UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
	)	USCA Dkt. No. 11-5005/MC
v.	)	
	)	Crim. App. No. 201000220
Jeremy J. NASH, Staff Sergeant (E-6) U.S. Marine Corps Appellee	)	

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WHETHER THE LOWER COURT FAILED TO APPLY THE IMPLIED BIAS TEST THAT ASK WHETHER, CONSIDERED OBJECTIVELY, "MOST PEOPLE IN THE SAME POSITION WOULD BE PREJUDICED," REITERATED IN 2010 IN *BAGSTAD*, AND INSTEAD ERRONEOUSLY APPLIED A TEST ASKING WHETHER THE MEMBER'S CIRCUMSTANCES "DO INJURY TO THE PERCEPTION OR APPEARANCE OF FAIRNESS IN THE MILITARY JUSTICE SYSTEM?

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I.

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III.

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Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006), because Appellee's approved sentence included confinement for one year or more and a dishonorable discharge. The Judge Advocate General of the

Navy sent this case to this Court for review, bringing this case within this Court's jurisdiction. Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2006).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellee, contrary to his pleas, of four specifications of indecent acts, five specifications of indecent liberties, and one specification of possessing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2006). The Members sentenced Appellee to eighteen years confinement, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed. Although there was no pretrial agreement, the Convening Authority deferred automatic forfeitures until he took action, then waived the automatic forfeitures for six months from the date of his action.

On appeal at the Navy-Marine Corps Court of Criminal Appeals, Appellee submitted a brief that raised five assigned errors. The Government filed an answer to Appellee's brief. The service court held oral argument on Appellee's first assigned error: the issue involving the challenge for cause against Master Gunnery Sergeant (MGySgt) S. In its opinion, the service court addressed two of the five assigned errors and set

aside the findings and sentence. The Government moved the lower court to reconsider its decision en banc, but the court denied that motion.

Statement of Facts

A. Background.

1. Appellee committed indecent acts on and took indecent liberties with LR.

Appellee committed indecent acts on and took indecent liberties with his niece, LR, on various occasions. When LR was about eight or nine years old, Appellee touched her vagina. (J.A. 56-59.) Specifically, Appellee put his hands underneath her pajamas and underwear to touch LR's vagina. (J.A. 59.)

Appellee also took LR to his house, where he touched her vagina, took naked pictures of her, and showed her pornography. (J.A. 62-68.) After Appellee took LR to his house, she watched television and Appellee touched her vagina. (J.A. 62.) He touched her vagina about twenty to twenty-five times. (J.A. 64, 74.) As he touched LR's vagina, Appellee sometimes touched her breasts too. (J.A. 72-73.) He touched her breasts about ten to fifteen times. (J.A. 72.) On one occasion, he took nude photographs of LR. (J.A. 63-64.) She was about nine or ten years old at the time. (J.A. 63.) Appellee showed LR pornography of adults having sex. (J.A. 64-66.) On a separate occasion at LR's grandmother's house, Appellee showed LR a

pornographic magazine. (J.A. 66-69.) Additionally, when LR was about nine or ten years old, Appellee masturbated in front of her and ejaculated. (J.A. 69-72.)

2. Appellee committed indecent acts on and took indecent liberties with MR.

Appellee committed indecent acts on and took indecent liberties with his niece, MR, on various occasions. MR was with her sister, KR (J.A. 50), at her grandmother's house, while Appellee worked on the house. (J.A. 47-48.) At the time, MR was about six years old and KR was four or five years old. (J.A. 49-50.) MR was playing and danced into a bedroom, where Appellee was. (J.A. 48.) Appellee then pulled his pants down, masturbated, and ejaculated in front of MR and KR. (J.A. 48-51.) Both MR and KR saw Appellee do this; specifically, they saw his penis and ejaculation. (J.A. 48-51.) Appellee told them not to tell anyone. (J.A. 50.) Additionally, Appellee had MR touch his penis. (J.A. 54-55.) He asked her, "want to touch it?" (J.A. 55.) And MR touched Appellee's penis for a second. (J.A. 55.)

3. Appellee possessed child pornography.

Based upon interviews with LR and MR, Naval Criminal Investigative Service (NCIS) Special Agent Rick Rendon spoke to Appellee's wife and she gave him permission to take the home computer. (J.A. 39-41.) Special Agent Rendon received a search

warrant to search the computer for child pornography. (J.A. 42.) As a result of that search, 580 child pornography images and seven child pornography videos were found on Appellee's computer. (J.A. 44-45.)

B. During general voir dire, the Military Judge applied the liberal grant mandate and the implied biased test.

At the beginning of general voir dire on November 16, 2009, the Military Judge explained to the Members that they must retain an open mind until all the evidence was presented and the instructions were given:

> 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 instructions, it is of vital importance that you retain an open mind until all the evidence has been presented and the instructions have been given to you.
>
> You must impartially hear the evidence, the instructions on the law. And only when you are in your closed session deliberations, may you properly make a determination as to whether the accused is guilty or not guilty; and if necessary, as to an appropriate sentence.

