6; R. at 433). The military judge sustained the objection. (App. Ex. LXV, p. 8; R. at 433). The defense counsel indicated that the text was being offered for "effect on the listener" and requested an Article 39(a), UCMJ, session. (R. at 433).

During the subsequent Article 39(a), UCMJ, session, defense counsel argued the "thank you for your service" line was "in reference to a conversation about the sex they are having the night before." (App. Ex. LXV, p. 6; R. at 434). The defense clarified they were offering the text to demonstrate SPC DM's "then existing mental, emotional, or physical condition" because she testified that she had "mental trauma" after the assault. (App. Ex. LXV, p. 7; R. at 435). The government responded that the "thank you for your service text" "doesn't get to her state of mind[;] [i]t's not clear what she's referencing." (App. Ex. LXV, p. 7;

R. at 436). The military judge affirmed her earlier ruling sustaining the objection, finding the statement was "too ambiguous" and she did "not see how it ties to her then existing state of mind" under Mil. R. Evid. 803(3). (App. Ex. LXV, pp. 7–8; R. at 438).

2. Major (MAJ) SS's testimony.

During its case-in-chief, the government called MAJ SS, a licensed physician who served as the brigade surgeon for SPC DM's unit. (App. Ex. LXV, p. 9; R. at 474, 478). The government elicited MAJ SS's qualifications and training but did not qualify her as an expert. (App. Ex. LXV, p. 9; R. at 475–78). In April 2019, SPC DM sought treatment for the sexual assault from MAJ SS in her capacity as a sexual assault care provider. (App. Ex. LXV, p. 9; R. at 479). Major SS provided such treatment, including providing her with resources for behavioral health and legal advice, and screening for sexually transmitted diseases and pregnancy. (App. Ex. LXV, p. 9; R. at 479). Major SS, however, testified that she was not aware of the details of the assault, including the assailant, location, time, or how the assault occurred. (R. at 493). Major SS also became SPC DM's supervisor during the same time period, and while she was SPC DM's supervisor, she noticed a positive change in her demeanor. (App. Ex. LXV, p. 9; R. at 490).

Major SS also testified she was aware that SPC DM continued to communicate with Appellant after the assault. (R. at 480). The defense objected

to the government asking MAJ SS whether that seemed unusual to her, on the basis that the question called for an expert opinion. (R. at 480). The government stated it was seeking a lay witness opinion based on her assessment as a sexual assault examiner. (R. at 480–81). The military judge overruled the defense objection, and found the evidence was relevant because it made "the fact she made her report more or less probable," and the prejudicial effect did not weigh the probative value. (R. at 488). Major SS then responded, "No" when asked whether SPC DM's behavior in continuing to communicate with Appellant seemed unusual to her. (R. at 490). The military judge did not give the "witness opinion on credibility or guilt instruction." (App. Ex. LXV, p. 19). The defense did not object to the military judge's instructions or request additional instructions. (R. at 511–12).

B. Lieutenant Colonel CB received and responded to a media inquiry regarding SGT EF during Appellant's court-martial.

At 1428 on September 23, 2020, Mr. CS, a journalist, emailed LTC CB requesting a response to comments made by the Massachusetts members of a congressional delegation that recently visited Fort Hood related to the death of SGT EF—there are "systemic problems on post to include 'Soldiers not getting resources to live safely and in health conditions,'" and there is a "toxic, systemic culture at Fort Hood." (App. Ex. LXV, pp. 10, 24; App. Ex. XXXVII, encl. 4). Mr. CS stated in his email to LTC CB that he was "working on this story with an

end-of-day-deadline." (App. Ex. XXXVII, encl. 4). Shortly thereafter, during a recess, LTC CB forwarded the request via email to his non-commissioned officer in charge (NCOIC) and the SJA, among other individuals, stating, "Will need to portray the seriousness of how we took this, info from CID on the polygraph piece and highlighting our focus on soldier/care wellbeing." (App. Ex. XL). After the government and defense rested and the court recessed for the evening, LTC CB returned to his office, drafted a response to Mr. CS's press inquiry, and at approximately 1803, emailed the draft to his NCOIC, the SJA, and others for their input. (App. Ex. LXV, p. 24; App. Ex. XL; R. at 699). At approximately 1909, the SJA responded with his input. (App. Ex. XL).

Since they worked in the same building, LTC CB went to see the SJA shortly thereafter to discuss the draft response and to obtain information on the investigation pertaining to SGT EF's sexual harassment claims. (App. Ex. pp. 10, 24; R. at 659, 667). Specifically, LTC CB wanted to discuss "how to describe the legal process for [SGT EF's] case being unsubstantiated, and how to describe that in a way that was legally sufficient, understandable to the public, and in a way that would not violate any rules, laws, or you know, compromise, the previous investigation . . . ." (R. at 700). Lieutenant Colonel CB spoke with the SJA for approximately thirty minutes; the Deputy Staff Judge Advocate (DSJA) was also present. (App. Ex. LXV, p. 24, R. at 667). At one point, LTC CB spoke with the

Chief of Justice (COJ) regarding terminology. (App. Ex. LXV, p. 24; R. at 686–87). During their conversation, the SJA, DSJA, and COJ were aware that LTC CB was a panel member in Appellant's court-martial. (App. Ex. LXV, pp. 10, 24). At no point did they, indirectly or directly, reference or discuss Appellant's case with LTC CB. (App. Ex. LXV, pp. 10, 24; R. at 679).

Lieutenant Colonel CB responded to Mr. CS's press inquiry around 2045 that night with a statement that included talking points from Operation Pegasus Strength. (App. Ex. LXV, p. 10; App. Ex. XXXVII, encl. 4; R. at 704). Operation Pegasus Strength was a "readiness order that emphasizes training, communication, and leader engagement" issued by the 1st Cavalry Division Commanding General on September 7, 2020. (App. Ex. LXV, pp. 3, 28–29). The mission of Operation Pegasus Strength is "to build 'upon existing programs to engage Troops, 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.'" (App. Ex. LXV, p. 3). "The trial and defense counsel at the time of [Appellant's] trial were not aware of Operation Pegasus Strength." (App. Ex. LXV, p. 4).

On September 24, 2020, Mr. CS published an article (CS Article) titled "Lawmakers who toured Fort Hood found 'a toxic culture of fear, intimidation, harassment, and indifference'" in the Patriot Ledger, Quincy, Massachusetts. (App. Ex. XXXII; App. Ex. LXV, pp. 10–11). The article addressed a

congressional delegation's visit to Fort Hood "to investigate an 'alarming number' of deaths at [Fort Hood] this year, including" SGT EF's death. (App. Ex. XXXII). The article further addressed SGT EF's suicide, the investigation of SGT EF's sexual harassment allegation, and other issues at Fort Hood. (App. Ex. XXXII; App. Ex. LXV, p. 24). The article quoted LTC CB—the "spokesman for Fort Hood"—pertaining to the investigation. (App. Ex. XXXII; App. Ex. LXV, p. 24). The article stated, "[LTC 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; App. Ex. LXV, p. 11). The article further quoted LTC CB's statement that, "The division and the Army takes the health and well-being of all of our Soldiers seriously and the loss of any one of our teammates affects us all," and "We urge all Soldiers to reach out to their leadership, to the on post resources, and to Family and Friends if they need help as each trooper is valuable and has a life worth living." (App. Ex. XXXII).

C. Appellant requested to re-open voir dire during deliberations.

On September 24, 2020, in an Article 39(a), UCMJ, session held while the panel was deliberating, the defense requested to individually voir dire LTC CB on his statements in the CS Article to determine whether a challenge for cause was appropriate. (R. at 562, 565). "The Article 39(a) focused on LTC [CB's] voir dire

and his quotation in the article about 1CD '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. LXV, p. 30). The military judge noted that the quotes by LTC CB in the article did not differ from his response to whether there was a sexual assault problem in the military; the defense counsel agreed. (R. at 564). The military judge further stated that the article was not just addressing sexual assault, but the "context of the article was about suicide, sexual assault, sexual harassment." (R. at 565). The defense counsel agreed. (R. at 566).

