IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Thomas H. TAPP,** Private First Class (E-2) U.S. Marine Corps Appellant	**BRIEF ON BEHALF OF APPELLANT** Crim.App. Dkt. 202100299 USCA Dkt. 23-0204/MC

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

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WAS APPELLANT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JUDGE?

Introduction

[redacted]

Later, after Appellant was convicted and the trial ended, defense counsel left the courtroom and trial counsel was gathering their things. Trial counsel asked the military judge if he was interested in conducting a later debrief with all counsel and he declined. But then the military judge launched into a forty-minute, *ex parte* "blasting" of trial counsel where his anger against the Defense erupted again.[3] The military judge was outraged with the low sentence in the case and thought trial

[1] J.A. at 1459-60.
[2] J.A. at 1460.
[3] J.A. at 587.

counsel needed to ask for more punishment. He thought the trial counsel had "undervalue[d] this case."[4]

He cited what he saw as the aggravating factors in Appellant's case and asserted that "when the Trial Counsel 'caps' the sentence by asking for less than the maximum amount of confinement, the Defense have no incentive to avoid contested trials, and *then there is no 'price' to be paid by the Defense* for their earlier decisions," such as filing motions late or during trial as occurred here.[5] Trial counsel, frozen by this encounter, immediately thereafter spoke to supervisory counsel and provided a memorandum to defense counsel outlining the military judge's outburst.

The military judge later recused himself in a post-trial 39(a) where he defended his impartiality despite his pretrial comments, his *ex parte* outburst, and several troubling comments he made throughout the record about the evidence that demonstrated he had a preconceived notion about the case. And after a hearing where all the witnesses during the *ex parte* lecture testified except the military judge, a follow-on military judge ruled he was impartial.

But this ruling, which found no bias and no justification for setting aside the

[4] J.A. at 503.
[5] J.A. at 1382 (emphasis added).

findings, was an abuse of discretion littered with several clearly erroneous findings of fact. The military judge's actions before, during, and after trial demonstrate partiality for the Government. Aside from his biased view of the facts of the case, the military judge critically [redacted] And when Appellant was not required to pay a "price" in sentencing for the actions of his counsel, he "blasted" the trial counsel for letting that happen. The military judge was actually biased and at least apparently biased. This case should be reversed to restore public confidence in military justice.

Statement of Statutory Jurisdiction

Private First Class (PFC) Tapp's approved sentence includes a dishonorable discharge and three years' confinement.[6] The Navy and Marine Corps Court of Criminal Appeals (NMCCA) reviewed this case under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[7] Thus, this Court has jurisdiction pursuant to Article 67(a)(3), UCMJ.

[6] J.A. at 92, 497.
[7] 10 U.S.C. § 866(b)(3) (2018).

Statement of the Case

A general court-martial composed of members with enlisted representation convicted PFC Thomas H. Tapp, contrary to his pleas, of one specification of violating a lawful general order and one specification of sexual assault in violation of Articles 92 and 120, Uniform Code of Military Justice (UCMJ).[8] The members sentenced him to three years' confinement, total forfeitures, reduction in rank to E-1, and a dishonorable discharge.[9] The NMCCA affirmed the findings and sentence.[10] Appellant timely petitioned this Court on June 16, 2023, and this Court granted review.

Statement of Facts

A. Appellant, PFC Hanley, and A.N. drank alcohol and engaged in sexual activity in Appellant's barracks room. A.N. was too drunk to remember anything after consensually kissing Appellant in response to his question "[d]o you want more?"[11]

Appellant (age twenty) and PFC Hanley (age eighteen) were both involved in a sexual encounter with A.N. (age sixteen) after drinking alcohol.[12] A.N. later alleged she could not recall some of the sexual activity and would not have

[8] 10 U.S.C. § 892 (2018); 10 U.S.C. § 920 (2018).
[9] J.A. at 497.
[10] J.A. at 1-35.
[11] J.A. at 357.
[12] J.A. at 249-67, 328-29, 359-61.

consented because it was not her "intention."[13] PFC Hanley testified for the Government.[14] He was granted immunity and the offenses charged against him were dismissed.[15]

Appellant was ultimately convicted of drinking underage and sexually assaulting A.N. without her consent.[16]

1. A.N. testified she engaged in consensual sexual activity in the Uber and at the barracks.

On the afternoon of July 18, 2020, A.N. and her mom met Appellant and PFC Hanley at Oceanside Beach.[17] A.N.'s mom left shortly after they introduced themselves.[18] The Marines flirted with A.N. and gave her a piggy back ride.[19] Appellant and PFC Hanley then asked A.N. if she wanted to come to their place, drink, and hang out.[20] A.N. agreed and let her mom know she would be "out with some friends."[21] Her mom told her to be home by 8:30 p.m.[22]

A.N. told the Marines she wanted to "get a bottle of Henny" and "go

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[13] J.A. at 249-67, 328-29, 359-61.
[14] J.A. at 239.
[15] J.A. at 270-71.
[16] J.A. at 89-90, 496.
[17] J.A. at 195, 307.
[18] J.A. at 195-96.
[19] J.A. at 272-73.
[20] J.A. at 273, 308-11.
[21] J.A. at 310-11.
[22] J.A. at 195-96, 311.

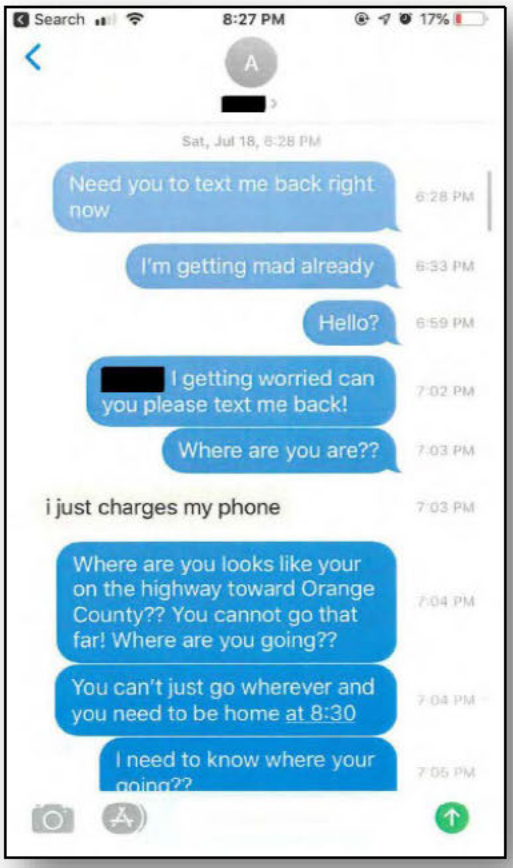
drinking."[23] She initially said she needed to be home by 11:00 p.m., but later told the Marines she would spend the night.[24] A.N. also falsely told the Marines she was nineteen years old.[25]

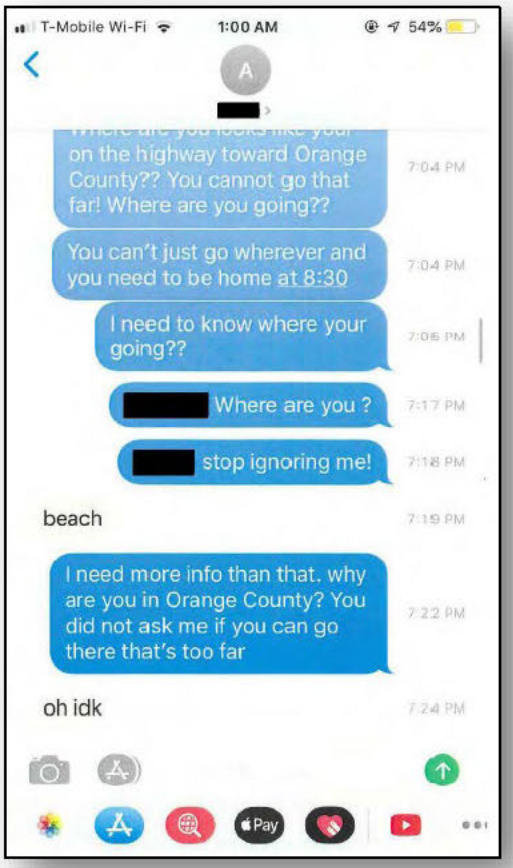
After getting some alcohol at a liquor store, Appellant, PFC Hanley, another Marine, and A.N. shared an Uber ride from Oceanside Beach to the barracks on Camp Pendleton.[26] Right before the Uber ride, PFC Hanley discussed with A.N. that they would "[m]ess around a little bit."[27] A.N. drank "less than half" a beer while they waited.[28] During the ride, the occupants were drinking a bottle of vodka.[29] PFC Hanley and A.N. began "flirting a lot" and "making out."[30] A.N. ran her fingers through his hair.[31] PFC Hanley unbuttoned A.N.'s skirt and digitally penetrated her vulva for two to five minutes.[32] A.N. later told NCIS and the Sexual Assault Nurse Examiner (SANE) that this sexual activity was

[23] J.A. at 241, 273.
[24] J.A. at 273.
[25] J.A. at 241.
[26] J.A. at 242, 313-15.
[27] J.A. at 275.
[28] J.A. at 313-14.
[29] J.A. at 316.
[30] J.A. at 230, 242-43, 276.
[31] J.A. at 276.
[32] J.A. at 242, 276, 319.

consensual.[33] At trial, A.N. testified, "he just did it, and I allowed it."[34]

Despite testifying that she was uncomfortable in the Uber, A.N. lied to her mom about where she was going:[35]





Appellant, PFC Hanley, and A.N. went to PFC Hanley's room to drink beer and vodka and later moved to Appellant's room.[36] In total, A.N. had approximately

[33] J.A. at 380, 416.
[34] J.A. at 347.
[35] J.A. at 666-67.
[36] J.A. at 244-45, 320-23.

eight drinks.[37]

Just moments before Appellant and A.N. had sex, they were hugging and taking selfies in the bathroom.[38] A.N. took this video at 7:55 p.m.:[39]

Appellant kissed her and asked, "[d]o you want more?"[40] A.N. testified that

[37] J.A. at 388.
[38] J.A. at 247, 324-38, 665.
[39] J.A. at 665.
[40] J.A. at 357.

after hearing that question, she consensually kissed him back.[41]

2. While having sex with Appellant, A.N. moaned pleasurably, actively participated, and stimulated PFC Hanley's penis with her tongue.