(J.A. 16.)

After voir dire, the Civilian Defense Counsel challenged four Members for cause, but MGySgt S was not challenged. (J.A. 33-35.) The Military Judge granted Appellee's challenge for two of the Members based on implied bias. (J.A. 36-37.) But before

announcing his decision, the Military Judge explained he understood the liberal grant mandate and the implied bias test:

> I'm mindful of the liberal grant mandate applied to the defense challenges for cause. Only the test for the implied bias is an objective test and under the circumstances to the eyes of the public and focusing on the perception or appearance of fairness and the military justice system. And that applies disclaimers of bias notwithstanding . . . .

(J.A. 36.)

C. Challenge for cause of MGySgt S.

After presenting its evidence, which included the testimony of ten witnesses (R. 504-795), the Government rested. (J.A. 76.) Then, the Defense presented the testimony of two witnesses. (R. 796-808.) On November 19, 2009, the Defense called Mrs. Mari Nash, Appellee's wife, to testify. (J.A. 77.)

1. Assistant Trial Counsel wanted to cross-examine Mrs. Nash about her statements made to Child Protective Services.

Assistant Trial Counsel wanted to cross-examine Mrs. Nash on the statements she made to Child Protective Services:

> ATC: We have a [Child Protective Services] CPS report. There was some San Diego Child Protective Services action in this case in which Mari Nash was interviewed by a CPS worker, and the question was posed to her "Are you aware of pictures found of child pornography on your husband's computer?" Her response was "and?" The worker says, "Do you think that having child pornography pictures on the computer is okay?" Her response was "I don't care. Are they from my children? You saw my children. They're doing okay."
>
> I want to cross her on the fact that when she was posed the question and——I don't know if I would call

> that an earlier proceeding or she was questioned by certain representatives from the San Diego Protective Services, they asked her, "Do you think that having child pornography pictures on the computer is okay?" And her response was "I don't care, are they from my children?" I think it goes to——it's not to bias, but it goes to——
>
> MJ: How does it impeach her?
>
> ATC: Well, I think it would be under the analysis——I think it's relevant to show that if somebody doesn't care about the particular issue that is before the court, the criminal charge of possession of child pornography, I think it could be argued that the members should——it's almost a bias of lack of recognition of criminality of the possession, I guess, is the way to put it.
>
> In other words——and when you take that, we also have evidence before the court through the stipulation from Rick Rendon where she had said to him, "What if I was looking at those?" I think the members should be able to hear that because it goes to almost a reverse bias, in other words, the fact that this is not an issue that she cares about. I think, arguably, they should take into account when they evaluate all of her testimony.
>
> So that would be the argument. I think it's the fact that she says, "I don't care, are they from my children? You saw my children, they are doing okay." When you take in conjunction with a subsequent statement to Rick Rendon when he is seizing the computer, "What if I was?"

(J.A. 90-91.) The Military Judge denied that cross-examination.

(J.A. 91-92.)

2. MGySgt S wanted to ask Mrs. Nash: do you think a pedophile can be rehabilitated.

During Mrs. Nash's testimony, one of the Members, MGySgt S, wanted to ask her a question, and submitted the following

proposed question in writing to the Military Judge: "Do you think a pedophile can be rehabilitated?" (J.A. 101-02, 164.) Both the Trial Counsel and the Defense objected to this question, and the Military Judge declined to pose the question to Mrs. Nash. (J.A. 101-02, 164.) After Mrs. Nash testified, Defense called its fourth and final witness to testify. (J.A. 105-20.)

After the fourth witness testified, the Civilian Defense Counsel, Mr. Patrick Callahan, wanted to voir dire MGySgt S based on the question MGySgt S wanted to ask Mrs. Nash:

> MJ: During the recess, Mr. Callahan indicated that he wanted me to voir dire Master Gunnery Sergeant [S] based on the question that he asked on one of the appellate exhibits from Mari Nash. And the question was "Do you believe that a pedophile can be rehabilitated?" And Mr. Callahan's concern expressed during the 802 conference was that it reflected——might reflect an indication that Master Gunnery Sergeant [S] had not kept an open mind, had already made up his mind about this case.

(J.A. 121.) The Military Judge did not individually voir dire MGySgt S, instead the Military Judge instructed the Members that they must keep an open mind until all the evidence was in and they were instructed on the law. (J.A. 121-22.) All the Members agreed that they maintained an open mind. (J.A. 122.)

After excusing the other Members, the Military Judge then conducted voir dire of MGySgt S. (J.A. 126-127.) MGySgt S agreed that he could maintain an open mind until all the evidence was admitted and the Members were instructed:

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?

MEM (MGySgt [s]): Yes, sir.