After reviewing the CS Article, the military judge found that the article did not raise actual or implied bias and denied the defense request to re-open voir dire. (R. at 567–68). The military judge reasoned: 1) the "quotes are not tied to this particular court-martial; the quotes are in reference to a high profile investigation;" 2) LTC CB provided the quotes in his position as PAO; and 3) LTC CB stated during voir dire that he provided press releases regarding the SGT EF investigation, that this did not impact his ability to be impartial in Appellant's case, that he felt no pressure to find a particular outcome in Appellant's case, that he affirmatively stated he believed sexual assault is an issue in the Army because "one is too many" but acknowledged that allegations could be unfounded or false, that he has an open mind, and could follow the military judge's instructions. (R. at 568–69). The military judge also found that his comments regarding "corrosives"

did not give rise to actual or implied bias because he "described during voir dire his role as a leader as educating and enforcing standards; and as the PAO to build awareness in the Army standards, and it doesn't impact his ability to sit." (R. at 568). The military judge further concluded "during voir dire [LTC CB] was questioned about things similar to this." (R. at 568-69).

Later that same day, the panel convicted Appellant, and the military judge sentenced him to twelve months of confinement and a dismissal. (R. at 570, 596).

D. Appellant filed his first post-trial motion.

On November 9, 2020, Appellant filed a motion seeking a post-trial Article 39(a), UCMJ, session, and requesting the judge reconsider her rulings: 1) prohibiting cross-examination of SPC DM on her "(thumbs up emoji) thank you for your service" text to Appellant; 2) permitting MAJ SS to testify as to SPC DM's behavior in communicating with Appellant after the assault; 3) denying the defense request to re-open voir dire during deliberations to question LTC CB on the CS Article;[3] 4) denying the defense request to produce SPC DM's mental

[3] The defense claimed that had the military judge permitted voir dire, "then LTC [CB]'s understanding of the 'two levels of truth,' and his involvement in Operation Pegasus Strength would have been revealed." (App. Ex. LXV, p. 23). "Two levels of truth" refers to a statement by LTC CB during voir dire in a different, subsequent court-martial that "'there are two separate levels of truth' regarding claims of sexual assault—those that are 'true but not true to a legal perspective.'" (App. Ex. LXV, 23). The defense claimed there would have been a valid challenge

health records;[4] 5) denying the members' request for access to text messages not admitted into evidence, and 6) requiring the defense to provide copies of documents he intended to use to cross-examine SPC DM to the trial counsel during the government's case-in-chief. (App. Ex. XXXVI). Appellant also requested The Charge and its Specification be dismissed due to unlawful command influence (UCI) based on the implementation of Operation Pegasus Strength, and that the military judge grant a mistrial or new trial as a result of all of the alleged errors raised in the motion. (App. Ex. XXXVI). The government responded on November 15, 2020. (App. Ex. XXXVII).

On November 18, 2020, while interviewing the DSJA, defense counsel learned LTC CB spoke with the SJA and DJSA on September 23, 2020, regarding his response to Mr. CS's press inquiry. (App. Ex. LXVIII, p. 7). Defense counsel also interviewed LTC CB and learned LTC CB forwarded the press inquiry to the SJA from the courthouse before the court recessed for the day, and LTC CB also interacted with the COJ that evening. (App. Ex. LXV, p. 14; App. Ex. LXVIII, pp. 7–8). The defense previously interviewed the SJA on November 10, 2020, but the September 23, 2020 conversation was never raised. (App. Ex. LXVIII, p. 6).

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for cause based on those views and his statements in the CS Article. (App. Ex. LXV, p. 23).

[4] The military judge's subsequent ruling on this issue is Appellate Exhibit LXVI.

E. The military judge held a post-trial Article 39(a), UCMJ, hearing.

On November 19, 2020, the military judge held a post-trial Article 39(a), UCMJ, session to address Appellant's November 9, 2020 post-trial motion. (R. at 603–756). The court heard testimony from the SJA and LTC CB regarding the September 23, 2020 conversation and Operation Pegasus Strength. (R. at 654–83, 688–723). Lieutenant Colonel CB testified that Operations Pegasus Strength addressed overall wellness issues that included eradicating the "corrosives" of suicide, extremism, sexual harassment, sexual assault, among other issues, and ensured that soldiers have access to resources. (R. at 692, 717–18; App. Ex. LXV, p. 15). He further testified that when discussing "corrosives" in the press release, he was referring to "conduct that is antithical [sic] to building cohesive teams," not to people. (R. at 718; App. Ex. LXV, p. 15). Lieutenant Colonel CB also testified that he had previously expressed concern about sitting on a court-martial panel because his position as PAO. (R. at 712–13, 717; App. Ex. LXV, p. 15). Lieutenant Colonel CB re-affirmed that he did not have any connection as PAO with Appellant's case prior to being impaneled, did not make any press releases about it, and was not aware of it. (R. at 717).

Appellant raised the issue of the nondisclosure of the September 23, 2020 meeting and argued the SJA, DSJA, and COJ "had an obligation to make the court and the defense aware of that engagement so that it would have supported the

defense request to reopen voir dire." (R. at 729). The military judge stated she would "consider it as part of the facts," but she did "not consider it to be a violation of the professional rules of conduct." (R. at 729–30).

F. Appellant filed supplemental post-trial motions.

On November 25, 2020, Appellant filed a supplemental post-trial motion seeking a mistrial or new trial based on the government's nondisclosure of the occurrence of the September 23, 2020 meeting. (App. Ex. LXVIII). The defense averred the SJA, DSJA, and COJ should not have met with LTC CB, and the government should have disclosed the meeting because they have "an affirmative duty to disclose any known ground for challenge for cause." (App. Ex. LXVIII, pp. 10–11 (quoting *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995) (citation omitted))). Appellant argued that had the military judge known about the meeting, "she would have taken steps to ensure that the meeting would not influence the member and that [Appellant's] trial was fair," including conducting voir dire of LTC CB about the meeting and "soliciting challenges for cause." (App. Ex. LXVIII, p. 11). Appellant further alleged a challenge for cause existed based on actual or implied bias, and the facts of the situation supported a claim of UCI. (App. Ex. LXVIII, pp. 12–14). The government responded on December 3, 2020. (App. Ex. LXIX).

On January 25, 2021, Appellant filed a second supplemental post-trial motion seeking findings of not guilty, dismissal with prejudice, mistrial or new trial. (App. Ex. XLXIX). The government responded on February 3, 2021. (App. Ex. L). The defense replied on February 8, 2021. (App. Ex. LXI).

G. The military judge granted Appellant's request for a mistrial.

On February 16, 2021, the military judge granted Appellant's request for a mistrial, finding that a mistrial was warranted for a combination of three reasons. (App. Ex. LXV, pp. 17, 19–20, 23–25, 31–32). First, the military judge determined that she erred when she "sustained the government's objection and kept [SPC DM] from testifying to whether she made the statement, '(thumbs up emoji) thank you for your service.'" (App. Ex. LXV, pp. 17, 31). Second, the military judge determined that she erred when she "allowed MAJ [SS] to offer a lay opinion regarding [SPC DM]'s behavior in remaining in communication with" Appellant. (App. Ex. LXV, pp. 19–20, 31). Third, the military judge determined that the government's nondisclosure of the September 23, 2020 conversation created an "implied bias that would raise doubt in the eyes of the public that [Appellant] received a fair trial" because had the disclosure been made, "it is likely the court would have permitted voir dire thus allowing defense to develop the information in question to determine whether a valid challenge for cause existed." (App. Ex. LXV, p. 32).