A.N.'s last memory of the evening was consensually kissing Appellant.[42] Her next memory was waking up in a hospital bed.[43]

PFC Hanley (the Government's witness) testified that after Appellant and A.N. kissed in the bathroom and took pictures together, A.N. returned to the bedroom.[44] All three of them started "making out" and getting undressed.[45] A.N. took off Appellant's shirt.[46] She "shimmied" her hips to help them remove her skirt and swimsuit bottom.[47] A.N. put her arms around Appellant and continued kissing him once they were all naked and standing.[48] A.N. and Appellant moved back to the bed, "slipped to the ground" together, and continued kissing.[49] Appellant and A.N. had "missionary style" sex for ten minutes on the floor.[50]

While having sex with Appellant, A.N. masturbated PFC Hanley's penis

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[41] J.A. at 357.
[42] J.A. at 327-28, 359.
[43] J.A. at 328.
[44] J.A. at 245-49, 282.
[45] J.A. at 248-49.
[46] J.A. at 249, 283.
[47] J.A. at 284.
[48] J.A. at 286.
[49] J.A. at 249, 286.
[50] J.A. at 249, 251-52; 286.

with her hand for two minutes.[51] She did so without assistance and while fully "gripping" PFC Hanley's penis.[52] PFC Hanley testified that she was "awake, participating, and making pleasurable moans," and that her eyes were closed.[53] This all occurred while she was still having sex with Appellant.[54]

PFC Hanley then tapped A.N.'s cheek and asked her to perform oral sex on him, and she lifted her head in response.[55] A.N. actively engaged in oral sex with PFC Hanley—making "sex noises" while "using her tongue" around PFC Hanley's penis.[56] During PFC Hanley's testimony, one panel member asked, "was she giving you oral sex or were you moving her head?"[57] He answered, "[i]t was both. She had—had made a squeal and was using her tongue, but I was, also, like, moving her head back and forth."[58]

PFC Hanley then asked Appellant to switch positions.[59] At this point, Appellant and A.N. stopped having sexual intercourse.[60]

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[51] J.A. at 252, 287.
[52] J.A. at 287, 295.
[53] J.A. at 253, 287.
[54] J.A. at 287.
[55] J.A. at 254, 288.
[56] J.A. at 289-90, 296-97.
[57] J.A. at 297.
[58] J.A. at 297.
[59] J.A. at 255, 290.
[60] J.A. at 290.

PFC Hanley explained his perception *at the time*:[61]

> **Questions by the trial counsel continued:**
>
> Q. What was your perception of A.N. when PFC Tapp was penetrating her, based on your observations?
>
> A. At the time, seemed normal. Just like a drunk hookup.

PFC Hanley was the only witness who testified about what occurred during this time. Appellant did not testify, but told NCIS the sex was consensual, and A.N. did not remember anything about this part of their sexual encounter.[62]

When Appellant moved, PFC Hanley stated he saw a red area on Appellant's crotch that he believed was a colored condom.[63] He thought later, at trial, it "might have been blood."[64] Nonetheless, a later forensic analysis indicated no blood from A.N. on Appellant's penis or scrotum despite A.N.'s DNA being present.[65]

After Appellant moved, PFC Hanley positioned himself between A.N.'s legs.[66] PFC Hanley attempted to penetrate her vulva with his penis, but could not,

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[61] J.A. at 269.
[62] J.A. at 327-28, 1297, 1301-04, 1316, 1325-28, 1331, 1336.
[63] J.A. at 256-57.
[64] J.A. at 256-57.
[65] J.A. at 228, 383, 384-85. The examiner also did not observe visible blood on his penis. J.A. at 229.
[66] J.A. at 257.

so he began digitally penetrating her vulva and masturbating himself for three minutes.[67] He testified A.N. continued "moaning" while PFC Hanley digitally penetrated her, and she was "into it."[68] PFC Hanley explained he did not have long fingernails because he bites them.[69] After three minutes, PFC Hanley noticed blood on his hands and attempted to show A.N., but she did not respond.[70] PFC Hanley looked to Appellant and did not notice any blood on Appellant even though he was naked and standing up facing him.[71]

Until he tried to show his fingers to A.N., PFC Hanley agreed that A.N. "was fully, enthusiastically participating" in the sexual encounter.[72]

3. A.N. was likely menstruating. This caused a significant amount of blood to pool under her in the barracks room. A Sexual Assault Forensic Exam (SAFE) revealed two lacerations to the exterior of her vagina, which could have contributed to the blood at the scene.

PFC Hanley started "freaking out" because of the blood.[73] He made sure she was breathing and rubbed his knuckles on her sternum.[74] She responded with a

[67] J.A. at 257.
[68] J.A. at 257, 291-92.
[69] J.A. at 259.
[70] J.A. at 258, 292.
[71] J.A. at 292-93.
[72] J.A. at 293-94.
[73] J.A. at 259-61.
[74] J.A. at 259-61.

groan.[75] She would not stop bleeding from her vagina so Appellant and PFC Hanley wiped her with a damp paper towel.[76] They tried repeatedly to wake her.[77] Finally, they clothed her, moved her to a recovery position, and PFC Hanley went to get a friend, PFC Schilling, who had medical training.[78]

When PFC Schilling walked into the room, A.N. and Appellant were both unconscious.[79] There was a pool of blood in the middle of the carpet with several "very small, fleshy pieces" in the center and vomit everywhere.[80] PFC Schilling believed it was possibly period blood and proceeded to check A.N.'s airway, breathing, and circulation.[81] She started making puking sounds so he turned her on her side.[82]

In the meantime, A.N.'s mom had contacted the Camp Pendleton police, told them she was worried about her daughter, and asked them to do a welfare check.[83] The iPhone location she provided eventually led the police to Appellant's barracks

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[75] J.A. at 261.
[76] J.A. at 262.
[77] J.A. at 263.
[78] J.A. at 264-65.
[79] J.A. at 231. PFC Schilling also testified with immunity. J.A. at 238.
[80] J.A. at 201, 204, 210, 219, 231.
[81] J.A. at 232-33, 236-37.
[82] J.A. at 235.
[83] J.A. at 202.

room.[84]

The Emergency Medical Technicians (EMTs) arrived on the scene around 11:00 p.m.—approximately three hours after Appellant and A.N. had sex.[85] The police told the EMTs that the room was a potential crime scene.[86] The EMTs observed that both A.N. and Appellant appeared unconscious.[87] Because of the blood on the floor and on A.N.'s skirt, the EMT thought she might be injured.[88] After the use of painful stimuli, A.N. "opened her eyes a little bit" and gave limited answers to questions the EMT asked her.[89] In the ambulance, A.N. told the EMT she had started her menstrual cycle and that she was not in pain.[90]

At the hospital, A.N. told the nurse she had started her menstrual cycle, as reflected in the nurse's chart.[91] When she woke up the next day, unprompted, the nurses told her she "may have been sexually assaulted" and A.N. was taken for a Sexual Assault Forensic Exam (SAFE).[92] A.N. testified she felt a sharp pain in her vagina when she first got out of the hospital bed and the pain continued to occur

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[84] J.A. at 202.
[85] J.A. at 209.
[86] J.A. at 209.
[87] J.A. at 209.
[88] J.A. at 211.
[89] J.A. at 213.
[90] J.A. at 216-17.
[91] J.A. at 223-224.
[92] J.A. at 329, 364.

over a period of about two weeks.[93]

The Sexual Assault Nurse Examiner (SANE), Ms. Ostapovicz, testified that A.N. said she was on her period and that this was the "normal time" for it.[94] A.N. had a twenty-eight day cycle and experienced her next period approximately twenty-eight days after this.[95] Ms. Ostapovicz testified that period blood could contain fleshy tissue from the uterine lining and it does not clot (unlike blood from a laceration).[96] Ms. Ostapovicz testified that A.N. said she felt pain when Ms. Ostapovicz touched her during the genital exam but that alcohol could dull pain at the time of an injury.[97] The Government's forensic toxicologist confirmed that intoxication increases pain tolerance.[98] Ms. Ostapovicz observed external genital lacerations that "seep[ed]" blood—not gushed blood—and saw blood that appeared to be menstrual blood: "drip down and bright red."[99]