(J.A. 128.) The Military Judge asked MGySgt S about the proposed question for Mrs. Nash:

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 (MGySgt [S]): 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 (MGySgt [S]): 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 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 (MGySgt [S]): 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.
>
> MEM (MGySgt [S]): Yes, sir.
>
> MJ: 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 (MGySgt [S]): Yes, sir. I know——maybe, you know, 19 years ago when I wasn't married yet, my frame of mind was more tunnel vision. You know being with my wife, you know, I've developed a more open mind, especially since we have a son who has autism. So I have to keep an open mind on how to deal with that. I've learned not to make quick judgments, determinations, and just try to take it as much information as I can so I can make an educated decision.

(J.A. 129-30.)

Civilian Defense Counsel then challenged MGySgt S for cause, arguing that MGySgt S had failed to keep an open mind:

> Sir, the defense would challenge the witness for cause. The defense is not satisfied, doesn't believe his answers completely make sense. The question to the witness whether or not she believes that a pedophile can be rehabilitated to test her level of naiveness, 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.

(J.A. 131.) The Military Judge denied the challenge. (J.A. 131-133.) The Military Judge found no bias, but rather interpreted MGySgt S's comment as an attempt to probe Mrs.

Nash's bias, similar to questions Trial Counsel himself had proffered:

> The defense challenge for cause is denied. While unusual, the question asked by Master Gunnery Sergeant [S] was not far from the questions proffered by trial counsel to probe the witness's bias, as it were, based on her statement to Special Agent Rendon that she may have viewed the child pornography. In essence, Colonel Sullivan argued that since she 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 had gone on here. Master Gunnery Sergeant [S]' question, again, was not far from that.

(J.A. 132.) The Military Judge continued:

> 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 in to 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 Master Gunny Sergeant [S] has not retained an open mind, I find that his answers were sincere and they reflected that, at this point in 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. And that he will express his views and listen to the views of the other members in the deliberation room with an open mind.

So that challenge for cause is denied.

(J.A. 132-33.)

D. MGySgt S's questions to the witnesses.

During the trial on the merits and on sentencing, MGySgt S submitted twelve Members Question Sheets. (J.A. 156-67.) Eight Question Sheets were prior to the "pedophile" question. (J.A. 156-163.) Three Question Sheets were after the "pedophile" question. (J.A. 165-67.) MGySgt S's questions included: who determines what is high risk——the owner of the item or the shipping company (J.A. 156); "what happens when you format a hard drive" (J.A. 157); "did you ask SSGT Nash to do things for you, over Mr. [JR], because he was more handy or did better work . . . ." (J.A. 165.)

E. NMCCA's opinion.

1. NMCCA finds the indecent acts and taking indecent liberties with MR and LR factually sufficient.

Appellee raised five assigned errors at the lower court, which included a factual sufficiency challenge of the convictions for taking indecent liberties with and committing indecent acts with MR and LR. *United States v. Nash*, No. 201000220, 2011 CCA LEXIS 116, *2-3 (N-M. Ct. Crim. App. June 28, 2011). The lower court applied the factual sufficiency test from *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), and found that "the evidence was factually sufficient as to the

findings of guilty of committing indecent acts and taking indecent liberties with MR and LR." *Nash*, 2011 CCA LEXIS 116, at *14-15.

2. The service court identified a variation of the standard of review for evaluating implied bias rulings, and applied de novo review.

In reviewing whether implied bias existed for the first assigned error, NMCCA identified a variation of the standard of review for analyzing a military judge's ruling on implied bias:

> [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.

Nash, 2011 CCA LEXIS 116, at *18-19. Citing to *United States v. Terry*, 64 M.J. 295, 305 (C.A.A.F. 2007) (citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)), NMCCA explained that "when the military judge tests for implied bias the record must reflect 'a clear signal that the military judge applied the right law.'" *Nash*, 2011 CCA LEXIS 116, at *19.

The service court distinguished this case from *Terry* and *Downing* by noting that the Record here lacked a clear signal that the Military Judge applied the right law, because the Record here indicated the Military Judge had erroneously applied

the actual bias test in ruling on implied bias. *Nash*, 2011 CCA LEXIS 116, at *21-22. The court also determined there was no indication that the Military Judge considered the liberal-grant mandate. *Id*. at *22. Finally, the lower court stated:

> We conclude that while the trial judge properly tested for actual bias, he did not articulate any treatment of implied bias and it's [sic] attendant test. Accordingly, we review de novo the question of whether implied bias exists.

Id. at *23.

3. The lower court found that MGySgt S had not kept an open mind.

Using de novo review, the lower court evaluated the totality of the circumstances and considered: (1) the initial voir dire of MGySgt S; (2) the Military Judge's colloquy with MGySgt S; and (3) the timing of the question. *Nash*, 2011 CCA LEXIS 116, at *24-26. In addressing the timing of MGySgt S's question, the lower court concluded "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." *Nash*, 2011 CCA LEXIS 116, at *25-26. The court concluded:

> [T]hat 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."

Id. at *26-27 (emphasis added).