The military judge found that 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," and "such conduct would raise doubt in the eyes of the public that the [Appellant] received a fair trial." (App. Ex. LXV, p. 24). The military judge noted that "[t]here is no question that LTC [CB] was only performing his duties as PAO and that at no time did anyone speak about [Appellant's] court-martial," and it was "understandable that the SJA, DSJA, and COJ may not have thought twice about speaking with LTC [CB] due to the urgency and high profile nature of the press release." (App. Ex. LXV, p. 24). Nevertheless, the military judge found that the conversation "created a perception that would raise doubt in the eyes of the public which cause an implied bias" because it occurred during Appellant's sexual assault court-martial. (App. Ex. LXV, p. 25).

Although the military judge found there was implied bias based on the government's nondisclosure and the conversation itself, she rejected Appellant's claim that she erred by denying the defense request to re-open voir dire during deliberations to question LTC CB regarding the CS Article. (App. Ex. LXV, p. 22). The military judge reasoned that LTC CB's "involvement in Operation Pegasus Strength and his statement of 'two levels of truth' did not establish actual or implied bias." (App. Ex. LXV, pp. 21, 23). The military judge determined the

government had no duty to notify the defense of Operation Pegasus Strength. (App. Ex. LXV, p. 21). The military judge further determined that no language within the order establishing Operation Pegasus Strength—an initiative "focused on comprehensive Soldier services"—and no testimony from LTC CB or the SJA "regarding their perception of the order, or statements of leaders in 1CD published in press releases discussing the order that demonstrate any type of actual bias." (App. Ex. LXV, pp. 21–22).

The military judge also found that LTC CB was not actually or impliedly biased based on his voir dire responses. (App. Ex. LXV, p. 22). She also found that his personal views on sexual assault, his statements in the CS Article, and his "two levels of truth" statement did not create an actual bias or implied bias. (App. Ex. LXV, pp. 22–24). The military judge found that LTC CB was "candid with the court," "direct and forthright in his answers," he stated during voir dire that "he would weigh all the evidence and would listen to the military judge's instructions," and "there was no evidence in his answers or his demeanor that indicate he did not yield to the court's instructions or to the evidence presented at trial." (App. Ex. LXV, p. 22). The military judge further found LTC CB's "answers reflected an open mind, a willingness to apply the court's instructions, and an understanding of the law," and "[a]n objective observer would not have had a substantial doubt

about the fairness of [Appellant's] court-martial based on [his] answers." (App. Ex. LXV, pp. 22–23).

H. The military judge found there was no UCI in Appellant's court-martial.

The military judge rejected Appellant's claims that: the September 23, 2020 meeting, "coupled with the delay in informing the defense about the details of this meeting[,] rose to an improper manipulation of the criminal justice system"; and "the conduct of the government gave the appearance of [UCI]." (App. Ex. LXV, p. 29). The military judge found that while "the government's failure to disclose the meeting resulted in the implied bias of LTC [CB]," there was no evidence the government "intentionally withheld the information from the defense," and there was no "appearance that the government tried to manipulate the military justice system." (App. Ex. LXV, pp. 29–30). The military judge found it was "reasonable that the SJA and CoJ did not connect the dots between their brief meeting with LTC [CB] and the subject of the Article 39(a)" because the "24 September Article 39(a) litigation centered on the [CS] news article and LTC [CB's] statements in that article." (App. Ex. LXV, p. 30).

The military judge also noted that the "short" discussion between LTC CB and the SJA, DSJA, and COJ was "completely unrelated to LTC [CB]'s duties as a panel member," "the issue was urgent and of a high-profile nature," and "LTC [CB's] duties frequently required coordination with the OSJA, so [the

conversation] would not have seemed out of the ordinary." (App. Ex. LXV, p. 30). Under these facts, the military judge concluded, "a reasonable member of the public . . . would not have a loss of confidence in the military justice system and believe it to be unfair." (App. Ex. LXV, p. 30). The military judge also rejected the defense allegation that the 1st Cavalry Division Commanding General committed UCI through Operation Pegasus Strength, or that the "CG determined that [Appellant] was a 'corrosive' before, during, and after his court-martial." (App. Ex. LXV, p. 29).

The military judge further rejected Appellant's request to enter a finding of not guilty based on the legal errors raised in his post-trial motion because the panel members had sufficient evidence to determine whether Appellant was guilty beyond a reasonable doubt, and although she committed two evidentiary errors, "those errors did not substantially affect the legal sufficiency to merit a finding of not guilty." (App. Ex. LXV, p. 16). The military judge also determined she did not err when she denied the members' request to view text messages or required the defense to turn over text messages of SPC DM to the government. (App. Ex. LXV, pp. 25–28).

Summary of Argument

The Army Court had jurisdiction in this case pursuant to Article 62(a)(1)(A), UCMJ, because a mistrial "terminates the proceeding with respect to a charge or

specification," as is required. This interpretation is consistent with Congress's use of "proceedings" throughout the UCMJ, the legislative purpose of Article 62, UCMJ, and decisions of both the Navy-Marine Corps Court of Criminal Appeals[5] (NMCCA) and the Coast Guard Court of Criminal Appeals[6] (CGCCA).

The military judge abused her discretion in granting a mistrial based on the government's nondisclosure of a September 23, 2020 meeting between LTC CB and the SJA, DSJA, and COJ. The military judge applied the incorrect law in analyzing whether the nondisclosure deprived Appellant "of the opportunity to develop information in question to determine whether a valid challenge for cause existed." The correct analysis is whether the government should have disclosed the conversation because it could have served as a basis for a challenge for cause or otherwise precluded effective voir dire. Here, Appellant conducted effective voir dire because he asked LTC CB about the nature of his PAO role, and Appellant concluded that there was no basis for a challenge for cause. Moreover, a member of the public would not conclude that LTC CB's service as a panel member undermined the appearance of fairness of Appellant's court-marital simply because LTC CB met with the SJA, DSJA, and COJ on a completely unrelated, professional, and urgent matter. This is particularly true given that Appellant was

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[5] *United States v. Dossey*, 66 M.J. 619 (N.M. Ct. Crim. App. 2008) (en banc).
[6] *United States v. Flores*, 80 M.J. 501 (C.G. Ct. Crim. App. 2020).

aware of the nature of LTC CB's professional relationship with OSJA and declined to challenge LTC CB for cause or peremptorily.

The military judge abused her discretion when she concluded that a structural error—the presence of an implied biased panel member—could factor into a cumulative error analysis. She further abused her discretion when she concluded that the two purported non-prejudicial evidentiary errors—declining to admit a one-line text message, "thank you for your service," and permitting MAJ SS to briefly testify that she thought it was not unusual for SPC DM to continue communicating with Appellant—warranted the drastic remedy of a mistrial. Therefore, this Court should affirm the Army Court's decision setting aside the military judge's ruling.

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

Standard of Review

This court reviews issues of jurisdiction and statutory interpretation 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)).

Law and Argument

Article 62(a)(1)(A), UCMJ, confers jurisdiction to the Courts of Criminal Appeals (CCAs) to review a military judge's ruling granting a mistrial. *United States v. Dossey*, 66 M.J. 619 (N.M. Ct. Crim. App. 2008) (en banc); *United States v. Flores*, 80 M.J. 501 (C.G. Ct. Crim. App. 2020). The United States may file an interlocutory appeal of "[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, UCMJ, does not define the phrase "terminates the proceedings." Appellant contends that Article 62(a)(1)(A), UCMJ, does not encompass mistrials because the phrase "terminates the proceedings" should be interpreted "to broadly apply to all proceedings on the charge or specification, not just the immediate proceeding." (Appellant's Br. 36). However, both the NMCCA in *Dossey* and CGCCA in *Flores* rejected this argument. These CCAs held that mistrials are encompassed within Article 62(a)(1)(A) because the "the phrase 'terminates the proceedings' . . . means to terminate the proceedings *before the particular court-martial* to which a charge has been referred." *Dossey*, 66 M.J. at 624; *Flores*, 80 M.J. at 505–06 (emphasis in original). Because this interpretation—and not Appellant's—is fully consistent with Congress' use of "proceedings" throughout the UCMJ and the legislative intent of Article 62, UCMJ, this court should

conclude that it has jurisdiction under Article 62(a)(1)(A), UCMJ, to review the finding of a mistrial in this case.

