

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JEREMY J. NASH  
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201000220  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 20 November 2009.

**Military Judge:** Col John Ewers, USMC.

**Convening Authority:** Commanding General, 3d Marine Aircraft Wing, Marine Corps Air Station Miramar, San Diego, CA.

**Staff Judge Advocate's Recommendation:** Col K.J. Brubaker, USMC.

**For Appellant:** Patrick J. Callahan; Maj Kirk Sripinyo, USMC.

**For Appellee:** Capt Mark Balfantz, USMC.

**28 June 2011**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

MAKSYM, Senior Judge:

In November of 2009, a panel of three officers and three enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification each of taking indecent liberties with and committing an indecent act with MR, a child under the age of 16; four specifications of taking indecent liberties with and three specifications of committing indecent acts with LR, a child under the age of 16; and one specification of knowingly and wrongfully possessing visual depictions of persons under the age of 16 engaging in sexually explicit conduct to the prejudice of good order and discipline and of a nature to bring discredit upon the armed

forces, all in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The members sentenced the appellant to 18 years of confinement, reduction to pay grade E-1, and to be dishonorably discharged. The convening authority approved the findings and sentence as adjudged and ordered the sentence executed (except for the dishonorable discharge). The convening authority deferred automatic forfeitures until his action, and then waived the automatic forfeitures for six months thereafter.

The appellant has assigned five errors: (1) that the military judge abused his discretion by denying the appellant's challenge for cause of Master Gunnery Sergeant (MGySgt) S; (2) that the military judge abused his discretion when he failed to grant a defense motion to admit the statement of Ms. Akiko T –the mother of the complaining witnesses – or, in the alternative abate the proceedings until she was produced; (3) that the military judge abused his discretion by failing to grant the defense request to have the convening authority fund an "anti-propensity expert"; (4) that the military judge abused his discretion when he denied a defense motion to compel the Government to enter into a stipulation of fact concerning the child pornography found on the appellant's computer; and (5) that the findings of guilty for taking indecent liberties with and committing indecent acts with MR and LR lack factual sufficiency. We need address only the first and fifth assignments of error.

### **Facts**

The facts that give rise to this case occurred primarily in Okinawa, Japan amidst significant family turmoil. To describe the underlying facts as both tawdry and sensational would be an understatement and we need not delve into their particulars for purposes of this review. In summary, the appellant married Mari T during his first tour in Okinawa. The appellant and Mari had two daughters together, both born before the trial that necessitates this appeal.

Mari is the sister of Akiko T. Akiko was married to JR from 1997 until 2007. When JR and Akiko met in 1996, Akiko already had a daughter, LR, whom JR legally adopted after the marriage. JR and Akiko went on to have three more children together, including MR and KR. In 2007 Akiko and JR divorced under Japanese law and JR took sole custody of all the children (including LR). Akiko and JR divorced for several reasons, the two most apparent of which were the affair that the appellant and Akiko were having from 2003 until JR discovered it around Thanksgiving of 2006, and Akiko's debilitating alcohol abuse and the frequent suicide attempts that followed. Finally, the appellant, while otherwise involved – was trying, but failing, to seduce Mari.

Mari and Akiko are the daughters of Tomoko T (grandmother of LR and MR) who maintained an active role as the family matriarch. As such, holidays were typically celebrated at Tomoko's house and

grandchildren often spent weekends there. At various points in 2006 Akiko, as well as her children, lived in Tomoko's house full time. Also in 2006, the appellant was assisting Tomoko by doing renovations on one of the bedrooms in her house.

During this period of time, when MR was six years old, she alleges that the appellant, who was then renovating rooms in her grandmother's house, took MR and her four-year-old sister KR into one of their grandmother's bedrooms and exposed himself, and otherwise committed indecent acts in the presence of MR and KR not involving the touching of their persons (KR did not testify at trial).

LR alleges that, starting in December of 2003 and for three years thereafter, the appellant indecently touched her 20 to 25 times. During this time LR was either living at her grandmother's house or she was spending weekends there. She was between eight and nine years old at the time the acts began. She testified that the first assault she recalls – though not the first one ever – occurred while she was sitting at a knee-high table, watching TV, in her grandmother's living room. She testified that the appellant came up behind her, put his hands down her pants and touched her vagina for five to seven minutes. She explained that whenever the appellant would run errands for his construction project he would ask if anyone wanted to go with him. LR would often agree to go with him and then he would either touch her vagina in his car, or take her back to his house and molest her there. While at his house, he once showed her pornography on his computer, once masturbated in front of her, and once took nude pictures of her (these pictures were never discovered over the course of the underlying investigation).