Summary of Argument

A military judge's decision on whether to grant a challenge for cause based on implied bias is reviewed with less deference than abuse of discretion, but more deference than de novo review. Despite holding that the Military Judge incorrectly applied an "actual bias" test in analyzing MGySgt S' question for an "indication" of bias, and finding that MGySgt S' responses "reflected that . . . he has an open mind," the lower court itself applied a virtually identical test, looking to the same facts and merely concluding the opposite, in language that as easily could be characterized as an "actual bias" finding: that MGySgt S "had not maintained an open mind." The lower court erred in applying a de novo standard to the Military Judge's findings, particularly when: (a) the Military Judge enunciated the liberal grant standard on the Record; and, (b) the Military Judge considered not only his view of MGySgt S' credibility, but objectively, what MGySgt S' answers "reflected."

Implied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced. This implied test is an objective test, which has an objective lens. The implied bias test is objective, "viewed through the eyes of the public, focusing on the appearance of fairness." Here, when testing for implied bias, the lower court made the implied bias test——whether, despite a disclaimer of bias, most people in the same position as the court member would be prejudiced——an additional consideration and not the test itself.

Regardless of the standard of review and test applied, the lower court erred in finding implied bias. MGySgt S's circumstances, reviewed either under a de novo or a "middle" standard, do no injury to the perception or appearance of fairness in the military justice system. Applying the proper implied bias test, this Court will find that there is no implied bias because most people in MGySgt S's position would not be prejudiced. MGySgt S had no relationship with an aspect of the trial, such as a substantial emotional involvement, close personal ties with someone who was a victim of the same or similar crime, or a close relationship with one of the parties, witnesses or another member. His question did not reflect bias.

Argument

I.

NMCCA ERRED IN REVIEWING THE IMPLIED BIAS ISSUE DE NOVO BECAUSE THE STANDARD OF REVIEW IS "LESS DEFERENCE THAN ABUSE OF DISCRETION, BUT MORE DEFERENCE THAN DE NOVO".

A. The standard of review is less deference than abuse of discretion, but more deference than de novo.

A military judge's decision on whether to grant a challenge for cause based on implied bias is reviewed with less deference than abuse of discretion, but more deference than de novo review. *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citations omitted). "A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not." *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007) (citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

Appellate courts want "a clear signal that the military judge applied the right law." *Id*. (citing *Downing*, 56 M.J. at 422). "While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted." *Id*. (citing *Downing*, 56 M.J. at 422.) Specifically, "where a military judge considers a challenge based on implied bias, recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of

discretion will be reversed will indeed be rare." *Clay*, 64 M.J. at 277.

If a military judge does not clearly signal that he applied the correct law, his decision is not reviewed de novo, but instead is still reviewed within the standard of less-deference-than-abuse-of-discretion, but-more-deference-than-de-novo-review; thus, the military judge is entitled to a modicum of deference by appellate courts, which means appellate courts cannot review the decision de novo. *See United States v. Hollings*, 65 M.J. 116, 119 (C.A.A.F. 2007) (noting that a military judge who addresses the liberal grant mandate is entitled to greater deference than one that does not, but "this does not suggest that the military judge is entitled to no deference."); *but cf. United States v. Briggs*, 64 M.J. 285, 287 (C.A.A.F. 2007)(noting that implied bias is not reviewed de novo, but that "deference is warranted only when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts.").

When the record does not indicate the military judge applied the implied bias test, the court gave less deference, but did not state it was using de novo review. *See Bagstad*, 68 M.J. at 462; *see also United States v. Townsend*, 65 M.J. 460, 463-64 (C.A.A.F. 2008); *see also United States v. Terry*, 64 M.J. 295, 305 (C.A.A.F. 2007); *see also Briggs*, 64 M.J. at 286-87;

see also Clay, 64 M.J. at 278; *see also United States v. Leonard*, 63 M.J. 398, 403 (C.A.A.F. 2006); *see also United States v. Moreno*, 63 M.J. 129, 133-35 (C.A.A.F. 2006); *see also Downing*, 56 M.J. at 422-23.

Less deference is given where a military judge's analysis is not comprehensive. *Bagstad*, 68 M.J. at 462 (citing *United States v. Richardson*, 61 M.J. 113, 120 (C.A.A.F. 2010)). In *Richardson*, the military judge denied a challenge for cause and explicitly considered implied bias, but did not articulate the implied bias test. *Id*. at 117, 120. The *Richardson* court gave less deference because the military judge did not articulate the test and the record was not sufficiently developed to determine if implied bias existed. *Id*. at 120-21. The *Downing* court determined that the record did not reflect that the military judge applied the correct legal standard to the appellant's challenge for implied bias, but reviewed the totality of the circumstances and found the appellant had not met his burden to establish grounds for implied bias. *Downing*, 56 M.J. at 42-23.