A. "Proceedings" refers to a particular court-martial.

As observed by the NMCCA, the UCMJ "almost without exception, . . . uses 'proceedings' to refer to happenings before a particular court-martial." *Dossey*, 66 M.J. at 623–24 (providing examples of Congress' use of "proceedings" in various articles of the UCMJ). Appellant offers no rationale as to why Congress, in light of the context in which it uses "proceedings" in other areas of the Code, would intend "proceedings" within Article 62, UCMJ, to have a different meaning. *See, e.g.,* UCMJ art. 28, 38, 45, 51, 54.

If the difference in status between dismissed charges versus withdrawn charges were of any significance for purposes of Article 62(a)(1)(A), UCMJ, Congress would have said so. It would have simply drafted that provision to state, "The government may appeal an order or ruling by the military judge dismissing a charge or specification." It did not. Both a mistrial and dismissal "terminate[] the proceedings, in a plain and ordinary sense of the phrase." *Flores*, 80 M.J. 505; *see also* Rule for Courts-Martial (R.C.M.) 907; R.C.M. 915 discussion ("Also, a mistrial is appropriate when *the proceedings must be terminated* because of a legal defect . . . .") (emphasis added). The view that a mistrial "terminates the proceedings" is also consistent with the Supreme Court's characterization of

mistrials: When an accused asks for a mistrial, he "has elected to *terminate the proceedings* against him . . . ." *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (emphasis added).

It is true that a mistrial may not "extinguish *all* proceedings for *all* time" because a convening authority may re-refer the affected charges before a new court-martial. *Flores*, 80 M.J. at 505 (emphasis in original) (citing R.C.M. 915(c)(1), MCM (2019 ed.); R.C.M. 915(c)(1) discussion). However, even in light of the language of R.C.M. 907 referring to a request for a dismissal as "a request to terminate further proceedings as to one or more charges or specifications," dismissals may also not "extinguish *all* proceedings for *all* time" because often an accused may be re-tried on the affected charges or specifications. *Flores*, 80 M.J. at 505 (emphasis in original). To that end, military courts have found Article 62, UCMJ, jurisdiction over dismissals without prejudice. *See, e.g.*, *United States v. Weymouth*, 40 M.J. 798, 800 (A.F. Ct. Crim. App. 1994) (en banc) (finding Article 62, UCMJ, jurisdiction over a dismissal without prejudice); *United States v. Jones*, 60 M.J. 917 (N.M. Ct. Crim. App. 2005) (noting an appeal of a military judge's dismissal without prejudice for improper referral was "properly before th[e] court under Article 62, [UCMJ]"). Thus, "proceedings" in Article 62(a)(1)(A), UCMJ, is properly interpreted to "to refer to happenings before a particular court-martial." *Dossey*, 66 M.J. at 623–24; *Flores*, 80 M.J. at 505. The mistrial in this case

terminated this particular court-martial—this is true even though the mistrial occurred after a post-trial Article 39(a) session. *See* UCMJ art. 60(b) ("In accordance with regulations prescribed by the President, the military judge in a general or special court-marital shall address all post-trial motions and other post-trial matter that may affect a plea, a finding, the sentence . . . ."); R.C.M. 1104(a)(1) ("[T]he military judge may direct a post-trial Article 39(a) session at any time before the entry of judgment . . . ."). Thus, this court has jurisdiction to review the ruling granting a mistrial.

B. Appellant's interpretation is contrary to the legislative purpose of Article 62, UCMJ.

Congress explicitly drafted Article 62, UCMJ, "to afford the government a right to appeal which, 'to the extent practicable . . . parallels [the Criminal Appeals Act,] 18 U.S.C. § 3731.'"[7] *United States v. Wuterich*, 67 M.J. 63, 71 (C.A.A.F. 2008) (quoting *United States v. Lopez de Victoria*, 66 M.J. 67, 70–71 (C.A.A.F.

[7] In pertinent part, the Criminal Appeals Act states:

> 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.

2008)); *Jacobsen*, 77 M.J. at 86 (noting that "Congress modeled Article 62, UCMJ, in large part, after 18 U.S.C. § 3731"); *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 2005) (noting that the purpose of Article 62, UCMJ, is "to provide the Government with a right of appeal similar to that applicable in federal civilian courts under . . . 18 U.S.C. § 3731."). In passing the Criminal Appeals Act, Congress "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, 338–39 (1975). "[I]t seems inescapable that Congress was determined to avoid creating non-constitutional bars to the Government's right to appeal." *Id*.

The liberal construction clause in the Criminal Appeals Act further shows Congress's intent that the government enjoys a broad right of appeal: "The provisions of this section shall be liberally construed to effectuate its purposes." 18 U.S.C. § 3731. Article 62(e), UCMJ, contains the same liberal construction clause: "This clause broadens the government's right to appeal . . . ." *Jacobsen*, 77 M.J. at 87. As the NMCCA noted in *Dossey*, "[r]eading the phrase 'terminates the proceedings' in Article 62 to mean the proceedings before the court-martial to which a charge has been referred renders a broader range of orders appealable than the alternate reading, and effectuates the Congressional intent that the Government should enjoy a broad right to appeal." 66 M.J. at 624. Appellant's proposed

interpretation would frustrate Congress's intent that the government enjoy a broad right of appeal. *Flores*, 80 M.J. at 505 ("A narrow interpretation that an order must *permanently* terminate a proceeding runs counter to this purpose.") (emphasis in original). It also fails to recognize that regardless of the government's ability to try Appellant again, the government has a significant interest in preserving the conviction and .

Appellant's reliance on *United States v. Jorn*, 400 U.S. 470 (1971), in support of his position that Article 62(a)(1)(A), UCMJ, excludes mistrials is misplaced. (Appellant's Br. 23–24). Importantly, the Supreme Court in *Jorn* interpreted the pre-1971 version of Criminal Appeals Act[8] that did not include a liberal construction provision, and thus the statute, at that time, was "strictly construed against the Government's right of appeal." *Will v. United States*, 389 U.S. 90, 96–97 (1967) (citing *Carroll* v. *United States*, 354 U.S. 394, 399–400 (1957)). Consequently*, Jorn's* dicta that "the Government could not have appealed [the] original declaration of mistrial" because "a mistrial ruling explicitly contemplates re-prosecution of the defendant," *Id*. at 476, was influenced by a version of the Criminal Appeals Act before Congress expanded its scope. Congress subsequently amended the Criminal Appeals Act to include a liberal

[8] The pre-1970 version of the Criminal Appeals Act provided that the government had a direct right of appeal from "'the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.'" *Jorn*, 400 U.S. at 474.

construction provision specifically aimed "to broaden considerably those situations in which the Government could appeal." *United States v. Goldstein*, 479 F.2d 1061, 1065 (2d Cir. 1973). Accordingly, the Supreme Court's interpretation of the former version of the statute in *Jorn* is of little value.

Furthermore, Appellant's view fails to recognize the distinction between mistrials in federal cases versus courts-martial. *See Dossey*, 66 M.J. at 624 n.13 (discussing why "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"). Just as the Criminal Appeals Act does not constrain jurisdiction solely to dismissals in federal cases, this court should likewise interpret Article 62(a)(1)(A), UCMJ, to not constrain jurisdiction solely to dismissals in courts-martial. Because Article 62(a)(1)(A), UCMJ, encompasses mistrials, this court has jurisdiction to review the instant case.

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.

Standard of Review

This Court reviews a military judge's decision on a challenge to a member for implied bias "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 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)).