It is impossible to discern from the record how appellant's misconduct relative to MR and LR was uncovered. JR testified that in December 2006, after he had a conversation with Akiko – who was admitted to in-patient alcohol rehabilitation at the time – something she said led him to immediately take his daughters to see the Naval Criminal Investigative Service (NCIS).<sup>1</sup> MR initially told NCIS that the appellant had masturbated in front of her; LR, however, first denied that any touching had occurred or that the appellant had shown her pornography, but later changed her story and alleged the events that manifested in this court-martial.

The appellant was also convicted of possession of child pornography, which was discovered by NCIS on his personal desktop computer in the course of investigating the allegations of molesting MR and LR. The child pornography images were downloaded in October through November 2003 and the videos were downloaded in 2006.

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<sup>1</sup> Akiko refused an invitation to testify at the trial.

During the defense case on the merits, before the members were instructed on beginning deliberations, MGySgt S, a member, posed the following question to Mari Nash, "Do you think a pedophile can be rehabilitated?"<sup>2</sup> Both trial and defense counsel objected to the question, and the question was not asked of the witness. The defense then asked the military judge to *voir dire* MGySgt S in order to determine whether he still maintained an open mind. The Government requested instead that the military judge issue a curative instruction to all the members.

After reviewing the other questions asked by MGySgt S and concluding that those other questions did not indicate a bias, the military judge decided to *voir dire* the panel as a whole. The military judge explained that he was concerned that if MGySgt S was *voir dired* individually it might "chill the discussion in the deliberation room."<sup>3</sup> The military judge then brought the members back into the courtroom and stated to all of them, "I told you at the outset of this trial that as court members you must keep open minds regarding the verdict until all the evidence is in and you've been instructed as to the law. Everybody recall that instruction?" The members responded affirmatively. The military judge next asked, "Is there any member that believes they have been unable at this point to keep an open mind regarding the verdict?" The members all responded in the negative.<sup>4</sup>

The defense then rested. Shortly thereafter the court-martial recessed in order to allow the military judge to prepare instructions, and the parties to prepare any arguments they may have regarding those instructions. When court was called back to order, however, the military judge explained that he had reconsidered his ruling and now felt it was necessary to individually *voir dire* MGySgt S based upon his question to Mari Nash.<sup>5</sup> The trial counsel objected, stating that he feared that by conducting individual *voir dire*, MGySgt S would think he had done something wrong and feel compelled to vote not guilty.<sup>6</sup> The military judge overruled the objection. The *voir dire* of MGySgt S proceeded as follows:

Military Judge (MJ): Okay. You also remember the instruction I gave you again just a few minutes ago, and that's to keep an open mind until all the evidence has been admitted and you've been instructed?

MGySgt S (Mem): Yes, sir.

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<sup>2</sup> Appellate Exhibit CXXV.

<sup>3</sup> Record at 859.

<sup>4</sup> *Id.* at 860.

<sup>5</sup> *Id.* at 864.

<sup>6</sup> *Id.* at 865.

MJ: You think you've managed to follow that?

Mem: Yes, sir. I think I have.

MJ: Okay. I also advised you in asking questions you should not depart from your impartial role as a trier of fact and ask questions biased to aid[e] one side or the other. Do you remember that instruction?

Mem: I believe so, sir.

MJ: I got to ask you. You wanted to ask Mari Nash a question, and the question was: Do you think that pedophiles can be rehabilitated?

Mem: Yes, sir. I went back and forth with that question in my head. I wanted to get her opinion if she understood that frame of mind, I guess, if it is a frame of mind or if it's a disease or a learned thing. I was just curious, sir, you know, I haven't made a judgment either way yet.

MJ: And you just wanted to see if that would give you some insight into her credibility as a witness? Is that a fair statement?

Mem: Yes, sir. I guess you could say it's a fair statement. I wanted to see - well, not necessarily checking her intelligence level or anything. I guess her naiveness [sic] or if she's - because I know there's a lot of - from my experience in Japan, they seem real timid or naïve maybe, easily embarrassed.

MJ: So the question wasn't an indication that you had determined that Staff Sergeant Nash might be a pedophile, but to try to knock her out of her naiveté that you thought she might be experiencing?