B. The lower court erred in giving the Military Judge no deference.

Here, the lower court gave no deference to the Military Judge, and applied a de novo standard in reviewing for implied bias. *Nash*, 2011 CCA LEXIS 116 at *23. The lower court found that the Military Judge give no "clear signal" that he applied

the implied bias test, and no indication that he considered the liberal-grant mandate. *Id*. The lower court erred: the Military Judge knew the implied bias test and considered the liberal-grant mandate. He correctly enunciated those three days earlier during general voir dire. (J.A. 36-37.) And, in finding no implied bias, he used language reflecting the objective considerations of implied bias: (1) he considered "any remaining implied bias or indication" of bias; and (2) he found that MGySgt S' answers "reflected that" he had an open mind. (J.A. 132.)

The implied bias test may be satisfied in many ways. The lower court's analysis, relying on dependent clauses to indicate its understanding of the implied bias doctrine, held that "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." *Nash,* 2011 CCA LEXI 116, at *26. This, clearly, appears to be an "actual bias" finding——and yet the lower court found that the Military Judge had not abused his discretion in finding no actual bias. *Id.* at *17. Likewise, the Military Judge announced on the Record his understanding of the liberal grant mandate and the objectiveness of the implied bias test. (J.A. 36.)

Later, near the close of Findings, the Military Judge revisited issues of bias, and wrapped-up his findings in

succinct language that summarized his findings of no implied bias, yet faithfully reflected the objective nature of the test: he looked to "any remaining implied bias" or "indication" on the Record of bias; and, he found, revisiting the bias issue now near the end of Trial, both that the Member's answers were sincere——an issue that also goes to actual bias——and that the Record "reflected" that the Member maintained an open mind——much like the lower court's analysis, looking to the Record itself for an indication of bias. (J.A. 132.) The Military Judge's looking to the Member's actual words, and finding that the Record reflected an "open mind" does not mean that the judge misapplied the law or failed to consider what the Record would reflect, objectively, to the public about the fairness of the proceedings. The lower court itself engaged in this route of analysis.

Unlike *Richardson*, the Military Judge here gave a clear signal merely three days earlier in the trial that he understood the implied bias test and that he had to apply the liberal grant mandate. (J.A. 36.) When he ruled on Appellee's challenge of MGySgt S, the Military Judge knew he had to apply the implied bias test and the liberal grant mandate. The Military Judge specifically considered implied bias. (J.A. 132.)

The Military Judge considered what the Record reflected about MGySgt S's demeanor, which may inform judgments about the

public perception of the fairness of a trial. *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002) (citation omitted); *see also Downing*, 56 M.J. at 422. Thus, the lower court erred in failing to apply "some deference" rather than de novo. The proper standard of review for implied bias in this case is on the more deferential side of the standard of review spanning the range from less-than-abuse-of-discretion, but more-than-*de-novo*.

Assuming *arguendo* that the Military Judge did not properly acknowledge the liberal grant mandate nor properly articulate the implied bias test on the Record, the lower court should have given some deference above de novo because this Court has never reviewed de novo an implied bias issue. *See Bagstad*, 68 M.J. at 462; *see also Bragg*, 66 M.J. at 326; *see also Hollings*, 65 M.J. at 119; *see also Terry*, 64 M.J. at 305; *see Briggs*, 64 M.J. at 286-87; *see also Clay*, 64 M.J. at 278; *see also Leonard*, 63 M.J. at 403); *see also Moreno*, 63 M.J. at 133-35; *see also Downing*, 56 M.J. at 422-23. In other words, within the standard of review ranging from less-than-abuse-of-discretion, to more-than-*de-novo*, NMCCA should have reviewed the issue on the less deferential side of this range, but without reviewing the issue de novo.

II.

THE LOWER COURT ERRED, APPLYING THE WRONG IMPLIED BIAS TEST. IT FAILED TO APPLY THE TEST THAT CONSIDERS WHETHER "MOST PEOPLE IN THE SAME POSITION WOULD BE PREJUDICED." INSTEAD, IT MADE IT AN ADDITIONAL CONSIDERATION AND NOT THE FOCUS OF THE TEST.

A. Implied bias case law.

"Viewing the circumstances through the eyes of the public and focusing on the perception or appearance of fairness in the military justice system, we ask whether, despite a disclaimer of bias, most people in the same position as the court member would be prejudiced." *Moreno*, 63 M.J. at 134. Challenges for implied bias are evaluated based on the totality of the factual circumstances. *Bagstad*, 68 M.J. at 462 (citation omitted). In applying the implied bias test, "observation of the member's demeanor may inform judgments" about the public perception of the fairness of a trial. *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002)(citation omitted); *see also Downing*, 56 M.J. at 422.

The burden of persuasion remains with the party making the challenge. R.C.M. 912(f)(3); *see also Downing*, 56 M.J. at 422. Even if the military judge did not apply the liberal grant mandate or the implied bias test, appellate courts still evaluate whether the appellant met his burden of establishing that grounds for a challenge of a member based on implied bias

existed. *Downing*, 56 M.J. at 422. "In carrying out this objective test, this Court determines 'whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high.'" *Bagstad*, 68 M.J. at 462.