Law and Argument

The military judge abused her discretion in finding implied bias in three ways. First, the military judge applied the incorrect law when she analyzed the

government's nondisclosure of the meeting as a matter of implied bias. She concluded that a LTC CB was impliedly biased simply because the nondisclosure deprived Appellant "of the opportunity to develop information in question to determine whether a valid challenge for cause existed," (App. Ex. LXV, pp. 31–32), rather than properly analyzing whether the government should have disclosed the conversation. *Modesto*, 43 M.J. at 321. The meeting was not grounds for challenge for cause and the government's nondisclosure did not otherwise preclude effective voir dire because Appellant was on notice through LTC CB's voir dire of the nature of his role as PAO, his involvement in responding to press inquiries concerning SGT EF, and the nature of his working relationship the OSJA. With the benefit of this information, Appellant did not challenge LTC CB for cause or seek to re-open voir dire to explore whether a potential meeting occurred between LTC CB and OSJA staff regarding his statements to Mr. CS. Appellant's actions waived any claim that relief was warranted for the government's nondisclosure. *United States v. Dunbar*, 48 M.J. 288 (C.A.A.F. 1998); *see also United States v. Lake*, 36 M.J. 317, 324 (C.M.A. 1993) ("[A] claim of unfairness dissipates if defense counsel could have reasonably discovered the grounds for his untimely challenges and examined these members on them through voir dire.").

Second, notwithstanding Appellant's waiver, the military judge's conclusion that the September 23, 2020 meeting created an implied bias is unsupported by her

findings of fact, the record, and the law. The totality of the circumstances in this case would not lead a member of the public to conclude that LTC CB's service as a panel member undermined the appearance of fairness of Appellant's court-marital simply because LTC CB met with the SJA, DSJA, and COJ on an unrelated, urgent professional matter. Appellant was aware of the nature of LTC CB's professional relationship with staff at the OSJA, declined to challenge LTC CB for cause or peremptorily, and did not request to re-open voir dire on the basis of a potential meeting. Thus, the military judge abused her discretion when she found implied bias.

A. The military judge abused her discretion in determining LTC CB was impliedly biased because of the government's nondisclosure of the September 23, 2020 meeting.

The military judge abused her discretion when she concluded that the government's nondisclosure of the September 23, 2020 meeting created an "implied bias that would raise doubt in the eyes of the public that [Appellant] received a fair trial" because had the disclosure been made, "it is likely the court would have permitted voir dire thus allowing defense to develop the information in question to determine whether a valid challenge for cause existed." (App. Ex. LXV, p. 32). The military judge applied the incorrect legal test in determining whether the nondisclosure warranted relief because she analyzed the nondisclosure as a matter of implied bias and subsequently concluded that the nondisclosure—

rather than the panel member's circumstances—"created an implied bias." (App. Ex. LXV, p. 32). Whether a panel member is impliedly biased and whether the government was obligated to disclose information concerning a panel member are two separate issues, each with distinct legal analyses.

A panel member must be excused for cause if 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).[9] This general ground for cause encompasses both actual and implied bias. *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008). As opposed to actual bias,[10] 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)). "Implied bias addresses the perception or appearance of fairness of the military justice system." *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

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[9] Rule for Courts-Martial 912 provides numerous other grounds to excuse members for cause. R.C.M. 912(f)(1)(A)–(M). "The burden of establishing that grounds for a challenge exist is upon the party making the challenge." R.C.M. 912(f)(3).

[10] "The test for actual bias is whether any personal bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997) (quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)). "Because a challenge based on actual bias involves credibility judgments, and because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire,' a military judge's ruling on actual bias is afforded great deference." *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)).

The test for implied bias is "whether, in the eyes of the public, the challenged member's circumstances do injury to the 'perception [or] appearance of fairness in the military justice system.'" *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006)). In making this determination, this court "review[s] the totality of the circumstances, and assume[s] the public to be familiar with the unique structure of the military justice system." *United States v. Woods*, 74 M.J. 238, 244 (C.A.A.F. 2015). Where "there is no actual bias, 'implied bias should be invoked rarely.'" *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)).

The trial counsel has a duty to "state any ground for challenge for cause against any member of which trial counsel is aware." R.C.M. 912(c); *Modesto*, 43 M.J. at 318 ("Both the SJA and the trial counsel have an affirmative duty to disclose any known ground for challenge for cause."). The disclosure obligation under R.C.M. 912(c) is a "procedural safeguard[] to insure [sic] that members are impartial," as is the requirement for voir dire itself to provide "an accused the opportunity to expose possible biases." *Modesto*, 43 M.J. at 318. An allegation that the government violated its affirmative duty to disclose a known ground for challenge for cause amounts to a claim that an Accused was denied a fair trial. *Id.* at 319 ("We granted review in this case to evaluate if one of these safeguards—the

Government's affirmative duty to disclose any known ground for challenge for cause—was violated, thereby denying appellant a fair trial."). In determining whether the government's nondisclosure of information violated R.C.M. 912(c) and warrants a new trial, military courts examine whether the information "constituted grounds for a challenge for cause or otherwise preclude[d] effective *voir dire*." *Id*. at 316, 321; *United States v. Kunishige*, 79 M.J. 693, 710 (N.M. Ct. Crim. App. 2019) ("When the improperly withheld discovery pertains to a member, we must determine whether the material would have given rise to a ground for challenge of the member for cause or whether the improper nondisclosure precluded 'effective' voir dire.") (citing *Modesto*, 43 M.J. at 316).

Relatedly, a panel member has a duty to disclose to the court if the "member learns of information during the trial which makes an earlier response to a voir dire question inaccurate . . . ." *United States v. Albaaj*, 65 M.J. 167, 170 (C.A.A.F. 2007) ("The duty of candor does not stop at the end of voir dire but is an obligation that continues through the duration of the trial."); *see Modesto*, 43 M.J. at 319 (analyzing the issue of nondisclosure under R.C.M. 912(c) and considering "whether the panel member whom the information concerned 'compromised his duty of honesty and candor during *voir dire*'"). To obtain a new trial based on panel member nondisclosure, "'a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a

correct response would have provided a valid basis for a challenge for cause.'" *United States v. Mack*, 41 M.J. 51, 55 (C.M.A. 1994) (quoting *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)). If the moving party fails to show juror dishonesty, a court does not examine the question of whether that party would have a valid challenge for cause. *United States v. Taylor*, 44 M.J. 475 (C.A.A.F. 1996).

In this case, the military judge expressly found that LTC CB was not impliedly biased based on his voir dire responses and that an "objective observer would not have had a substantial doubt about the fairness of [Appellant's] court-martial based on those responses. (App. Ex. LXV, pp. 22–23). Yet, the military judge determined the government's nondisclosure of the September 23, 2020 meeting "created an implied bias" because "had the court been aware of this information, it is likely the court would have permitted voir dire thus allowing defense to develop the information in question to determine whether a valid challenge for cause existed." (App. Ex. LXV, pp. 31–32). In so finding, the military judge erroneously analyzed the nondisclosure itself as the basis for implied bias and failed to apply the correct legal test for analyzing nondisclosure, as enunciated in *Modesto*. Under *Modesto*, the question is not whether the nondisclosure simply prevented voir dire that *could have explored* if a challenge was warranted, but whether the nondisclosure prevented *effective* voir dire or

whether the underlying information constituted grounds for cause. *Modesto*, 43 M.J. at 316, 321. Although the military judge found that the meeting itself "would raise doubt in the eyes of the public that the [Appellant] received a fair trial" because of its "optics," (App. Ex. LXV, p. 24), the facts and the law concerning implied bias do not support her ruling.