But at a follow-up appointment three days later, A.N. told Ms. Ostapovicz

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[93] J.A. at 328-31, 333.
[94] J.A. at 366, 380-81.
[95] J.A. at 332, 363. A.N. testified she bled for approximately two and a half weeks after the incident and then got her period two weeks later. J.A. at 332.
[96] J.A. at 378.
[97] J.A. at 365-67, 381.
[98] J.A. at 386-87, 394. The Defense expert SANE also confirmed alcohol increases pain tolerance. J.A. at 448.
[99] J.A. at 366-68, 455-56, 461-62.

she was not actually menstruating at the time of the alleged incident.[100] Ms. Ostapovicz then changed her assessment of the blood based on A.N.'s new claim, but still testified that the blood, even during her follow-up exam, "could have been . . . her menstruation."[101] Ms. Ostapovicz testified the bleeding, since it was not menstruation according to A.N. (although it was consistent with menstruation), was instead likely from an internal injury to the vaginal wall—despite never actually observing it during the initial or follow-up appointments.[102] She thus believed that the blood at the scene was likely from a combination of this unobserved injury to her vaginal wall as well as the blood from her external lacerations, which could not have alone been the cause.[103]

A government-provided defense expert testified and agreed that the observed lacerations alone could not have caused the blood at the scene.[104] She testified instead that the blood at the scene could have been menstrual blood that pooled in A.N.'s vagina and gushed out upon her moving.[105] Specifically, the Defense expert articulated that while sex cannot start a woman's period, when the cervix is

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[100] J.A. at 369-71.
[101] J.A. at 370, 460-61.
[102] J.A. at 458-61.
[103] J.A. at 458-62.
[104] J.A. at 424.
[105] J.A. 424-25.

stimulated from sex, it may trigger menstrual blood being released.[106]

B. The Government pursued a theory that nonconsent was evidenced by the bleeding and follow-on pain that A.N. experienced, regardless of the testimony of PFC Schilling and her prior consensual conduct.

In an early Article 39(a) hearing, the Government told the military judge: "[s]o part of the government theory is that the injuries A.N. had would have been so painful when made that no reasonable person would have consented, sir."[107]

[redacted] During trial, the Government's theory of the case was similarly that blood, pain, and A.N.'s unobserved and observed injuries were evidence of a nonconsensual sexual encounter.[109]

[redacted]

[106] J.A. at 452-53.
[107] J.A. at 197.
[108] J.A. at 1501.
[109] J.A. at 182-94, 198-200, 203, 205-06, 209, 214, 218, 221, 225-26, 465-95, 668.
[110] J.A. at 672-964, 999-1242, 1503-72, 1615-30.

[redacted]

C. [redacted]

[redacted]

[redacted]

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[111] J.A. at 672-964, 999-1242, 1503-72, 1615-30.
[112] J.A. at 1459.
[113] J.A. at 146.
[114] J.A. at 1440-96, 1557-72.
[115] J.A. at 669-71, 1440-96. A continuance of the trial date was requested by the Defense for various reasons, the Government did not oppose, and the court granted the motion. J.A. at 151-52. A third Article 39(a) was then held. J.A. at 145-52.
[116] J.A. at 1440-65, 1557-73.
[117] J.A. at 1458-59.
[118] J.A. at 1440-65.

[redacted]

[119] J.A. at 1458.
[120] J.A. at 1456-57.
[121] J.A. at 146.
[122] J.A. at 1459.
[123] J.A. at 1459-60 (emphasis added).
[124] J.A. at 1460.

[redacted][5]

D. In ruling on other motions, the military judge made his opinion on the evidence in this case apparent through several on-record comments.

The Defense litigated several other motions to rebut the Government's theory of the case. In weighing and ruling on these motions, the military judge regularly offered his views on the evidence.

1. [redacted]

[125] J.A. at 1465-98, 1589-1604.
[126] J.A. at 1586.
[127] J.A. at 1512.
[128] J.A. at 1513.
[129] J.A. at 1575, 1628.

[redacted]

[130] J.A. at 1575.
[131] J.A. at 1430-36, 1586.
[132] J.A. at 1585.
[133] J.A. at 1586. The lower court similarly found the majority of the bleeding was "undoubtedly caused" by the observed lacerations, "possibly with menstrual blood added." J.A. at 14.

[redacted]

2. [redacted]

[redacted]

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[134] J.A. at 1586-87.
[135] J.A. at 1587.
[136] J.A. at 1587.
[137] J.A. at 1586, 1588 (emphasis in orginal). The lower court found this finding to be clearly erroneous. J.A. at 14.
[138] J.A. at 1556.
[139] J.A. at 1556
[140] J.A. at 1607-14.

[redacted]

[141] J.A. at 1607-14.
[142] J.A. at 1607.
[143] J.A. at 1607.
[144] J.A. at 1578, 1586, 1588.
[145] J.A. at 1374, 1605.
[146] J.A. at 1605.
[147] J.A. at 299-301.
[148] J.A. a t 1605.

[redacted] He concluded, before reviewing the Defense's motion, that "frankly, the Court is not convinced . . . a motion to reconsider is even applicable here" and "[t]here is zero impact on the defense's ability to defend itself."[150]

[redacted]

[149] J.A. at 304.
[150] J.A. at 304-06.
[151] J.A. at 1615-30.
[152] J.A. at 1616.
[153] J.A. at 1623.
[154] J.A. at 1607.
[155] J.A. at 1499.

[redacted]

3. The military judge denied the Defense's request for an expert consultant in forensic pathology, gynecology, and wound interpretation. He explained "[w]ell, most people don't participate in an activity that causes that much injury . . . voluntarily."[158]

The Government's theory was also that this was a "forensic" case.[159] Trial counsel argued they proved lack of consent simply based on the "uncontroverted medical, scientific, and forensic evidence."[160]

Pre-trial, the Defense filed a motion to compel the Government to employ Dr. Matshes as a confidential expert consultant in forensic pathology and gynecology to dispute the Government's contentions.[161] The Defense argued that because A.N. suffered injuries to her vaginal area, and the Government's theory was that Appellant allegedly caused those injuries, understanding the bleeding and lacerations was crucial for the Defense.[162] The Defense argued Dr. Matshes would conduct a wound interpretation analysis by reviewing A.N.'s SAFE and photos of

[156] J.A. at 1502.
[157] J.A. at 1500.
[158] J.A. at 130.
[159] J.A. at 465-66.
[160] J.A. at 465.
[161] J.A. at 871, 873.
[162] J.A. at 873.

her injuries.[163] Dr. Matshes testified in support of the motion.[164]

The military judge denied the motion, concluding "[t]here is a lot of faulty analysis by the defense with respect to Dr. Matshes."[165] He found A.N.'s menstruation cycle was "a very simple issue to understand, that a SANE could, frankly, help with."[166] He concluded this case did not involve "the type of fact pattern that's so complicated that a forensic pathologist is needed to diagnose or to interpret wounds that are out of the ordinary."[167] Finally, the military judge said, "the Court completely agrees with the government's response and adopts its analysis as the Court's own."[168] The military judge directed the Government to provide the Defense with an adequate substitute SANE or SAMFE, explaining "they need to be qualified and equivalent and competent" to what the Government will present.[169]

After the Government provided LT Hargis as the Defense's SANE consultant, the defense filed a motion for reconsideration to compel Dr.

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[163] J.A. at 874.
[164] J.A. at 95.
[165] J.A. at 107.
[166] J.A. at 107.
[167] J.A. at 109.
[168] J.A. at 111.
[169] J.A. at 112.

Matshes.[170] Lieutenant Hargis had only performed three female SAFE exams and made no findings of injury in all three.[171] In contrast, the government's SAMFE, Ms. Ostapovicz, had conducted 103 examinations, made findings of injuries forty percent of the time, and had done more than 500 peer reviews of SAFEs.[172]

The military judge was unconcerned that LT Hargis was significantly less experienced than Ms. Ostapovicz: "when comparing [LT Hargis'] expertise to the facts of this case and the government SANE, this will be a very equal situation where the defense is well-position to learn everything it needs to learn in preparation for trial."[173] The military judge said that because LT Hargis had seen injuries to the female genitalia during childbirth, her experience would help with injuries resulting from alleged sexual assault.[174]

The military judge took the trial counsel at his word when he claimed the Government will not engage in a "battle of the experts."[175] The military judge found this was "not even expected in this case, and that makes sense in a case primarily about consent and not complicated or unique medical opinions."[176] In

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[170] J.A. at 1127-1242.
[171] J.A. at 1129.
[172] J.A. at 125-27.
[173] J.A. at 133-34.
[174] J.A. at 131.
[175] J.A. at 138.
[176] J.A. at 138.

response to the Defense's argument that they would need an expert to explain A.N.'s injuries, the military judge said, "[w]ell, most people don't participate in an activity that causes that much injury . . . voluntarily."[177] He said, "[p]enetration and the injuries that it may have caused is not the central issue, and frankly, not that difficult to understand."[178]

The military judge then again denied the Defense's motion, concluding "[t]his is absolutely noncontroversial [and] how alcohol-facilitated sexual assault cases like this are tried all the time in the Marine Corps."[179]

E. After the trial adjourned and defense counsel left the courtroom, the military judge chastised the trial counsel for forty minutes. He said this case had significant "aggravating evidence" and stated there is "no price to be paid by the Defense" for going to a contested trial or litigating motions when the Government fails to ask for the maximum sentence.[180]

After the military judge adjourned the court-martial and the trial defense counsel left the courtroom, Major Michel (lead trial counsel) asked the military judge if he would be willing to set up a debrief with all counsel.[181] The military judge said "no."[182]

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[177] J.A. at 130.
[178] J.A. at 140-41 (emphasis added).
[179] J.A. at 142.
[180] J.A. at 503, 1381-82.
[181] J.A. at 1381.
[182] J.A. at 634, 1381.