In typical implied bias cases, the potential bias is identified at the beginning of trial, where the member may have some relationship with an aspect of the trial. Such a relationship includes: (a) some substantial emotional involvement, *Clay*, 64 M.J. at 278 (moral convictions and harsh punishment for rape); (b) close personal ties with someone who was a victim of the same or similar crime before the court, *Terry*, 64 M.J. at 305 (ex-girlfriend was raped); or, (c) a close relationship with one of the parties, witnesses, or another member. *Downing*, 56 M.J. at 422-23 (member knew trial counsel); *Leonard*, 63 M.J. at 403 (member's professional relationship with the victim was one of trust); *Bagstad*, 68 M.J. at 460 (senior reporting officer of another member).

This is consistent with Justice O'Connor's examples of implied bias: "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith v. Phillips*, 455 U.S. 209,

222 (1982)(O'Conner, J., concurring). Appellate courts also consider whether the member understood and appreciated his role as a court member, which includes his obligation to apply the law as instructed and to remain unbiased. *See Townsend*, 65 M.J. at 465.

B. Implied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced.

"Implied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced . . . ." *Bagstad*, 68 M.J. at 462 (internal quotations and citations omitted); *see also Bragg*, 66 M.J. at 327 (noting that prejudiced means biased); *see also Townsend*, 65 M.J. at 463; *see also Briggs*, 64 M.J. at 286 (noting that prejudiced means biased); *see also Leonard*, 63 M.J. at 402; *see also Moreno*, 63 M.J. at 134 (combining the objective lens with the implied bias test); *see also United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003).

This implied test is an objective test and this Court has established an objective lens for the test: the implied bias test is objective, "viewed through the eyes of the public, focusing on the appearance of fairness." *Bagstad*, 68 M.J. at 462; *see also Bragg*, 66 M.J. at 326; *see also Briggs*, 64 M.J. at 286; *see also Clay*, 64 M.J. at 276; *see also Leonard*, 63 M.J. at 402; *see also Moreno*, 63 M.J. at 134; *see also Richardson*, 61

M.J. at 118; *see also Miles*, 58 M.J. at 194-95; *see also Downing*, 56 M.J. at 422. This Court further explains the objective lens by noting that "[i]n carrying out this objective test, this Court determines 'whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high.'" *Bagstad*, 68 M.J. at 462.

This Court typically describes the objective lens and the implied bias test separately. *See Bagstad*, 68 M.J. at 462; *see also Bragg*, 66 M.J. at 326-27; *see also Briggs*, 64 M.J. at 286; *see also United States v. Strand*, 59 M.J. 455, 458-59 (C.A.A.F. 2004). But the *Moreno* court then combined the two into one sentence: "Viewing the circumstances through the eyes of the public and focusing on the perception or appearance of fairness in the military justice system, we ask whether, despite a disclaimer of bias, most people in the same position as the court member would be prejudiced." *Moreno*, 63 M.J. at 134 (citing *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000), and *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)).

A year later, the *Terry* court not only confused the objective lens with the implied bias test itself, but broke the analysis into two seemingly distinct questions:

> Here, 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 of appearance of fairness in the military justice system."* In considering this question, courts *also* consider whether "most people in the same position would be prejudiced [i.e. biased]."

Terry, 64 M.J. at 302 (internal citations omitted) (emphasis added). With the *Terry* variation, the implied bias test that most people in the same position would be prejudiced, erroneously becomes an additional consideration and not the test. This Court avoided a similar error in a subsequent case by showing that whether "most people in the same position would be prejudiced" is the question to be answered:

> [T]he 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 of appearance of fairness in the military justice system. In making this objective evaluation, we ask whether most members in the same position as [the member] would be prejudiced or biased.'"

United States v. Albaaj, 65 M.J. 167, 171 (C.A.A.F. 2007).

C. <u>The lower court erred in applying the objective nature of the test as the implied bias test itself</u>.

Here, although not citing to *Terry*, the lower court applied the *Terry* implied bias test, which both mixes and bifurcates the proper implied bias analysis:

> Implied bias is an objective test, "'viewed through the eyes of the public, focusing on the appearance of fairness.'" 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." In considering this question, courts also consider whether "most people in the same position would be prejudiced [i.e. biased]."

Nash, 2011 CCA LEXIS 116, at *18 (internal citations and footnote omitted).

This test makes the implied bias test——whether most people in the same position would be prejudiced, *i.e.*, biased——an afterthought. Instead, the lower court mistook the objective lens——viewed through the eyes of the public, focusing on the appearance of fairness——for the implied bias test. And as reiterated in *Bagstad*, the correct implied bias analysis is to focus on whether most people in the same position would be prejudiced, *i.e.,* biased. 68 M.J. at 462.

Since the lower court applied the wrong test, it erred in its legal analysis. As a result, this Court should disregard the lower court's analysis. The *Moreno* implied bias test is the appropriate test because it combines the objective lens and the implied bias test, and maintains the focus on whether most people in the same position would be biased. This Court should reject the lower court's enunciation of the *Terry* standard and all confusing variants of the test, state clearly that the test is not bifurcated, and that the test looks——objectively, that is,

through an objective lens——to whether most people in the member's position would be biased.