1. Appellant waived any issue concerning the September 23, 2020 meeting.

The military judge further compounded her error in utilizing an incorrect legal test to analyze the government's nondisclosure when she failed to account for LTC CB's candid disclosure during voir dire that he responds to press inquiries—including those concerning SGT EF—and that he has a working relationship with the OSJA related to those responses. (App. Ex. LXV, p. 5; R. at 195–98, 205). Because LTC CB clearly and honestly explained his professional relationship with the OSJA during voir dire, and Appellant knew of the CS Article, Appellant was on notice that LTC CB might have met with the OSJA when he prepared his response to Mr. CS's press inquiry. *See Lake*, 36 M.J. at 324 (C.M.A. 1993) ("[A] claim of unfairness dissipates if defense counsel could have reasonably discovered the grounds for his untimely challenges and examined these members on them through voir dire."). Appellant only requested to re-open voir dire based on the article itself, not to explore whether and to what extent a potential meeting with the OSJA occurred. (R. at 562–69).

Simply put, Appellant waived any issues with the 23 September, 2020 meeting by failing to request to re-open voir dire on the basis of LTC CB's PAO duties. In *United States v. Dunbar*, this Court found waiver where the government did not disclose the fact that a panel member previously testified as a prosecution expert in one of the trial counsel's previous cases and "conducted extensive pretrial interviews" in another case with the trial counsel—information which the defense specifically became aware of after trial—because the defense knew that the member was a family advocacy counselor who previously testified in child abuse cases. 48 M.J. at 289–90. Despite having this information during voir dire, the defense counsel failed to voir dire the member on whether she served as a prosecution expert in any of the trial counsel's cases or challenge her for cause or peremptorily. *Id*. at 290. The CAAF determined that "defense counsel's failure to ask further questions in this case constitute[d] a waiver which did not affect a substantial right of [the] appellant." *Id*.

> [Rule for courts-martial] 912[(c)] does not presume that the trial counsel acts as the arbiter of the merits of a challenge. Rather, the rule was designed to allow the defense to explore the potential conflict through *voir dire*, with the judge as the decision maker on the merits of the challenge.

Id. at 290.

Here, like in *Dunbar*, Appellant's failure to "make reasonable inquiries into the background of the member" waived any post-trial complaint that he was denied

an opportunity to discover such matter. *Dunbar*, 48 M.J. at 290; *see United States v. White*, ACM 34115, 2002 CCA LEXIS 77, at *21 (A.F. Ct. Crim. App. 8 Mar. 2002) (unpub.) (finding the failure to disclose the professional relationship between a panel member and the victim's father did not deprive defense counsel of the right to exercise a challenge because defense counsel possessed statements that identified the victim as a dependent of a military member and that military member's name, but failed to voir dire the members about whether they knew the victim's father, thereby waiving "any post-trial complaint that he was denied an opportunity to discover these matters").

"This is not a case where the salient fact went unnoticed or unexamined on the record." *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004). The potential that LTC CB meets with members of the OSJA regarding his response to the CS Article was patently apparent from his response to defense counsel's question concerning his role as PAO during voir dire: "I take any media inquiries on any of the various--various topics of public interest whether it's [SGT EF] or, you know, another case that is active and open and that I consult with . . . the Staff Judge Advocate [who] makes sure everything is legal and proper . . . ." (R. at 205). It was also evident from LTC CB's statement during voir that he "work[s] closely with members of the team, specifically the administrative law team as well as the SJA, Deputy SJA themselves, . . . [for] legal reviews on various press

statements that we have to issue out of my office." (R. at 195–96). The military judge recognized this in her UCI analysis: "LTC [CB's] duties frequently required coordination with the OSJA, so this [September 23, 2020 meeting] would not have seemed out of the ordinary." (App. Ex. LXV, p. 30).

With these disclosures on the record, the onus was on Appellant to further inquire about whether LTC CB met with OSJA staff in responding to the CS Article. Appellant did not, choosing instead to seek additional voir dire based only on LTC CB's statements in the CS Article. (App. Ex. LXV, p. 30). Thus, this case is vastly distinguishable from cases such as *Glenn*[11] and *Schuller*[12] where the government nondisclosure entirely "precluded effective voir dire and had made it impossible for the judge or counsel to test the member's potential bias." *Modesto*, 43 M.J. at 319. The defense counsel's "failure to explore this area on *voir dire*

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[11] In *Glenn*, the Court of Military Appeals found that a deputy and later acting SJA in a court-martial "had an affirmative duty to inform the staff judge advocate, trial counsel, and defense counsel that" a panel member was his sister-in-law because his "failure to inform the parties of his familial relationship . . . precluded effective *voir dire* and made it impossible for either the military judge or counsel to accurately test [the member] for bias or determine whether a challenge for cause was necessary." 25 M.J. at 280. The discussion to R.C.M. 912(f) explicitly states that "matters which may be grounds for challenge under [this] subsection . . . are that the member . . . is closely related to the accused, a counsel, or a witness in the case."

[12] In *Schuller*, the trial counsel and the law officer (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, and the defense counsel "did not know of the law officer's previous connection with the case." 5 U.S.C.M.A. at 105, 17 C.M.R. at 105.

indicates that the matter was not of concern to them." *Dunbar*, 48 M.J. at 290. Thus, Appellant waived any issue concerning the 23 September 2020 meeting.

2. Notwithstanding Appellant's waiver, the September 23, 2020 meeting did not constitute grounds for a challenge for cause on the basis of implied bias.

The government's nondisclosure of the September 23, 2020 meeting did not violate RCM 912(c) or otherwise deprive Appellant of a fair trial because this interaction did not constitute grounds for a challenge for cause against LTC CB. The meeting—which occurred as part of LTC CB's professional relationship with staff at the OSJA—was not a per se bar to LTC CB sitting as a member and no member of the public would believe that the member did "injury to the 'perception [or] appearance of fairness in the military justice system.'" *Terry*, 64 M.J. at 302 (quoting *Moreno*, 63 M.J. at 134).

In this case, the military judge correctly recognized that implied bias based on professional relationships is "fact dependent." (App. Ex. LXV, p. 5). Despite this, her finding that the "optics" of the "meeting with the SJA and CoJ while sitting as a panel member in an ongoing case where the Accused is charged with sexual assault" raises "doubt in the eyes of the public that [Appellant] received a fair trial" and "does not give the perception of fairness" is entirely arbitrary and unreasonable based on the law and her own factual findings. (App. Ex. LXV, pp. 24–25). The military judge's findings and the facts surrounding this case

demonstrate that the meeting did not go "beyond what would be perceived as fair to [] [Appellant] in the context of a typical court-martial." *United States v. Peters*, 74 M.J. 31, 36 (C.A.A.F. 2015).

Professional interactions between panel members and judge advocates, such as the kind that occurred in this case, are appropriate and commonplace in the military: "[M]ilitary communities and units are close-knit. Relationships among panel members and others involved in the case are unavoidable . . . . [I]t is not uncommon, nor inappropriate, for a panel member to be acquainted professionally with other individuals involved in the trial." *Id.* at 35; *United States v. Richardson*, 61 M.J. 113, 119 (C.A.A.F. 2005) (recognizing the strong likelihood that members may have current or prior professional dealings with trial or defense counsel given the nature of the military justice system). Thus, it is well-settled that professional interactions or relationships between a panel member and counsel "are not per se a ground for granting an implied bias challenge." *Peters*, 74 M.J. at 36; *Dunbar*, 48 M.J. at 290 ("This Court has reiterated the principle that 'prior professional relationships… are not *per se* disqualifying.'") (quoting *Napoleon*, 46 M.J. at 283); *United States v. Hamilton*, 41 M.J. 22, 25 (C.A.A.F. 1995) (noting that a "professional relationship does not constitute a *per se* ground for challenge").