But while trial counsel were packing up to leave, the military judge asked Major Michel if he "felt that there were worse sexual assault cases" than Appellant's.[183] Major Michel responded in the affirmative.[184] The military judge disagreed based on the "aggravating factors," such as the blood, alcohol, vomit, and A.N.'s age.[185] He chastised trial counsel about their "undervalue[d]" assessment of Appellant's case for forty minutes.[186]

First, he criticized Major Michel for asking for eleven years of confinement rather than the maximum sentence (thirty-two years) or at least "more than what [the Government] had asked for."[187] In an affidavit, the court reporter explained "LtCol Norman [(the military judge)] seemed upset that Appellant was sentenced to only 3 years of confinement."[188] The military judge said, "I don't know if you guys [(trial counsel)] know what right looks like."[189] Captain Gage O'Connell (another trial counsel) testified the military judge said he wished Captain O'Connell had done the Government's sentencing argument, recognizing that he

[183] J.A. at 1381.
[184] J.A. at 635, 1381.
[185] J.A. at 587, 594, 635-36.
[186] J.A. at 1381.
[187] J.A. at 586, 597, 635-36, 1381.
[188] J.A. at 1384
[189] J.A. at 629.

was "aggressive."[190] Captain O'Connell explained the military judge "takes military justice very seriously, *particularly when you're a trial counsel and you[']re] representing the government*."[191]

Then, he complained that when the government artificially "caps" the sentence by asking for less than the maximum, "the Defense has no incentive to avoid contested trials."[192] [redacted] said there is **"*no price to be paid by the Defense*"** for "their prior tactics during trial"—such as going to trial or filing untimely motions.[193]

The court reporter testified the military judge appeared upset, disappointed, raised his voice, and "blasted" the trial counsel.[194] All three trial counsel testified that the military judge was "chastising" them, angry, "pretty aggressive," and raised his voice.[195] Everyone stood for the duration of the forty-minute lecture.[196] None of the trial counsel felt comfortable enough to ask him to stop or request to leave.[197]

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[190] J.A at 627.
[191] J.A. at 620.
[192] J.A. at 618, 1382.
[193] J.A. at 640, 1381-82, 1460.
[194] J.A. at 586-588.
[195] J.A. at 591, 595, 612, 618-19, 623, 636.
[196] J.A. at 637.
[197] J.A. at 599-600, 628, 640-41.

F. Trial counsel immediately prepared a memorandum and provided it to the Defense. The Defense filed a motion seeking either dismissal with prejudice or a mistrial.

Once the trial counsel left the courtroom, they determined these *ex parte* comments "need[ed] to be reported" and called their supervisor.[198] On March 1, 2021, Major Michel provided a memorandum detailing the *ex parte* lecture to the Defense.[199]

On March 5, the military judge emailed the parties directing a post-trial Article 39(a) session, but did not explain why.[200]

The next day, the Defense filed a motion seeking the military judge's disqualification from further proceedings and dismissal with prejudice, or a mistrial in the alternative.[201] The motion was based on the military judge's demeanor and comments during trial and his *ex parte* post-trial lecture.

On March 8 the trial defense counsel objected to moving forward with the post-trial Article 39(a) without the military judge first ruling on whether he should be disqualified.[202] While repeatedly ignoring the defense's objection, the military

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[198] J.A. at 625, 643-44, 646.
[199] J.A. at 643, 1381.
[200] J.A. at 1390.
[201] J.A. at 1353-90.
[202] J.A. at 498-507.

judge explained his impartiality in a statement that takes up six transcript pages.[203] He corroborated much of what the trial counsel said.[204]

He explained that this case had "significant aggravating . . . evidence" and that he believed trial counsel "undervalue[d] this case."[205] He also stated that "zealous advocacy on sentencing supports effective pretrial negotiations."[206] "[W]hen the government undervalues a case in sentencing, like I believe they had here . . . it acts like a self-imposed cap on the sentence . . . ."[207] He argued he assisted both sides because before the *ex parte* counseling he had "already strongly encouraged the defense to put on a robust sentencing case."[208] He said four times, "I've remained completely impartial throughout this trial and remain impartial now."[209]

The military judge said he does "not believe there is a reasonable appearance of bias based on the totality of the circumstances."[210] But looking back, he would have asked all counsel "to come back in the courtroom before giving any

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[203] J.A. at 502-07.
[204] J.A. at 502-07.
[205] J.A. at 503.
[206] J.A. at 503.
[207] J.A. at 503-04.
[208] J.A. at 505.
[209] J.A. at 502-03, 506-07.
[210] J.A. at 503, 505.

feedback."[211] Despite claiming to be impartial, he ended his monologue by recusing himself from any further post-trial matters.[212]

G. Colonel Woodard, the post-trial military judge, denied the Defense's post-trial motion.

Shortly after the first military judge—LtCol Norman—adjourned the post-trial session, ColWoodard became the presiding judge.[213] After conducting voir dire, the Defense challenged Col Woodard based on his professional relationship with LtCol Norman as giving the appearance of bias.[214] Colonel Woodard denied this challenge.[215]

Before LtCol Norman was called to testify, Col Woodard brought in LtCol Norman's defense counsel to give him a rundown about what questions were going to be asked.[216] Colonel Woodard then allowed LtCol Norman's defense counsel to consult with LtCol Norman.[217] Instead of allowing Appellant's defense counsel to question LtCol Norman, Col Woodard decided he should ask the questions.[218]

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[211] J.A. at 503, 505.
[212] J.A. at 506-07.
[213] J.A. at 577-79.
[214] J.A. at 508-70.
[215] J.A. at 570.
[216] J.A. at 571-72.
[217] J.A. at 573-77.
[218] J.A. at 577-78.

Colonel Woodard then ordered LtCol Norman to testify, but LtCol Norman invoked his right against self-incrimination and refused to answer any questions.[219] At this hearing, Col Woodard heard testimony from everyone present during the *ex parte* lecture (except LtCol Norman).[220]

Colonel Woodard later denied the defense's motion for dismissal with prejudice.[221] He found that the court-martial's legality, fairness, and impartiality were not put into doubt by LtCol Norman's post-trial *ex parte* comments and his actions and rulings during trial.[222] He found the *ex parte* comments "did not focus on the accused," but instead focused on counsels' shortcomings in representing their clients.[223] He found "LtCol Norman never stated that the trial counsel should have asked for more than the 11 years of confinement."[224]

Colonel Woodard wrote the *ex parte* comments were a "misguided attempt by LtCol Norman to provide objective but pointed critical feedback."[225] He found LtCol Norman's comments during and after trial "did not exhibit favoritism for

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[219] J.A. at 579-82.
[220] J.A. at 584, 590, 614, 631.
[221] J.A. at 1411-27.
[222] J.A. at 1423.
[223] J.A. at 1424.
[224] J.A. at 1415.
[225] J.A. at 1424.

one side over the other."[226] Finally, he concluded "granting a remedy would not be necessary to ensure that LtCol Norman or other military judges exercise the appropriate degree of discretion in the future."[227]

Summary of Argument

Appellant was denied a fair trial because of LtCol Norman's actual bias against Appellant. Before trial, [redacted]

After trial, his *ex parte* lecture and unsworn statement prior to recusal revealed his anger with trial counsel for not teaching the Defense that lesson. And when this raw insight into LtCol Norman's perception of the case is examined alongside comments he made about the evidence throughout trial and his disparate treatment of counsel, there is no doubt that LtCol Norman meant what he said. He saw the case as egregious and he wanted the Defense (including Appellant) to pay a "price" in the form of more confinement for their actions in litigating it.[229] He was thus actually biased and at a minimum his "impartiality might reasonably be questioned."[230]

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[226] J.A. at 1425.
[227] J.A. at 1426.
[228] J.A. at 1460.
[229] J.A. at 1381-82.
[230] R.C.M. 902(a).

Colonel Woodard made clearly erroneous findings of fact and rested on incorrect conclusions of law when he denied the Defense's motion to set aside the findings and sentence. He therefore abused his discretion. A standard of impartiality should be set. Lieutenant Colonel Norman's bias undercuts public confidence in military justice and presents a significant risk of injustice for other accused as well. As such, this bias warrants reversal.

Argument

Appellant was deprived of his constitutional right to an impartial judge.

Standard of Review

The standard of review of a military judge's impartiality is abuse of discretion.[231] "A military judge abuses his discretion when: (1) he predicates his ruling on findings of fact that are not supported by the evidence of record; (2) he uses incorrect legal principles; (3) he applies correct legal principles to the facts in a way that is clearly unreasonable . . . (4) he fails to consider important facts.[232]

[231] *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000).
[232] *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F 2017) (internal citations omitted).