III.

REGARDLESS OF WHETHER THE LOWER COURT APPLIED THE CORRECT STANDARD OR REVIEW OR SUBSTANTIVE TEST, THE LOWER COURT ERRED IN REVERSING THE MILITARY JUDGE AND SETTING ASIDE THE FINDINGS AND SENTENCE. UNDER EITHER A DE NOVO OR "MIDDLE DEFERENCE" STANDARD OF REVIEW, MGYSGT S'S CIRCUMSTANCES DO NO INJURY TO THE PERCEPTION OR APPEARANCE OF FAIRNESS IN THE MILITARY JUSTICE SYSTEM. NO ACTUAL BIAS EXISTED, AND THE MEMBER'S COMMENTS REVEALED NO IMPLIED BIAS SUCH AS RELATIONSHIPS TO AN ASPECT OF TRIAL IMPUTING AN UNFAIRNESS OF THE TRIAL. MOREOVER, THE INDECENT ACTS AND INDECENT LIBERTIES CONVICTIONS WERE FACTUALLY SUFFICIENT.

Applying the *Moreno* implied bias test, which focuses on whether most people in the same position would be prejudiced, *i.e.*, biased, most people in the same position as MGySgt S would not be prejudiced. And regardless of whether the lower court applied the correct standard of review, the lower court reached the wrong result because, even using the lower court's implied bias test, MGySgt S's circumstances do no injury to the perception or appearance of fairness in the military justice system.

A. Applying the *Moreno* implied bias test, most people in MGySgt S's position would not be prejudiced.

1. Standard of review.

As addressed above, a military judge's decision on whether to grant a challenge for cause based on implied bias is reviewed with less deference than abuse of discretion, but more deference than de novo review. *See supra* 17-22. Nevertheless, even using a de novo standard of review, this Court will find when the correct implied bias test is applied that the most people in MGySgt S's position would not be prejudiced.

2. Applying the *Moreno* implied bias test, most people in MGySgt S's position would not be biased.

Here, using the *Moreno* implied bias test, most people in MGySgt S's position would not be biased. MGySgt S did not have some relationship with an aspect of the trial: some substantial emotional involvement; close personal ties with someone who was victim of the same or similar crime; or had a close relationship with one of the parties, witnesses, or another member. MGySgt S was not predisposed to bias and the initial voir dire revealed that, but the lower court discounted that fact. This is a fact that should not be discounted, but should be a basis for the implied bias analysis because this Court has used these factors to evaluate implied bias.

MGySgt S was an engaged Member that asked numerous questions. He was a Member that heard all of the Government's

evidence and was assimilating the Defense's evidence into his thinking. When MGySgt S wanted to ask his "pedophile" question, the Government had rested (J.A. 76) and the Defense had called its third witness[1]. (J.A. 102; 164.)

During the trial on the merits and on sentencing, MGySgt S submitted twelve Members Question Sheets. (J.A. 156-67.) He submitted eight Question Sheets prior to the "pedophile" question. (J.A. 156-63.) Even after the "pedophile" question, he continued to be engaged. (J.A. 165-67.) NMCCA even noted MGySgt S asked about forty percent of the members' questions during findings. *Nash*, 2011 CCA LEXIS 116, at fn. 22 at *24-24. This indicates that MGySgt S was a member that was not afraid to ask questions; rather, he was engaged and wanted more evidence to make an informed decision.

The substance of the questions do not show bias, but that MGySgt S was engaged: who determine what is high risk——the owner of the item or the shipping company (J.A. 156); "what happens when you format a hard drive" (J.A. 157); "did you ask SSGT Nash to do things for you, over Mr. [JR], because he was more handy or did better work . . . ." (J.A. 165.) Some of the questions may have been irrelevant, but do not indicate that MGySgt S had made up his mind.

[1] Appellee did not challenge MGySgt S until after the Government rested (J.A. 76), and after the Defense's final witness testified. (J.A. 105-17, 121.)

Although the lower court concluded that timing was irrelevant, *Nash*, 2011 CCA LEXIS 116, at *26, the timing of the question is relevant to determining whether most people in MGySgt S's position would be prejudiced under the totality of the circumstances. He was a Member that heard all of the Government's evidence and was assimilating the Defense's evidence into his thinking. When MGySgt S wanted to ask his "pedophile" question, the Government had rested (J.A. 76) and the Defense had called its third witness[2]. (J.A. 102; 164.)

When asked by the Military Judge why he asked the question, he unartfully explained that he wanted to test Mrs. Nash's credibility. (J.A. 129-30.) When MGySgt S wanted to ask his question, there was evidence that Mrs. Nash allowed NCIS Special Agents to search a computer, but stated that they could not search the computer for child pornography and asked "what if I was looking at those." (J.A. 41.) As the Military Judge found, MGySgt S's question related to this question and Mrs. Nash's testimony may be colored by her belief that there was not anything seriously wrong. (J.A. 132.)