Mem: Yes, sir. I wasn't accusing Staff Sergeant Nash or trying to indicate that I made my decision already. Just you know, I thought it was a tough question to ask. That's why I went back and forth with it, you know, is the timing right for that type of question.

MJ: We've heard a lot of evidence in this case to this point. . . . From both sides. From the prosecution and the defense. Do you feel like you've been able to keep an open mind throughout, listening to all the evidence?

Mem: Yes, sir.<sup>7</sup>

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<sup>7</sup> *Id.* at 866-68.

Neither the Government nor the defense elected to pose further *voir dire*. The military judge then asked MGySgt S whether he felt this would impede his ability to contribute to deliberation, and also inquired as to whether MGySgt S would be able to listen to members junior in rank to him. MGySgt S stated that he would be able to offer his opinion and that he would be able to consider the opinions of "the junior guys."<sup>8</sup>

Once MGySgt S had left the courtroom, the defense counsel challenged MGySgt S for cause.<sup>9</sup> The defense counsel stated that he was not satisfied because he did not believe that MGySgt S's answers "completely make sense."<sup>10</sup> The defense counsel then argued:

The question to the witness whether or not she believes that a pedophile can be rehabilitated to test her level of naiveness [sic], to test her timidness, it does not quite make sense, sir. It's not the type of question you would ask in this type of case just to see if a witness is timid or naïve, sir. And despite the allegation by the master guns that he had kept an open mind and can keep an open mind, I believe that it would appear that he has not, sir.<sup>11</sup>

The Government counsel disagreed. He went so far as to assert that in his almost 20 years of experience, he had not heard a better response than that offered by MGySgt S "to difficult questions."<sup>12</sup>

The military judge denied the challenge for cause and stated:

While unusual, the question asked by [MGySgt S] was not far from the questions proffered by trial counsel to probe the witness's [Mari Nash] bias, as it were, based on her statement to Special Agent Rendon that she may have viewed the child pornography. In essence, [the prosecutor] argued that since [the witness] didn't see anything wrong with child pornography and that she may have viewed it to the extent that that's reflected on her statement to Special Agent Rendon, it is at least a logically supported proposition that she - her testimony may be colored by that form of bias, that she didn't think anything seriously wrong has gone on here.

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<sup>8</sup> *Id.* at 868.

<sup>9</sup> *Id.* at 869.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

[MGySgt S]'s question, again was not far from that.<sup>13</sup>

It is not entirely clear which particular aspect of testimony the military judge is referring to. A stipulation of Special Agent Rendon's testimony was read into evidence by the Government counsel during the Government's case on the merits. But that stipulation of expected testimony did not indicate that Mari Nash was apathetic about child pornography. In stark contrast, it indicated she was curious about the consequences of possession of child pornography.<sup>14</sup>

Mari Nash, who testified through a translator, was never asked before the members whether "she saw anything wrong with child pornography". Outside of the presence of the members, however, the trial counsel proffered that Mrs. Nash had made a statement to a Child Protective Services officer that she "didn't care" if child pornography had been found on her husband's computer. But this hearsay-within-hearsay statement was made outside the presence of the members. Even if this statement was an accurate reflection of Mrs. Nash's feelings about child pornography – and this court can reach no opinion on the matter based upon the record below – MGySgt S could not have known that she had allegedly made that statement.<sup>15</sup> The military judge continued with his ruling:

While that question may superficially indicate a tendency to draw conclusions, and while we do require members to keep an open mind, we all know as courtroom observers that the evidence can sway from one side to the other and to the extent that that did reflect a tendency to draw conclusions, it was not far from a member who comes into initial voir dire with problems with, say, presumption of innocence and through the education aspect of voir dire, that individual is rehabilitated based on voir dire itself.

So to the extent that there may have been any remaining implied bias or indication that [MGySgt S] has not retained an open mind, I find that his answers were sincere and they reflected that, at this point in

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<sup>13</sup> *Id.* at 870.

<sup>14</sup> The pertinent part of the stipulation of expected testimony follows: "We asked Mrs. Nash for permission to take the home computer for forensic analysis. We informed Mrs. Nash that she could say no if she wanted to or that she could place limitations on the search of the computer. Mrs. Nash agreed to let us take the computer and signed a permissive search authorization. Also known as a pass. Mrs. Nash, however, stated we could not search the computer for child pornography and said, quote, what if I was looking at those? End Quote. Mrs. Nash further limited the scope of the pass to searches related to information regarding [LR], [MR], [SR], [KR], Akiko R[], [JR], and Staff Sergeant Nash's e-mail address . . . ." *Id.* at 512.