Discussion

An accused has a constitutional right to an impartial judge.[233] "The neutrality required by constitutional due process helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law."[234] "The impartiality of a presiding judge is crucial, for the influence of the trial judge on the jury is necessarily and properly of great weight."[235] There is a strong presumption that judges are impartial, and the burden is on the party seeking to demonstrate bias.[236]

There are two grounds for disqualification of a military judge: actual bias and apparent bias.[237] Appellant raises both grounds. Rule for Courts-Martial 902(b) lists specific circumstances indicative of actual bias that require disqualification. This includes disqualification where the military judge "has a personal bias or prejudice concerning a party."[238]

Rule for Courts-Martial 902(a) addresses apparent bias, and requires the

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[233] *United States v. Quintanilla*, 56 M.J. 37, 43 (C.A.A.F. 2001) (internal quotations and citations omitted).
[234] *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) (internal quotations omitted)).
[235] *Quintanilla*, 56 M.J. at 43.
[236] *Id*. at 44.
[237] R.C.M. 902; *Quintanilla*, 56 M.J. at 45 (C.A.A.F. 2001).
[238] R.C.M. 902(b)(1).

disqualification of the military judge when his "impartiality might reasonably be questioned." On appeal, this Court asks whether, in the context of the entire trial, the court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions.[239] "The test is objective, judged from the standpoint of a reasonable person observing the proceedings."[240] Recusal based on the appearance of bias is intended to "promote public confidence in the integrity of the judicial process."[241]

In this case, LtCol Norman's pre-trial request for the Defense to learn a "lesson" and post-trial *ex parte* counseling expressing frustration with that not having occurred demonstrated actual bias. And when this is examined alongside his treatment of the evidence and the parties before and during trial it is clear that Appellant did not receive a fair trial. At a minimum, LtCol Norman's "impartiality might reasonably be questioned."[242] Colonel Woodard abused his discretion in finding otherwise.

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[239] *Burton*, 52 M.J. at 226.
[240] *Id.*
[241] *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, 858 (1988).
[242] R.C.M. 902(a)

A. Lieutenant Colonel Norman displayed a "deep-seated" bias against Appellant and the Defense.[243]

Remarks, comments, or rulings of a judge constitute bias or partiality if they "display a deep-seated favoritism or antagonism that would make fair judgment impossible."[244]

1. Lieutenant Colonel Norman's biased comments on and off the record exposed his partiality.

a. Lieutenant Colonel Norman's pretrial comments set the stage for his bias against the Defense.

[redacted]

[243] *Quintanilla*, 56 M.J. at 44 (internal quotations and citations omitted).
[244] *Id*. at 44 (internal quotations and citations omitted).
[245] J.A. at 1460.
[246] J.A. at 1459-60.
[247] J.A. at 1440-65.

[redacted]. [redacted] part of his later *ex parte* tirade; an action that the Defense needed to pay a "price" for.[248]

b. Lieutenant Colonel Norman's forty-minute *ex parte* lecture revealed this actual bias toward the Defense lasted through trial.

A military judge's extra-judicial, out-of-court, and *ex parte* statements should be considered as part of the totality of the circumstances in evaluating bias.[249] *Ex parte* communications involving substantive issues or that show favoritism for one side may necessitate recusal.[250] *Ex parte* communications that might have the effect of giving the appearance of granting an undue advantage to one party cannot be tolerated.[251]

Here, Lieutenant Colonel Norman's *ex parte* lecture shed light on the bias he harbored during the entire trial. He said, while he was still the military judge on

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[248] J.A. at 1381-82

[249] *Quintanilla*, 56 M.J. at 81 (holding the military judge's "incomplete disclosures and ex parte conversation appear to have prejudiced appellant"); *United States v. Bremer*, 72 M.J. 624, 627-29 (N-M. Ct. Crim. App. May 23, 2013) (setting aside the sentence for the military judge's failure to recuse himself based largely on out-of-court statements); *United States v. Kish*, No. 201100404, 2014 CCA LEXIS 358, at *10-13 (N-M. Ct. Crim. App. June 17, 2014) (setting aside the findings and sentence based on comments the military judge made at a training post-trial).

[250] *Quintanilla*, 56 M.J. at 79.

[251] *Id*.

the case, exactly how he felt about Appellant. He felt the trial counsel's recommendation for eleven years of confinement was insufficient. He implied this was the worst sexual assault case he had seen. He assumed the role of supervisory trial counsel to remind the Government that this case involved blood, a sixteen-year-old, and genital injuries. Even the court reporter knew the military judge was upset with Appellant's sentence.

Lieutenant Colonel Norman's post-trial anger toward the Government also directly implicated Appellant's constitutional rights to due process and the assistance of counsel.[252] He encouraged the trial counsel to recommend higher sentences—if not the maximum punishment. He said that when the government asks for less than the maximum sentence, there is "no 'price' to be paid by the defense" for their earlier decisions—like going to a contested trial and filing late motions.[253] [redacted]

This connection indicates LtCol Norman held his biased view against the Defense through the entire court-martial.

[252] *See United States v Jackson*, 390 U.S. 570, 581 (1968) (explaining that due process forbids a "chill [on] the assertion of" the right to a jury trial).
[253] J.A. at 1382.
[254] J.A. at 1460.

Moreover, this "blasting" is not merely an expression of dissatisfaction with the trial counsels' performance in this court-martial.[255] It shows a deep-seated favoritism toward the prosecution at the expense of all accused, including Appellant, and antagonism toward the Constitution. Lieutenant Colonel Norman warned the Government to be better—not better in the sense of becoming better advocates, but better by advocating for harsher punishments so the Defense pays the price for litigating issues in the zealous representation of their clients. Such policy also undermines the professional responsibility tenet that "a trial counsel has the responsibility of administering justice and is not simply an advocate."[256]

Notably, despite later asserting "in retrospect" that the Defense should have been present, he declined trial counsel's express invitation to involve defense counsel prior to delivering his remarks.[257] [redacted]

[255] J.A. at 587.
[256] Judge Advocate General's Rules of Professional Conduct, JAGINST 5803.1E, Rule 3.8.e(1).
[257] J.A. at 584.
[258] J.A. at 1381-82, 1460.

c. Lieutenant Colonel Norman "bent over backwards" to make it seem as though he had not acted as a result of actual bias by making self-serving statements on the record.[259]

This Court has held that a military judge's conduct may warrant disqualification where it can be shown "that the challenged judge, in order to compensate for the appearance of such bias, has bent over backwards to make it seem as though he had not acted as a result of such bias."[260]

Here, at the post-trial Article 39(a) hearing LtCol Norman conducted, defense counsel repeatedly objected to moving forward with the hearing until he ruled on the motion to disqualified him.[261] Each time, LtCol Norman said he understood the objection, but instead of ruling on it, he "bent over backwards" explaining four times that he "remained completely impartial throughout this trial and remain impartial now."[262] He did this while knowing he was going to recuse himself. On the record, he claimed he convened the Article 39(a) to consider the Defense's motion, but when he ordered the hearing, the Defense had not yet filed

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[259] *Quintanilla*, 56 M.J. at 43-44 (internal quotations and citation omitted).
[260] *Id*. at 43-44 (internal quotations and citation omitted); *see Bremer*, 72 M.J. at 626-68 (finding that the military judge's comments in a post-trial hearing evidence that he "bent over backwards" to defend his impartiality and thereby made himself appear partial) (quoting *Quintanilla*, 56 M.J. at 43-44).
[261] J.A. at 501-02, 504.
[262] J.A. at 502-03, 506-07.

their motion.[263]

Tellingly, R.C.M. 902 provides "[t]he military judge shall broadly construe grounds for challenge *but should not step down from a case unnecessarily*." "While military judges are obliged to disqualify themselves when they lack impartiality, they are equally obliged not to disqualify themselves when there is no reasonable basis for doing so."[264] The mere fact that LtCol Norman stepped down after delivering these remarks thus underscores his true (and correct) belief about the situation: he needed to recuse himself as he was biased.

Lieutenant Colonel Norman's "attempt to fill the record with enough facts to dispel the appearance of bias only made himself look more self-interested."[265] Thus, LtCol Norman's self-serving unsworn statement underlines the necessity of his recusal, but does nothing to wash out the stain of his partiality.

2. In light of his post-trial comments about his view of the evidence in Appellant's case, LtCol Norman's biased perception of the evidence as indicated by his statements on the record further indicate partiality.

When "there is an indication of extra-judicial bias, each questionable adverse ruling . . . tends to magnify the appearance of injustice."[266] Here, LtCol

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[263] J.A. at 502, 1353-1390.
[264] *Burton*, 52 M.J. at 226.
[265] *Bremer*, 72 M.J. at 628.
[266] *United States v. Edwardo-Franco*, 885 F.2d 1002, 1006 (2d Cir. 1989); *see also Kish*, 2014 CCA LEXIS 358, at *11-14 (finding that a military judge's actions,

Norman's biased view of the case and assessment of the evidence is seen during the very first Article 39(a) session over which he presided. He repeatedly downplayed the complexity of the case and took the prosecution's side.[267] He repeatedly called the forensic issues "non-controversial,"[268] "simple,"[269] "straightforward,"[270] that it is not so complicated an expert "is needed to diagnose or to interpret the wounds,"[271] and asserted "this case is not about what happened" but instead about whether A.N. could consent or whether there was a mistake of fact as to consent.[272]

He also made his opinion of the "aggravating factors" in the case clear to the parties. In discussing whether evidence of the blood was admissible, he said, "[i]t's hard to think of evidence of higher probative value."[273]

But this case was anything but simple. Lieutenant Colonel Norman's comments demonstrate that he had a preconceived notion about the case—that A.N. was violently assaulted by Appellant. This colored the lens through which

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such as commenting on the evidence and ruling on objections, "are called into question by the appearance of bias.")