Nor is there a per se bar against members of the panel receiving legal advice from trial counsel. *United States v. Castillo*, 79 M.J. 39 (C.A.A.F. 2015) (no error

where military judge declined to grant challenge for cause for implied bias where panel member regularly received advice from trial counsel, who was his brigade judge advocate); *Rome*, 47 M.J. at 469 (holding a member's "professional relationship with the trial counsel was not per se disqualifying"); *Hamilton*, 41 M.J. at 25 (finding no "per se ground for challenge" where three members had received legal assistance from the assistant trial counsel). In *United States v. White*, the Air Force Court of Criminal Appeals found that even if a professional relationship existed between a panel member and the victim's father, "it would not create a basis for challenge for cause" because "[i]t is well-settled that 'prior professional relationships . . . are not per se disqualifying.'" 2002 CCA LEXIS 77, at *20 (quoting *Napoleon*, 46 M.J. at 283). Thus, the government's nondisclosure in this case did not violate R.C.M. 912(c) because LTC CB's professional relationship with the OSJA was not a per se ground for challenge.

United States v. Peters demonstrates why there was no risk of implied bias here. In *Peters*, this court found that a panel member was impliedly biased due to his professional relationship with the trial counsel because he sought the trial counsel's input about whether it was common that someone from within the brigade serve on a panel as soon as he was summoned to be a panel member, they spoke the night before the court-martial and signed off the conversation "see you tomorrow," and the trial counsel relied upon his personal knowledge of the panel

member's character when arguing against a defense causal challenge. 74 M.J. at 36. The Court stated, "We should want and wish for especially strong bonds between judge advocates and the commanders they advise, provided such bonds do not carry over or appear to carry over into the trial proceedings." *Id*. *Peters* noted that "M.R.E. 912 generally, and the Military Judges' Benchbook specifically, directs counsel and military judges to explore" whether professional relationships between panel members and counsel rise to the level where those relationships are "qualitatively of a sort that reflects the kind of bond that would undermine the fairness of a proceeding or raise the prospect of appearing to do so." 74 M.J. at 35 (citation omitted); *see also Richardson*, 61 M.J. at 119 (examining whether such relationships are "indicative of special deference or bonding"); *Downing*, 56 M.J. at 423 ("[A]n objective observer, aware of Article 25, UCMJ, . . . and the military justice system, would distinguish between officers who are professional colleagues and friends based on professional contact and those individuals whose bond of friendship might improperly find its way into the members' deliberation room.").

Here, the military judge's finding of implied bias merely because of the "optics" of the conversation is insufficient. Unlike *Peters*, the September 23, 2020 meeting had no tie to the ongoing case. *Id.* Her comparison of the conversation between LTC CB and the SJA, DSJA, and COJ and "a panel member who is a brigade commander speaking with their brigade judge advocate on legal issue

issues pertaining to the brigade or a panel member who is a brigade commander or staff primarily speaking with the SJA on the telephone regarding an administrative law issue" is a distinction without a difference. (App. Ex. LXV, p. 25). When analyzed within the proper legal framework, the facts of this case present no concern that the working relationship between LTC CB and the OSJA carried over into the trial proceeding, and thus, there is no concern that an objective observer would believe that the conversation did "injury to the 'perception [or] appearance of fairness in the military justice system.'" *Terry*, 64 M.J. at 302 (quoting *Moreno*, 63 M.J. at 134).

Any possible trepidation by the hypothetical objective observer about the appearance of bias from LTC CB or the fairness of Appellant's court-martial vanishes in light of Appellant's failure to challenge LTC CB after he candidly explained, during voir dire, the nature of his duties as PAO, his working relationship with the OSJA, and his involvement with SGT EF case, which was garnering national media attention that week. (R. at 195–96, 205). Nothing prohibited LTC CB from executing his duties as PAO while the court-martial was in recess. (App. Ex. LXV, p. 23). In fact, as the military judge herself noted, "[i]t is reasonable to believe that many panel members catch up on email and handle other work related issues when court is in recess." (App. Ex. LXV, p. 23). Further, "[Lieutenant Colonel] [CB's] duties frequently required coordination with the

OSJA so [the conversation] would not have seemed out of the ordinary." (App. Ex. LXV, p. 30).

When LTC CB spoke with members of the OSJA regarding his response to Mr. CS's press inquiry, LTC CB performed his duties in the *precise manner* he described to the parties during voir dire. (R. at 195–96, 205). Lieutenant Colonel CB further stated during voir dire that he would not "give any more weight to [the] government's argument or evidence simply because [he] [is] advised by members of the [OSJA]," and to the extent the legal advice he previously received differs in any way from the military judge's instructions, he would follow the military judge's instructions and disregard any such previous legal advice. (R. at 196–97). There was no evidence indicating LTC CB "did not yield to the court's instructions or to the evidence presented at trial," and his voir dire answers "conformed to what the military judge system requires of an impartial panel member." (App. Ex. LXV, p. 22). An objective observer would not believe Appellant's court-martial to be unfair merely because LTC CB unremarkably executed his duties on September 23, 2020—duties he fully disclosed on the record and Appellant did not challenge him for.

Furthermore, unlike *Peters*, the judge advocates LTC CB spoke with were not the prosecuting attorneys. 74 M.J. at 36. Lieutenant Colonel CB's conversation was with the SJA, DSJA, COJ, and other staff at the OSJA, not with

the trial counsel trying Appellant's court-martial. To the extent the SJA, DSJA, and COJ were involved in Appellant's court-martial by virtue of their positions, the lack of any discussion among them with LTC CB about his court-martial duties or Appellant's case while they discussed a matter entirely unrelated to Appellant's court-martial, (App. Ex. LXV, p. 30), belie any finding of perception of bias or unfairness. A member of the public familiar with the military justice system would find that LTC CB's "brief" conversation during a recess with judge advocates who were not the trial counsel, concerning an "urgent and high profile matter" "completely unrelated to the court-martial and [] related to their respective duties," (App. Ex. LXV, p. 30), did not harm the appearance of fairness of the military justice system.

Consequently, LTC CB was not impliedly biased based on the conversation and the government's nondisclosure did not violate R.C.M. 912(c).

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.

Standard of Review

A military judge's determination on 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). The cumulative effect of all plain errors and preserved errors is reviewed de novo. *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011) (citing *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999)). Under the cumulative error doctrine, "a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding." *Id.* (citing *United States v. Banks*, 36 M.J. 150, 170–71 (C.M.A. 1992)). This Court will reverse only if it finds the cumulative errors denied Appellant a fair trial. *Id.*

Law and Argument

A military judge may declare a mistrial when "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). Indeed, a "mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee for a fair trial." *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). Mistrials are "'reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice.'" *United States v. Vazquez*, 72 M.J. 13, 19 n.5 (C.A.A.F. 2013) (quoting *United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991)). "The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons," including times "when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the

members." R.C.M. 915(a), discussion. A military judge has "considerable latitude in determining when to grant a mistrial." *United States v. Seward,* 49 M.J. 369, 371 (C.A.A.F. 1998).

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 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. 1899, 1907–08, 198 L. Ed. 2d 420 (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).

A. The purported non-prejudicial evidentiary errors found by the military judge did not warrant the drastic remedy of a mistrial.

The military judge abused her discretion when she granted a mistrial based on her failure to admit a single line of text conversation between SPC DM and Appellant ("[thumbs up emoji] thank you for your service") and her admission of lay opinion testimony from MAJ SS regarding SPC DM's continued communication with Appellant. Assuming arguendo that these evidentiary calls were error, these two non-related, non-prejudicial errors did not "cast a substantial

doubt on the fairness of the proceedings" such that a mistrial was "manifestly necessary in the interest of justice." (App. Ex. LXV, p. 32).