<sup>15</sup> Record at 828.

the trial, at a critical time, that is, just immediately before we argue the case, instruct the members and send them into the deliberation room, that he has an open mind. He may have the most open mind of any member based on the voir dire that we just went through with him at this point.<sup>16</sup>

### **Factual Sufficiency**

In his fifth assignment of error, the appellant has challenged the factual sufficiency of the findings of guilty of committing indecent acts with and taking indecent liberties with MR and LR. "For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this court is] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 ((C.M.A. 1987). Having applied this test, we find that the evidence was factually sufficient as to the findings of guilty of committing indecent acts and taking indecent liberties with MR and LR.

### **Challenge for Cause**

The Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence "based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (citations omitted). The impartiality of members is a core principle of the military justice system, and the "*sine qua non* for a fair court-martial." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (citation and internal quotation marks omitted); see RULE FOR COURTS-MARTIAL 912(f)(1)(M), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Its importance is emphasized by the fact that the mandate for disinterested, evenhanded members is echoed across the central sources of military jurisprudence: the Constitution, federal statutes, regulations and directives, and case law. *United States v. Leonard*, 63 M.J. 398, 399 (C.A.A.F. 2006); see also *United States v. Downing*, 56 M.J. 419, 421 (C.A.A.F. 2002) (finding that "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial court-martial panel") (citation and internal quotation marks omitted).

Our review of a military judge's determinations on the issue of member bias, actual or implied, is based on the "totality of the circumstances particular to [the] case." *United States v. Strand*, 59 M.J. 455, 456 (C.A.A.F. 2004). Such determinations are guided by the Court of Appeals for the Armed Forces' (CAAF) longstanding and often-stated holding that challenges for cause are to be liberally granted. *United States v. Clay*, 64 M.J. 274,

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<sup>16</sup> *Id.* at 870.

276-77 (C.A.A.F. 2007); *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006); *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003); *United States v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997); *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993).

The requirement for impartiality necessitates inquiry into both the actual bias and implied bias of potential members, with each type of bias distinct and reviewed under a different standard. *Youngblood*, 47 M.J. at 341.

"The test for actual bias is whether any 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) (citation omitted). The existence of actual bias is a question of fact, and we consequently provide the military judge with significant latitude in determining whether it is present in a prospective member. *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999). That the military judge, rather than the reviewing court, was physically present during *voir dire* and watched the challenged member's demeanor makes the military judge specially situated in making this determination. *Id.* (quoting *Napoleon*, 46 M.J. at 283) (noting that actual bias is viewed "subjectively, 'through the eyes of the military judge or the court members"). We therefore review the military judge's ruling on actual bias for an abuse of discretion. *Clay*, 64 M.J. at 276-77.

In this case, the military judge ruled that there was no actual bias after he observed MGySgt S testify that he would maintain an open mind. We cannot say that the military judge abused his discretion in making that ruling. The next issue we must address, therefore, is implied bias.

We recognize that when there is no showing of actual bias, "implied bias should be invoked rarely." *Leonard*, 63 M.J. at 402 (citations and internal quotation marks omitted). Nonetheless, the trial judiciary has the primary responsibility of preventing both the reality *and* the appearance of bias in courts-martial and must therefore test for both. See *Clay*, 64 M.J. at 277. Implied bias is an objective test, "'viewed through the eyes of the public, focusing on the appearance of fairness.'" <sup>17</sup> *Id.* at 276 (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). For this reason, the military judge's privileged position at trial is less important because the test for implied bias is objective, and asks whether, in the eyes of the public, the challenged member's circumstances do injury to the "perception or appearance of fairness in the military justice system." *Moreno*, 63 M.J. at 134 (citations omitted). In considering this question, courts also consider whether "most people in the same

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<sup>17</sup> The hypothetical objective outside observer is presumed to be aware of Article 25, UCMJ, and the military justice system generally. See *Downing*, 56 M.J. at 23.

position would be prejudiced [i.e. biased]." *Strand*, 59 M.J. at 459 (citation and internal quotation marks omitted). Because this is an objective test, in analyzing implied bias appellate courts provide less deference to the trial judge. *Napoleon*, 46 M.J. at 283. Hence, a military judge's ruling on implied bias, while generally not reviewed *de novo*, is afforded less deference than the abuse of discretion standard used for rulings on actual bias. *Clay*, 64 M.J. at 276 (citing *Strand*, 59 M.J. at 458); see *Miles*, 58 M.J. at 195. However, when the military judge fails to properly apply the law to a defense challenge for cause, his decision is given even less deference. See *Clay*, 64 M.J. at 277; see also Colonel Louis J. Puleo, *Implied Bias: A Suggested Disciplined Methodology*, *The Army Lawyer*, March 2008, at 34, 36.