[267] J.A. at 103, 105-08, 111, 114-15, 142.
[268] J.A. at 105-06, 111, 142.
[269] J.A. at 107-09, 111, 114.
[270] J.A. at 115.
[271] J.A. at 108.
[272] J.A. at 108.
[273] J.A. at 143.

LtCol Norman viewed the pretrial litigation and made trial rulings. He substituted the Government's view of the evidence for his own and ignored that the Defense could offer a competing theory. He became non-receptive to medical evidence, particularly from LT Hargis. [redacted]

And he simply decided the defense's requested expert, Dr. Matshes, was "overinflating his own importance with a financial motive to gain employment," despite testifying as an expert in other courts-martial.[275]

The military judge explained that menstruation is a "basic issue" [redacted]

But menstruation is not "basic" to everyone [redacted]

And LtCol Norman went further. He openly sided with the Government's theory by asserting that most women do not engage in painful sexual intercourse: "most people don't participate in an activity that causes that much injury . . .

[274] J.A. at 1586-87.
[275] J.A. at 142, 662.
[276] J.A. at 132.
[277] J.A. at 1631.

voluntarily."[278] The military judge believed "[p]enetration and the injuries it may have caused is not the central issue, and frankly, not that difficult to understand."[279] Yet the members asked, "[c]onstantly chewed nails typically are not crescent but jagged and short in nature. Could this have caused atypical lacerations?" And "[i]n your expert opinion what caused the laceration to A.N.?"[280]

And of note, the military judge denied defense challenges for cause to two members who had family members that were victims of sexual assault.[281]

"[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion."[282] Here, his rulings are not the sole grounds for Appellant's bias claim, but they do demonstrate the military judge's bias. Even if LtCol Norman's decisions on these issues were perhaps not an abuse of discretion, that does not mean that he was not biased or that bias did not affect his rulings.[283] And LtCol Norman's comments during these hearings, when colored by his pre- and

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[278] J.A. at 130.
[279] J.A. at 140-41.
[280] J.A. at 1350-51.
[281] J.A. at 173-81.
[282] *Liteky v. United States*, 510 U.S. 540, 555 (1994).
[283] Notwithstanding the fact that the lower court found LtCol Norman did not abuse his discretion, it found at least one critical finding on the Defense's M.R.E. 412 motion was erroneous. J.A. at 14. Specifically, it found that the record did not support a finding "that it was possible that she tested positive for chlamydia later that same evening as a result of sex with Appellant or PFC Hotel . . . ." J.A. at 14.

post-trial statements, indicate actual bias against the Defense and their theory of the case. At a minimum, LtCol Norman's "questionable adverse ruling[s] . . . tend[] to magnify the appearance of injustice."[284]

3. Lieutenant Colonel Norman treated the parties differently during the court-martial, exhibiting bias in favor of trial counsel.

"[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge" but "may" or "will do so" in some cases.[285] Here, they should be considered as part of the totality of circumstances in light of LtCol Norman's pre-trial and post-trial comments seeking to exact a cost on the Defense for litigating the case.

The most obvious example of bias against the Defense during trial was LtCol Norman's treatment of junior government and defense counsel. When considered alongside his post-trial comments expressing distaste with Defense tactics, the specter of bias is apparent.

Lieutenant Colonel Norman assisted and encouraged Captain O'Connell, the junior trial counsel. He helped Captain O'Connell in his attempt to lay the foundation for an expert witness: "Captain O'Connell, let me interrupt you. If you

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[284] *Edwardo-Franco*, 885 F.2d at 1006.
[285] *Liteky*, 510 U.S. at 555.

want to ask him a few foundational questions for his expertise, and then, go ahead and qualify him . . . Before jumping into the facts of this case, let's get that on the record, please."[286] "[R]ecognizing talent," he told Captain O'Connell he should have done the sentencing argument and that he "seemed very comfortable" in the courtroom.[287]

In contrast, LtCol Norman continually made demeaning comments toward 1stLt Robbins, the most junior defense counsel.[288] Lieutenant Colonel Norman repeatedly interrupted 1stLt Robbins during his oral argument on the defense's request for Dr. Matshes.[289] He told 1stLt Robbins he was "twisting the law" and that his argument was "just a total proffer and a guess and a hope."[290] When 1stLt Robbins asked for one moment to review his notes, LtCol Norman responded, "No. It's your motion. I'm asking you a question. Where's your evidence? Lieutenant Robbins, I'm asking you a question."[291]

Additionally, LtCol Norman humiliated 1stLt Robbins after the Government identified that the Defense had not filed a motion to suppress Appellant's statement

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[286] J.A. at 124
[287] J.A. at 626-27.
[288] J.A. at 1410.
[289] J.A. at 99-106
[290] J.A. at 101.
[291] J.A. at 102.

to NCIS (where Appellant stated the encounter was consensual):

> So, **you didn't know or couldn't understand or perceive or figure out, as a basically qualified defense counsel**, that one of the things you might want to do is suppress the accused's statement where he makes inculpatory admissions? Did you ever talk to Captain Grange about it, who's a little more experienced than you?"[292]

And rather than gently assisting 1stLt Robbins in refreshing a witness's recollection like he did for Captain O'Connell, LtCol Norman harshly said *in front of the members*, "[i]t's not the question, counsel, do it right."[293] While LtCol Norman was certainly not required to give 1stLt Robbins some leeway as a brand new judge advocate, an impartial judge would have at least treated these two junior counsel the same. Lieutenant Colonel Norman did not. The record is saturated with similar instances of favoritism.[294]

While "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge," they do here.[295] This is because LtCol Norman's post-trial comments—where he donned the role of supervisory trial

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[292] J.A. at 121 (emphasis added).
[293] J.A. at 215.
[294] *Compare* J.A. at 129, 144, 155, 227, 464, 1453-56, 1459, 1461, 1463 *and* J.A. at 111, 113, 116, 122-23, 154, 158, 463, 1454, 1455-56, 1458.
[295] *Liteky*, 510 U.S. at 555.

counsel—together with his comments during trial collectively highlight an actual bias against the Defense.[296]

B. The post-trial military judge found LtCol Norman's ex parte lecture "did not focus on the accused."[297] This finding, among others, was clearly erroneous and resulted in an incorrect conclusion that LtCol Norman was not biased.

Colonel Woodard presided over the post-trial hearing.[298] He made at least ten findings of fact the record does not support and failed to consider important facts. This resulted in unreasonable conclusions of law and an overall abuse of discretion.

First, he erroneously found "LtCol Norman never stated that the trial counsel should have asked for more than the 11 years of confinement."[299] The Government conceded LtCol Norman "expressed his belief that the Government should have argued for a longer period of confinement based on the evidence in aggravation presented during the trial and to incentivize the Defense to 'avoid

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[296] Notably, LtCol Norman has a pattern of contemplating contempt for defense counsel for unintentional oversights. In *United States v. Kunishige*, a trial that took place six months before Appellant's trial, LtCol Norman lectured the defense counsel after trial ended for eighteen transcribed pages for the defense's factual oversight that it corrected with an email to trial counsel and the court. J.A. at 1392-1409.
[297] J.A. at 1424.
[298] J.A. at 577-79.
[299] J.A. at 1415.

contested trials.'"[300] Colonel Woodard's finding was contradicted by everyone in the courtroom and by LtCol Norman himself.[301] Lieutenant Colonel Norman admitted he said the government had "undervalue[d]" the case.[302] The record shows LtCol Norman wanted trial counsel to argue for the maximum confinement sentence, or at the very least, more than eleven years. And this erroneous finding of fact was significant. When LtCol Norman told the trial counsel they should have asked for more confinement because, in his opinion, this was one of the worst sexual assault cases that he had seen, he demonstrated that he had abandoned his role as an impartial arbiter of the facts, and became a fourth prosecutor.

Second, Col Woodard erroneously found "LtCol Norman never stated or suggested that any accused or specifically the accused in this case, PFC Tapp, should pay a price."[303] But this statement contradicts Col Woodard's preceding sentence: "LtCol Norman referenced the defense counsel paying a price for their earlier actions during trial."[304] This "price" was also seeking higher sentences when defense counsel do not "avoid contested trials" and engage in lawful motions

[300] J.A. at 1391.
[301] J.A. at 586, 597, 617, 630, 635.
[302] J.A. at 503.
[303] J.A. at 1414-15.
[304] J.A. at 1415.

practice.[305] The memorandum of the tirade read: "when the Trial Counsel 'caps' the sentence by asking for less than the maximum amount of confinement, the Defense have no incentive to avoid contested trials, and then there is no 'price' to be paid by the Defense for their earlier decisions."[306] When Major Michel was asked at the Article 39(a) hearing if LtCol Norman "actually [told him] and the other trial counsel that" he replied "Yes."[307] Appellant was the only member at counsel table who would suffer "the maximum amount of confinement."[308] Only he would pay the "price" for his counsel's actions.[309] This finding was erroneous.