Appellant is "entitled to a fair trial, not 'an error—free, perfect trial.'" *United States v. Owens*, 21 M.J. 117, 126 (C.M.A. 1985) (quoting *United States v. Hasting*, 461 U.S. 499, 508 (1983)). Here, the "manifest necess[ity]" for a mistrial is missing. The military judge found that neither purported error substantially impacted the legal sufficiency of the findings nor prejudiced Appellant. (App. Ex. LXV, pp. 17, 20, 31). The purported error concerning the single line of text did not prejudice Appellant or otherwise substantially impact the proceedings because SPC DM testified to other messages she sent Appellant after the alleged assault, to include telling him she had a great time, that she missed him, and that she wanted to engage in sexual activities with him. (App. Ex. LXV, p. 17). Likewise, the purported error concerning MAJ SS's testimony did not prejudice Appellant or otherwise substantially impact the proceeding because the "panel heard [SPC DM] testify on direct as to why she continued to communicate with the [Appellant]; how she communicated with the [Appellant]; the length of time she remained in communication; and why she stopped communicating with him." (App. Ex. LXV, p. 20). "Further, the defense extensively cross-examined [SPC DM] on her motives to remain in contact with the [Appellant] and potential motivations as to why she would later file a report of sexual assault," (App. Ex. LXV, p. 20), and the

defense did not request any additional instructions or object to the military judge's proposed instructions based on the testimony. (R. at 511–12).

Additionally, the purported errors were unrelated, and the existence of other properly admitted evidence dispelled any concern that the inadmissible evidence had anything more than a *de minimus* impact on Appellant's trial. (App. Ex. LXV, pp. 17, 20). "Consequently, the errors, in the aggregate, do not come close to achieving the critical mass necessary to cast a shadow upon the integrity of the verdict." *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993). The two non-prejudicial, non-related errors did not substantially impact the sufficiency of the findings or "cast a substantial doubt on the fairness of the proceedings" such that a mistrial was "manifestly necessary in the interest of justice." (App. Ex. LXV, p. 32). Accordingly, the military judge abused her discretion by granting the "drastic" remedy of a mistrial. *See United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993) ("Declaration of a mistrial is a drastic remedy, and such relief will be granted only to prevent manifest injustice against the accused. It is appropriate only whenever circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial.").

B. The presence of an impliedly biased panel member would be structural error—thus, it cannot be included in a cumulative error analysis.

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. As a matter of law and logic, a biased member "cannot" be fair and impartial. *Badders*, 2021 CCA LEXIS 510, at *29. An impartial trier of fact is required as part of an accused's structural protection for a fair trial; the absence thereof would mandate automatic reversal. *Badders*, 2021 CCA LEXIS 510, at *29–30. Consequently, a structural error *cannot* be part of a cumulative error analysis.

Here, it was error for the military judge to include the purported implied bias of a panel member in her cumulative error analysis. As discussed *supra* pp. 32–50, the military judged erred in finding LTC CB was impliedly biased. This finding, coupled with the non-prejudicial nature of the evidentiary rulings, show that the military judge erred in granting a mistrial under a cumulative error analysis.[13]

[13] Appellant also asserts that his court-martial was tainted by the presence of actual and apparent unlawful command influence, (Appellant's Br. 66–76), and that LTC CB was actually and impliedly biased due to his comments to the media about "corrosives" and answers during voir dire concerning "two separate levels of truth." (Appellant's Br. 76–82). These issues are not properly before the Court. The United States filed an interlocutory appeal of "[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). The appeal in this case sought review of the military judge's grant of Appellant's post-trial motion for a mistrial. *Badders*, 2021 CCA LEXIS 510, at *1. The issues that the military judge considered in the cumulative error analysis—the two evidentiary issues and LTC CB's alleged implied bias for attending the September 23, 2020 meeting—along with the jurisdictional question, are the only issues properly before this Court. Because the military judge found these issues, when combined, constituted cumulative error that necessitated a mistrial, these serve as the basis of the ruling that terminated the proceedings with respect to the remaining charge and specification.

Conclusion

WHEREFORE, the United States respectfully requests this Honorable Court affirm the Army Court's decision setting aside the military judge's ruling.

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CERTIFICATE OF COMPLIANCE WITH RULE 21

1. This brief does not comply with the type-volume limitation of Rule 21(b) because this brief contains 13,855 words. The Appellee has submitted a motion for leave to file answer in excess of type-volume limits contemporaneously.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

Dustin L. Morgan
DUSTIN L. MORGAN
Captain, Judge Advocate
Attorney for Appellee
January 19, 2022

APPENDIX

United States v. Badders

United States Army Court of Criminal Appeals

September 30, 2021, Decided

ARMY MISC 20200735

Reporter
2021 CCA LEXIS 510 *; 2021 WL 4498674

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

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Badders, 2021 CAAF LEXIS 1027 (C.A.A.F., Nov. 29, 2021)*

Motion granted by *United States v. Badders, 2021 CAAF LEXIS 1025, 2021 WL 5763970 (C.A.A.F., Nov. 30, 2021)*

Motion granted by *United States v. Badders, 2021 CAAF LEXIS 1054 (C.A.A.F., Dec. 9, 2021)*

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

Case Summary

Overview
HOLDINGS: [1]-The military judge abused her discretion in the mistrial declaration because the judge abused her discretion in finding implied bias related to the Lieutenant Colonel's presence on the court did 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.

Outcome
Appeal granted and decision set aside.

Counsel: 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).

Judges: Before ALDYKIEWICZ, WALKER, and PARKER, Appellate Military Judges. Judges WALKER and PARKER concur.

Opinion by: ALDYKIEWICZ

Opinion

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

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* **[*2]** *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 CC referred one **[*3]** 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, [TEXT REDACTED BY THE COURT] and the Accused met on a social networking dating application (Tinder). Near the end of 2018, while deployed to Germany, they reconnected and began a consensual sexual relationship.

3. In April 2019, [TEXT REDACTED BY THE COURT] 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 Flood command climate and culture..., and its impact, if any, on the safety, welfare and readiness of our Soldiers and units.'"[] Specifically the

[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.

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 **[*4]** 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 20L1-188 (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."

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." **[*5]**

. . .

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 **[*6]** 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

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[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."

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. **[*7]**

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 **[*8]** 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 **[*9]** 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] **[*10]** 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 **[*11]** 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 **[*12]** 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.

[*13] 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 **[*14]** 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 **[*15]** 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 **[*16]** 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, **[*17]** 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. S[TEXT REDACTED BY THE COURT]'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 **[*18]** 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. **[*19]** 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* ***[*20]*** *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 **[*21]** 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 **[*22]** 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 thc 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 **[*23]** 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. 1 (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 **[*24]** 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 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

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

[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)*).

reviewing the case, we find that the military judge, abused her discretion in her post-trial finding of implied bias and its impact on the military judge's "cumulative error" **[*25]** analysis.[6]

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 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.

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:

> Under the cumulative error doctrine, "a column of errors may [] have a logarithmic effect, producing a total impact greater **[*26]** 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).

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[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*.

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 **[*27]** 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, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)* (distinguishing between structural defects 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. 1899, 1907-08, 198 L. Ed. 2d 420 (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, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927)*; total deprivation of the right to counsel, *Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)*; violation of the right to self-representation at trial, *McKaskle v. Wiggins, 465 U.S. 168, 177-78, n. 8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)*; deprivation, generally, of the right to a public trial, *Waller v. Georgia, 467 U.S. 39, 49, n. 9, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)*; unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)*; and improper jury instruction on "beyond a reasonable doubt" standard, *Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)*. Structural errors "defy analysis by 'harmless-error' standards." *Fulminante, 499 U.S. at 309*.

The presence of a biased **[*28]** 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.

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[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.

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 **[*29]** 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, 57 V.I. 856 (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 **[*30]** 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. **[*31]** 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 **[*32]** *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, 57 S. Ct. 177, 81 L. Ed. 78 (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 **[*33]** 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 **[*34]** 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:

> 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 **[*35]** 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.
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> . . .
>
> 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 **[*36]** motion, the military judge noted:

> As discussed in Issue 5: Request for

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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.

> 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. **[*37]**
>
> . . .
>
> 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 **[*38]** 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 *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 *Schuller* 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

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

(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 **[*39]** — "a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (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, 104 S. Ct. 845, 78 L. Ed. 2d 663 (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). **[*40]**

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 **[*41]** 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 **[*42]** 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 243-244* (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 **[*43]** 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.

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.

End of Document

[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)*.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on January 19, 2022.

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