The CAAF has recognized that "the law is clear in this area," and when the military judge tests for implied bias the record must reflect "a clear signal that the military judge applied the right law." *United States v. Terry*, 64 M.J. 295, 305 (C.A.A.F. 2007) (citing *Downing*, 56 M.J. at 422). A military judge must therefore conduct an objective implied bias test on the record. See *id.* (finding error where the record did not reflect the application of an objective implied bias test). The military judge must consider the effect, if any, that the liberal grant mandate should have upon his ruling. *Id.*; *Downing*, 56 M.J. at 422 (holding failure to state on the record whether an objective outside observer would consider the court-martial fair if the disputed member remained on the panel, and to specifically address the liberal-grant mandate in his ruling was error).

The military judges' errors in *Downing* and *Terry* centered upon ruling on implied bias without squarely addressing on the record whether the objective outside observer would perceive bias, or whether the liberal grant mandate should impact that judgment. *Downing*, 56 M.J. at 422 ("the military judge's otherwise thorough *voir dire* does not reflect that he applied the correct standard to appellant's challenge for implied bias"); see *Terry*, 64 M.J. at 305 (finding error where "the record does not reflect the application of an objective implied bias test"). The military judges' failure in these cases was, in essence, creating a record that lacked enough of the judge's analysis to allow appellate courts to properly assess whether the judge applied the law properly. Nonetheless, the military judge ruled there was no implied bias and, because the judge is "presumed to know the law and follow it absent clear evidence to the contrary", the CAAF afforded a modicum of discretion between *de novo* and abuse of discretion and affirmed their rulings. *Terry*, 64 M.J. at 305; *Downing*, 56 M.J. at 423; see *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007).

But we must distinguish the case at bar from *Downing* and *Terry*. In this case, the military judge should have squarely addressed the question of whether an objective outside observer would believe that MGySgt S had not made up his mind as to the guilt or innocence of the appellant at the time he proposed his

question for Mari Nash; and what effect, if any, the liberal grant mandate should have upon his ruling. See *Terry*, 64 M.J. at 305; *Clay*, 64 M.J. at 277; *Downing*, 56 M.J. at 422. The case before us lacks the "clear signal" as required by *Terry* and the state of the record is indicative of the incorrect test being applied and driving the ruling. In ruling there was no implied bias, the military judge stated that "to the extent that there may have been any remaining implied bias or indication that [MGySgt S] has not retained an open mind, I find that his answers were sincere and they reflected that, at this point in the trial . . . that he has an open mind."<sup>18</sup> This analysis indicates that the military judge applied the *actual bias* test, but does not support any test for implied bias.<sup>19</sup> In sharp contrast, the military judge's other observations about MGySgt S's question, specifically that it was an "unusual" question, and "that [the] question may superficially indicate a tendency to draw conclusions" would seem to illustrate that the trial judge accepted the possibility that an objective outsider may think that MGySgt S had made up his mind at that point in the trial. Furthermore, there is no indication on the record that the judge considered what, if any, effect the liberal-grant mandate should have upon his ruling. See *Terry*, 64 M.J. at 305; *Clay*, 64 M.J. at 277; *Downing*, 56 M.J. at 422.

We conclude that while the trial judge properly tested for actual bias, he did not articulate any treatment of implied bias and its attendant test. Accordingly, we review *de novo* the question of whether implied bias exists. We shall apply this objective test by looking at the totality of the circumstances particular to this case. *Strand*, 59 M.J. at 456.

MGySgt S's question to Mari Nash, "Do you think a pedophile can be rehabilitated?" clearly presented the appearance of bias in so much as it indicated that he had already concluded, prior to instructions on findings, that he believed Mari's husband, the appellant, was a pedophile. In other words, it indicates that MGySgt S had not maintained an open mind throughout the entire trial, nor had he followed the military judge's instruction that he could not determine guilt or innocence until he had been fully instructed by the military judge.<sup>20</sup>

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<sup>18</sup> Record at 870.