Third, Col Woodard's finding that "at no point . . . did any counsel believe that, given the nature of the conversation—objective feedback and criticism of their performance, they should attempt to end the conversation" was clearly erroneous.[310] Major Michel did not state LtCol Norman's comments were objective feedback and neither did any other witness. Instead, he testified: "I took it as him *trying* to give us, you know, objective feedback."[311] "That's what I

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[305] J.A. at 639.
[306] J.A. at 1382.
[307] J.A. at 648.
[308] J.A. at 1382.
[309] J.A. at 1382.
[310] J.A. at 1416. Colonel Woodard also downplayed that this lecture was *forty minutes long*. He stated" this post-trial ex parte interaction was a one-time, relatively brief interaction (less than 40 minutes) . . . ." J.A. at 1427.
[311] J.A. at 640 (emphasis added).

thought he was *trying* to do, was just give us, you know, feedback or objective criticism."[312] Importantly, Major Michel also testified that he did not feel comfortable telling LtCol Norman to stop, and during the comments, he started to wonder if he was going to need to memorialize or disclose them to the defense and expressed concern to his supervisor.[313] This took them out of the realm of objective feedback. Major Michel also distinguished this from a mentoring session.[314]

And beyond Major Michel, the court reporter testified that she was told about mentoring sessions in school, "but I didn't think that mentoring also meant something akin to this, sir."[315] When asked at the Article 39(a) if this was an "after-action brief with the trial counsel" Captain O'Connell replied "No, sir" and said he remained at parade rest throughout the tirade.[316] And, perhaps most contradictorily, Col Woodard himself later stated that this "was a misguided attempt by LtCol Norman to provide objective but pointed critical feedback."[317]

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[312] J.A. at 640, 642 (emphasis added).
[313] J.A. at 653-54.
[314] J.A. at 649.
[315] J.A. at 589.
[316] J.A. at 615, 619.
[317] J.A. at 1424.

This was an abuse of discretion. This was not "feedback," it was a request to crush defense counsel and their clients for inappropriate reasons, including Appellant.

Fourth, Col Woodard erroneously found LtCol Norman's comments "did not focus on the accused."[318] This is demonstrably false. Lieutenant Colonel Norman discussed Appellant's trial and his sentence while Appellant was not in the room. He told the trial counsel they had "undervalue[d] *this* case."[319] He implied it was the worst sexual assault case he had seen.[320] He admitted he discussed the "significant aggravating . . . evidence presented in *this* case."[321] The court reporter wrote in her affidavit that LtCol Norman seemed upset that *Appellant* was sentenced to three years' confinement.[322] Thus, LtCol Norman almost entirely focused on Appellant and demonstrated his bias in *this* case—a truth that should have significantly impacted Col Woodard's conclusions.

Fifth, Col Woodard erroneously found that "LtCol Norman did not express displeasure or disagreement with the adjudged sentence."[323] But the court reporter explicitly testified "[i]t did appear that he seemed upset about 3 years, ma'am."[324]

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[318] J.A. at 1424.
[319] J.A. at 503 (emphasis added).
[320] J.A. at 611.
[321] J.A. at 503 (emphasis added).
[322] J.A. at 1384.
[323] J.A. at 1415.
[324] J.A. at 586.

Colonel Woodard appeared to have missed this during witness testimony, as he later stated during a later witness' testimony "[t]his is the first time I'm hearing any question at all to any witness about Lieutenant Colonel Norman questioning the adjudged confinement in this case."[325] Lieutenant Colonel Norman thought this sentence was a grave injustice. Finding otherwise was erroneous.

Sixth, Col Woodard erroneously found all of "LtCol Norman's findings of fact [during the trial] were supported by the evidence before him and not clearly erroneous . . . [and he] did not exhibit an erroneous view of the law."[326] But even the NMCCA found that LtCol Norman made a clearly erroneous finding on the Defense's M.R.E. 412 motion to admit evidence of A.N.'s chlamydia diagnosis.[327] Specifically, the NMCCA found: "his belief that it was possible that she tested positive for chlamydia later that same evening as a result of sex with Appellant or PFC Hotel" was "unsupported by the record" and therefore "clearly erroneous."[328]

Seventh, LtCol Norman's numerous criticisms of the Defense throughout the record contradict Col Woodard's conclusion that LtCol Norman "did not exhibit

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[325] J.A. at 622.
[326] J.A. at 1424.
[327] J.A. at 14. Importantly, the NMCCA misunderstood the forensic evidence in a similar manner to LtCol Norman. JA at 13-16.
[328] J.A. at 14.

favoritism for one side over the other."[329] Colonel Woodard failed to consider how often LtCol Norman complimented and assisted the trial counsel while criticizing the Defense throughout trial. Yet he calls LtCol Norman's comments "firm but fair."[330]

Eighth, Colonel Woodard's conclusion that "the Government's case was strong and included Appellant's recorded admission" is not supported by the record.[331] Primarily, he failed to explain how the Government's case was strong. The Government's key witness (and only eyewitness) agreed that while Appellant was having sex with A.N. she "was fully, enthusiastically participating."[332] And any evidence of injury or blood was both not compelling and did not demonstrate nonconsent during sex. A.N. herself told the EMT she was not in pain and her last memories involved consensual sexual conduct. And there was also no observation of an internal vaginal laceration and no direct evidence as to who would have caused it (which by itself would not mean nonconsent). The evidence instead indicated that A.N. was menstruating. The only reason the Government's expert decided the bleeding was likely instead due to an unobserved internal vaginal

[329] J.A. at 1425.
[330] J.A. at 1424.
[331] J.A. at 1426.
[332] J.A. at 293-94.

injury was because she trusted A.N. when she changed her story and said she was actually not on her period (a revision contradicted by other evidence). Nothing else supports that there was an internal injury.

Furthermore, Appellant's recorded statement *supports* the defense theory that the sexual intercourse was consensual or that Appellant reasonably believed it was consensual.[333] It is anything but an admission of guilt—it is a reasonable explanation of a consensual sexual encounter.[334] This finding was erroneous.

Ninth, Colonel Woodard focused on how "[a]ll that remained for LtCol Norman to do in the trial was to issue the Statement of Trial Results and make Entry of Judgment" to justify not setting aside the case.[335] This sentiment was repeated multiple times, including when he stated "any risk of injustice was considerably diminished because the event . . . occurred after the members had rendered their verdicts on findings and sentence."[336] But LtCol Norman made similar remarks pretrial when he asked defense counsel [redacted] This

[333] J.A. at 1297, 1301-04, 1316, 1325-28, 1331, 1336.
[334] While Appellant at first denies having sex, this is because he is afraid that A.N. was under the legal age. J.A. at 1268. Once NCIS advises him this is not the case, he begins to explain the consensual situation. J.A. at 1277-80.
[335] J.A. at 1425.
[336] J.A. at 1426-27.
[337] J.A. at 1460.

indicates he held a bias against the Defense during trial: [redacted] by paying a "price."[338] Understanding these comments bookended the trial undermines Col Woodard's conclusory view of LtCol Norman's remarks. These statements stained the rulings and comments made by LtCol Norman throughout Appellant's case. This finding also overlooks how this commentary was directed at times towards defense counsel writ large, not just in this case. Regardless, as this Court found in *United States v. Greatting*, *ex parte* commentary about cases pending post-trial action and appeal can still amount to apparent bias.[339]

And last, Colonel Woodard's special treatment of LtCol Norman as a witness at the post-trial 39(a) calls into question his ruling and underscores the bias present in Appellant's case. He faulted LtCol Norman's inability to testify as the result of defense action: "[i]t was a defense filed professional responsibility complaint."[340] And when the defense requested to recess for the night at 11:00 p.m. to avoid "the perception that we are just rushing through this here today" and

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[338] J.A. at 1381-82, 1460.
[339] *United States v. Greatting*, 66 M.J. 226, 230-31 (C.A.A.F. 2008) (finding that an ex parte critique to the government about companion cases being sold "too low" while some were pending negotiations, clemency, and appeals constituted apparent bias).
[340] J.A. at 663.

that going further would result in ineffective representation, Colonel Woodard again blamed the Defense. He said "[w]ho requested this proceeding be scheduled for a single day? . . . the defense did."[341] Then he denied the request.[342]

Troublingly, his findings of fact are at times based on LtCol Norman's self-serving unsworn statement instead of other conflicting evidence. While LtCol Norman's statement is helpful in evaluating the issue of bias as it corroborates much of what the other witnesses said, LtCol Norman also downplayed the severity of his statements and did much to assert his impartiality. Contrary to Col Woodard's findings, this unsworn statement should be given less credibility than a room full of disinterested attorneys and a junior enlisted court reporter who exhibited courage in testifying. For instance, when Col Woodard found "LtCol Norman never stated that the trial counsel should have asked for more than the 11 years of confinement" he erroneously chose LtCol Norman's narrative over everyone else present.[343] Colonel Woodard similarly agreed with LtCol Norman that the "blasting," "ass-chewing" session where he encouraged the trial counsel to make the Defense and their clients pay a "price" was merely "objective

[341] J.A. at 659-60.
[342] J.A. at 660.
[343] J.A. at 1415.

feedback"—a fact also not supported by any witness but LtCol Norman.[344] This aversion to ruling against LtCol Norman and failure to discount his self-serving statement has skewed Col Woodard's findings.

In sum, Col Woodard's clearly erroneous findings of fact demonstrate a clear abuse of discretion and further exacerbate the harm LtCol Norman's comments caused. These facts are critical in revealing LtCol Norman's bias, undermining Col Woodard's legal conclusions otherwise. Indeed, Col Woodard's primary conclusion that "neither [LtCol Norman's] post-trial ex parte comments nor his actions and rulings during trial . . . placed in doubt the court-martial's legality, fairness, and impartiality" rests on these erroneous factual findings. He therefore "applie[d] correct legal principles to the facts in a way that is clearly unreasonable."[345]

C. The *Liljeberg* factors control whether reversal is required. Colonel Woodard abused his discretion in finding it was not.