Moreover, MGySgt S's unartful explanation makes sense: if Mrs. Nash answered, "yes," she would have less credibility because, if she believed Appellee was a pedophile and can be

[2] Appellee did not challenge MGySgt S until after the Government rested (J.A. 76), and after the Defense's final witness testified. (J.A. 105-17; 121.)

rehabilitated, she would be willing to lie during her testimony, since she would not worry that Appellee could be acquitted and return home and be with their children. If Mrs. Nash answered, "no," she would be more credible because if she believed Appellee was a pedophile and could not be rehabilitated, she would not be willing to lie during her testimony, since she would be concerned that Appellee could be acquitted and return home and be with their children. If Mrs. Nash answered, "I don't know," she is credible because she is answering a question that probably requires an expert witness to answer.

And even if MGySgt S was not, as interpreted by the Military Judge, trying to test the witness's credibility, his question did not objectively reflect any bias on the Member's part. His answers to the two direct questions by the Military Judge, in fact, reflected not that he had made up his mind, but that as a parent of an autistic child, he wondered if the witness had a mindset that pedophilia was a disease or learned. This question may have been irrelevant for the witness and for trial, but it is a question that, very likely, every person struggles with when contemplating evidence of such crimes. That the question is so universally contemplated suggests not that MGySgt S disobeyed the instructions and made up his mind, but rather that as a witness, he considered similar, universally posed dilemmas. And the Military Judge correctly both examined

the witness for his motive in posing the question, and instructed and ascertained that the Member remained unbiased.

But, to be sure, even if the question was irrelevant to the trial proceedings——and there is no requirement that a member's question makes logical sense when viewed by highly educated counsel and judges months after the trial——the question did not indicate or reflect bias. MGySgt S was simply an unbiased, but very involved, member who asked many questions. Based on the questions from the Military Judge, there is no doubt that he appreciated his role to remain unbiased throughout the whole trial. Similar to *Townsend*, MGySgt S stated that he would keep an open mind until all the evidence was in and he was instructed on the law. This should not now inure to Appellee's benefit.

Based on the totality of the factual circumstances, there is no implied bias because most people in MGySgt S's position would not be prejudiced. Nothing suggested that he was biased at the beginning of trial. MGySgt S was an engaged member that asked a lot of questions throughout the court-martial. The timing of MGySgt S's question is relevant and critical in evaluating the totality of the circumstances: MGySgt S asked this question near the end of the Defense's presentation of evidence. He had not made up his mind as to Appellee's guilt, but was looking to test Mrs. Nash's credibility. The Military Judge's observation of MGySgt S's demeanor also informs this

Court about the public perception of the fairness of this trial: "[MGySgt S] may have the most open mind of any member based on the voir dire that we just went through with him at this point." (J.A. 870.)

B. Applying the lower court's implied bias test, MGySgt S's circumstances do no injury to the perception or appearance of fairness in the military justice system.

Even under de novo review and applying the lower court's implied bias test, MGySgt S's circumstances do no injury to the "perception or appearance of fairness in the military justice system." The lower court's enunciation of the version of the implied bias test that made an appearance in *Terry* was:

> 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." In considering this question, courts also consider whether "most people in the same position would be prejudiced [i.e. biased]."

Nash, 2011 CCA LEXIS 116, at *18 (internal citations and footnote omitted).

Even under that test, MGySgt S's circumstances do no injury to the perception or appearance of fairness in the military justice system because MGySgt S did not have some relationship with an aspect of the trial, such as a substantial emotional involvement, close personal ties with someone who was a victim of the same or similar crime, or had a close relationship with one of the parties, witnesses or another member. MGySgt S was

an engaged Member that heard all of the Government's evidence, was assimilating the Defense's evidence, and wanted to test the credibility of a witness.

And similar to *Townsend*, MGySgt S stated that he would keep an open mind until all the evidence was in and he was instructed on the law. Additionally, NMCCA found that "the evidence was factually sufficient as to the findings of guilty of committing indecent acts and taking indecent liberties with MR and LR." *Nash*, slip op. at 8. Neither MGySgt S's circumstances nor his question injured the perception or appearance of fairness in the military justice system, especially where the findings are factually sufficient.

C. Assuming arguendo the Military judge abused his discretion, the error was harmless because of the evidence presented at trial.

Assuming arguendo this Court finds the Military Judge abused violated the liberal grant mandate by denying the challenge for cause, this Court should test whether this error was harmless. *See Miles*, 58 M.J. at 195 (finding the military judge's error in denying the challenge for cause based on implied bias was harmless because appellant pled guilty, but was not harmless for sentencing). This Court should find that the Military Judge's error was harmless based on the evidence presented at trial and NMCCA's finding that the convictions for

indecent acts and taking indecent liberties were factually sufficient. *Nash*, 2011 CCA LEXIS 116, at *14-15.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved by the Convening Authority.

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