<sup>19</sup> We note that the military judge's personal assessment of the sincerity of the member's answers during *voir dire*, as well as his personal observations of the member, does not properly address the issue of what the objective outside observer would conclude. See *Downing*, 56 M.J. at 422 ("Observation of the member's demeanor may inform judgments about implied bias; however, implied bias is reviewed under an objective standard, viewed through the eyes of the public") (citing *Napoleon*, 46 M.J. at 283) (quotation marks omitted).

<sup>20</sup> MGySgt S was instructed, "You must make your determination of whether or not the accused is guilty solely upon the evidence presented here in court and the instructions that I will give you. Since you cannot properly make that determination until you have heard all of the evidence and received the instructions, it is of vital importance that you retain an open mind until all

The initial *voir dire* of the MGySgt S offers very little insight other than to inform us that he had a 13-year-old daughter, a penchant for television shows about police, and had taken classes in criminal justice because he was briefly considering becoming a law enforcement officer after leaving the Marine Corps.<sup>21</sup>

We also consider the other questions that MGySgt S asked throughout the court-martial. None of these questions - except AE CXXV, of course - indicate a specific bias for or against the appellant.<sup>22</sup>

We next consider the colloquy with the military judge after the problematic question was asked.<sup>23</sup> We find this colloquy ineffectual, in part due to the leading nature of the military judge's questions, which then evinced either very predictable answers or additionally problematic, non-sequitur responses. The sum of those responses does little to dispel the concern that MGySgt S had already reached a determination as to the appellant's culpability; to the contrary, aspects of his responses seemed predicated on an assumption that the appellant was a pedophile and his wife, Mari, was naïve in her assessment of pedophiles. Indeed, the quality of MSGYSGT S's responses, and confidence in his objectivity going forward, is further degraded when he reveals his assessment of Japanese people generally, or perhaps just Japanese women, as timid or naïve, as the genesis for his pedophile related question. We are left with an improper question, indicative of having improperly reached a preliminary finding, apparently asked for reasons that fall somewhere between irrelevant and repugnant to the duties of a court member.

Lastly, we consider the military judge's observations about MGySgt S's question: that it was unusual and superficially indicated that MGySgt S has drawn a conclusion about the appellant.<sup>24</sup> We conclude that it is irrelevant that the question was asked very near the end of the merits portion of the trial because we have no way of discerning for how long MGySgt S wished to ask this question of Mari Nash or held the underlying beliefs that prompted it.

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the evidence has been presented and the instructions have been given to you." Record at 420; see also Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 36 (1 Jan 2010).

<sup>21</sup> Record at 466-69.

<sup>22</sup> We note that of the 42 questions asked by members throughout the findings part of the trial, 16 -or, about 40%- were asked by MGySgt S. See AE XCIV, XCIX, C, CI, CVI, CXVI, CXXIV, CXXV, CXXXII. Some of the question forms contained multiple questions.

<sup>23</sup> Reproduced *supra*.

<sup>24</sup> Record at 870.

While we cannot state with any certainty what MGySgt S actually thought of the state of the evidence, it is clear to this court from the call of his question to the appellant's wife that he had already reached the conclusion that the appellant was guilty. When the court reviews a matter under implied bias, it is in fact appearances that carry the day. We conclude that when MGySgt S's question to Mari Nash is "viewed through the eyes of the public, focusing on the appearance of fairness," the record reveals that MGySgt S had not maintained an open mind, but rather had prematurely and unfairly determined that the appellant was a pedophile, *ergo*, in some sense, guilty, prior to being instructed on the law by the military judge, and before deliberations had commenced. That MGySgt S had determined the appellant was at least generically, if not specifically guilty prior to instructions and members' deliberating compels this court to positively answer the question as to "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high." *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008). See also *Clay*, 64 M.J. 277; *Miles*, 58 M.J. 194. Moreover, when we consider the liberal grant mandate and the fact that the record does not contain any indication that it was deployed as a judicial tool, or even considered by the trial judge to this set of facts, we conclude that this member should have been dismissed. See *Terry*, 64 M.J. at 305; *Clay*, 64 M.J. at 277; *Downing*, 56 M.J. at 422.

### **Conclusion**

The findings and sentence are set aside and a rehearing is authorized.

Judge PERLAK and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL  
Clerk of Court