Rule for Courts-Martial 902(a) does not require a particular remedy when bias is determined to exist.[346] Instead, this Court has adopted the three *Liljeberg* factors to determine whether a conviction should be reversed when a judge

[344] J.A. at 587, 605, 613, 1382, 1414-15.
[345] J.A. at 1423; *Commisso*, 76 M.J. at 321 (internal citations omitted).
[346] R.C.M. 902(a).

erroneously fails to recuse or disqualify himself: (1) the risk of injustice to the parties in the particular case; (2) the risk the denial of relief will produce injustice in other cases; and (3) the risk of undermining the public's confidence in the judicial process.[347] The third factor is separate from the initial inquiry under R.C.M. 902(a) because "it is not 'limit[ed] . . . to facts relevant to recusal, but rather review[s] the entire proceedings, to include any post-trial proceeding, the convening authority action, the action of the [CCA], or other facts relevant to the *Liljeberg* test."[348]

The *Liljeberg* Court conducted a prejudice analysis because, "[a]s in other areas of law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance."[349] That is not what happened here—this was not an oversight. Colonel Woodard's findings of fact analyzed above bled between his analyses on bias and remedy, including into his application of the *Liljeberg* factors.[350] His erroneous findings of fact thus led to an incorrect conclusion of law in finding the case did not warrant reversal as well.

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[347] *Quintanilla*, 56 M.J. at 80-81 (citing *Liljeberg*, 486 U.S. at 864); *see also United States v. Uribe*, 80 M.J. 442, 449 (C.A.A.F. 2021) (internal citations omitted) (citing the *Liljeberg* factors).
[348] *Uribe*, 80 M.J. at 449 (alterations in original) (quoting *United States v. Martinez*, 70 M.J. 154, 160 (C.A.A.F. 2011)).
[349] *Liljeberg*, 486 U.S. at 862.
[350] J.A. at 1425-26.

This was an abuse of discretion.

1. Appellant suffered injustice.

First, Appellant was the victim of injustice. Lieutenant Colonel Norman ruled on several motions in this case and in doing so exhibited a one-sided, incorrect pre-disposition towards the evidence, as outlined above. This bias may have been the difference maker in the outcome of the trial. The issues he ruled on and dismissed as "simple" were issues that the court-martial members repeatedly asked questions about.[351] Indeed, the members asked six questions related to the blood, including "is the first day of the menstrual cycle the heaviest" and "could a sexual encounter bring about the beginning of the menstrual cycle?"[352] This was not "a very simple issue to understand."[353]

And as detailed above, the Government's case was weak. Most critically, the only eyewitness (a government witness with immunity) testified that A.N. actively participated in sexual intercourse with Appellant and Appellant told NCIS it was consensual. Lieutenant Colonel Norman's influence had the biggest impact on the forensic evidence, which was undoubtedly how the Government secured a conviction in light of these bad facts in their case. And there is little doubt these

[351] J.A. at 107-08, 111.
[352] J.A. at 1339-49, 1352, 1631.
[353] J.A. at 107.

rulings could have gone in Appellant's favor. The evidence was not as clear cut as he made it seem and even the lower court found his ruling on A.N.'s chlamydia diagnosis was premised on the clearly erroneous finding that the Marines gave it to her. [354]

Moreover, it cannot be said that his bias against the Defense for litigating these motions did not impact his rulings. Lieutenant Colonel Norman's *ex parte* statements indicated he wanted to crush the Defense and force them to pay a "price" for their litigation of the case: "he didn't enjoy [handling that late motion] either."[355] Indeed, his reactions [redacted] [6] These comments paired with his rulings on case-dispositive issues demonstrate that Appellant suffered an injustice.

2. Inaction will promote injustice in other cases.

Second, denial of relief will produce injustice in other cases. Lieutenant Colonel Norman told three junior trial counsel what he expected from them: make an appellant sorry for exercising their rights not just here, but in every case. Indeed, he displayed bias against defense teams [redacted].

[354] J.A. at 14.
[355] J.A. at 602, 639.
[356] J.A. at 304-06, 1460, 1500, 1502.

[redacted] Based on his pretrial and *ex parte* comments, LtCol Norman's bias undoubtedly exists outside Appellant's case. Lieutenant Colonel Norman [redacted] Without relief here, these counsel and other counsel aware of what transpired will feel compelled to punish the Defense (and their clients) in this manner. Colonel Woodard concluded, "this Court has no doubt this case will be a teaching point to all military judges and counsel."[359] But the "teaching point" as it stands is [redacted] that the law condones making an appellant pay a "price" for exercising his or her rights.[360] Absent a remedy, the chilling effect this will have on defense counsel is incalculable.[361]

3. A failure to reverse Appellant's case will undermine public confidence in military justice.

Colonel Woodard concluded that "even if LtCol Norman's actions in this case resulted in an appearance of bias, that appearance would not create an

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[357] J.A. at 1459.
[358] J.A. at 1458.
[359] J.A. at 1426.
[360] J.A. at 1381-82, 1460.
[361] *See also United States v. Segines*, 17 F.3d 847, 852-53 (6th Cir. 1994) (reversing a case where the military judge's comments had a "chilling effect" on the defense, including a comment that the military judge would take a defense refusal to stipulate to a fact "into account on the sentencing").

intolerable risk of undermining the public's confidence in the judicial process."[362] But here a military judge (a) sought to teach the Defense a "lesson" and then coached trial counsel to make the Defense pay a "price" for taking a case to trial and litigating it appropriately, (b) demonstrably treated defense counsel differently from trial counsel on the record, (c) immediately took the Government's view on the evidence as his own when considering and denying all the critical defense motions, (d) and had another judge protect him from testifying and then rule he was actually unbiased based on nonexistent facts.[363] Knowing this, the public would undoubtedly have questions about an appellant's ability to receive a fair trial. The risk of undermining public confidence here is intolerable.

And while, as discussed above, Colonel Woodard's handling of this issue did little to assuage any concerns of reduced public confidence, the lower court's ruling on the matter only exacerbated the issue. The NMCCA adopted many of LtCol Norman's factual misunderstandings, side-stepped finding whether any of Col Woodard's factual findings were clearly erroneous, and made no comment on LtCol Norman's *ex parte* lecture.[364] Instead, it chastised the trial defense counsel for (1) arguing LtCol Norman is biased and (2) conducting voir dire of the post-

[362] J.A. at 1427.
[363] J.A. at 1381-82, 1460.
[364] J.A. at 23-33.

trial military judge who presided over the post-trial hearing.[365] The NMCCA described the trial defense counsels' arguments as "speculative, unprofessional and inflammatory."[366] Incredulously, the NMCCA wrote:

> Whether [the trial defense counsels'] statements violated Rule 3.5 of the Judge Advocate General Instruction 5803.1E, which requires that a covered attorney be respectful of the military judge, in the context of this case is a matter for Rules Counsel, not this Court, to decide.[367]

The NMCCA spent more time chastising the trial defense counsel for raising the military judge bias issue than addressing the military judge's improper and egregious conduct during and after Appellant's trial.

Notably, the NMCCA also protected LtCol Norman's identity, explaining in a footnote that it would refer to him as the "prior military judge."[368] But the court unnecessarily named the trial defense counsel whom the court insinuated violated their ethical duties for moving to protect the accused's right to be tried without an unbiased judge.[369] In doing so, the NMCCA only further undermined the public's confidence in the judicial process.

Shockingly, the NMCCA also did not think it was necessary to order LtCol

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[365] J.A. at 23-33.
[366] J.A. at 31.
[367] J.A. at 31.
[368] J.A. at 27.
[369] J.A. at 28-31.

Norman to testify.[370] The NMCCA essentially told the Navy and Marine Corps that judges are untouchable—even when they *ex parte* discuss the merits of a case over which they presided. The "lesson"—as it stands now—is that when you're a military judge, accused by the Government of making inappropriate *ex parte* comments about a case on which you are still the military judge, a senior Marine Judge Advocate will come in, hold a hearing, give the key witness the questions beforehand, and clean up the rest of the mess with clearly erroneous facts. And if the trial defense counsel objects, the lower court will name them in a published opinion and insinuate they violated their professional responsibility duties for objecting to a biased judge. Public confidence in military justice should understandably not be high in light of this ruling.

Thus, all three factors of the *Liljeberg* test were met here.[371] Colonel Woodard overlooked critical facts and "applie[d] correct legal principles to the facts in a way that is clearly unreasonable" in finding otherwise.[372] We "must continuously bear in mind that to perform its high function in the best way justice

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[370] J.A. at 33.
[371] *See also In re Al-Nashiri*, 921 F.3d 224, 234 (D.C. Cir. 2019) ("Ordinary appellate review on the merits cannot detect all of the ways that bias can influence a proceeding."); *Berger v. United States*, 225 U.S. 22, 36 (1921).
[372] *Commisso*, 76 M.J. at 321.

must satisfy the appearance of justice."[373] This case warrants reversal.

Conclusion

Appellant respectfully asks this Court to reverse the NMCCA's decision and set aside the findings and sentence.

[373] *Greatting*, 66 M.J. at 232 (quoting *Liljeberg*, 486 U.S. at 864).

CERTIFICATE OF FILING AND SERVICE

I certify that the Brief was delivered to the Court, to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on December 15, 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Brief complies with the type-volume limitations of Rule 24(c) because it contains 13,695 words, and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

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