UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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


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COMES NOW APPELLANT, and provides the following Reply to the Appellee's Answer:

## 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".

The standard of review of a military judge's decision on whether to grant a challenge for cause based on implied bias is "less deferential than abuse of discretion, but more deferential 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)). But this does not mean that the military judge's decision is given "no deference." *United States v. Hollings*, 65 M.J. 116, 119 (C.A.A.F. 2007).

Appellee argues that the Government confused de novo review for "no deference" review. (Appellee's Answer at 16.) Appellee argues that de novo review satisfies *Hollings* because it gives more deference than "no deference." (Appellee's Answer at 16.) To be clear, the Government's position is that the standard of

review for implied bias is less-deferential-than-abuse-of-discretion,-but-more-deferential-than-de-novo review. (Appellant's Br. at 18.) And the appellate courts give deference along that scale and never reach abuse-of-discretion review or de-novo review. (Appellant's Br. at 18-19, 22.) Focusing on the de-novo limit: in those cases where the military judge did not apply the implied bias test, the courts gave less deference; but, more importantly, these same cases did not apply de novo review or state that de novo review should be applied. *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. Thus, applying de novo review would be inconsistent with this Court's precedent.

II.

THE LOWER COURT'S APPLICATION OF IMPLIED BIAS EVISCERATES THE ACTUAL BIAS TEST. THE LOWER COURT'S APPLICATION OF THIS OVERWEENING VERSION OF THE IMPLIED BIAS TEST PERMITS AN END-RUN AROUND THE DEFERENCE GIVEN TO ACTUAL BIAS HOLDINGS, CONFUSINGLY OCCUPIES THE SAME LEGAL SPACE AS THE ACTUAL BIAS TEST, AND PERMITS SERVICE COURTS TO SIMPLY SUPPLANT ACTUAL BIAS FINDINGS THEY DISAGREE WITH.

The implied bias test, posed precisely, asks whether most people, in same position as the court member, would be prejudiced; such members should be excused. *See Moreno*, 63 M.J. 129; *Briggs,* 64 M.J. at 287 (explicitly considering circumstances of the member but implicitly concluding that any member in those circumstances would be biased); *Leonard*, 63 M.J. at 402 (same); *United States v. Warden,* 51 M.J. 78 (C.A.A.F. 1999) (same).

The test's alternate versions, to the contrary, eschew this test by either supplanting actual bias and looking at whether the member's mind seems to have been made up, or asks broadly whether the trial proceedings seem unfair. *See, e.g., United States v. Bagstad,* 68 M.J. 460 (C.A.A.F. 2010); *United States v. Martinez,* 67 M.J. 59 (C.A.A.F. 2008); *United States v. Albaaj,* 65 M.J. 167 (C.A.A.F. 2007).

Only the first test, however, asks the precise question posed by *Moreno*: whether "most people in the same position as

the court member would be prejudiced." *Moreno*, 63 M.J. at 134. The latter two, respectively, both occupy the same legal space as actual bias, and broaden the test making its application prohibitively retrospective for military judges actually presiding over cases. The latter tests swallow the first test, and render it meaningless. Moreover, the first "circumstances" test is the only test military judges can precisely apply at trial, and reach consistent, objective holdings that are not subject to constant second-guessing on appeal.

This Court should evaluate this case under the implied bias test. Appellant, like the lower court, reshapes the issue to one of actual bias, or one that at least mimes actual bias:

> The question in these types of challenges is not whether other people would have made up their minds prematurely as well. That question can always be answered no. The pertinent question is whether the *challenged member* made up his mind prematurely.

(Appellee's Answer at 21.) But implied bias test is the proper test.

To be clear, there was no actual bias. Actual bias is "'bias in fact'——the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Ai*, 49 M.J. 1, 5 (C.A.A.F. 1998)(citations omitted). "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.*

*Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (*quoting United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 2007)). The existence of actual bias is a question of fact, so the appellate courts provide the military judge with significant latitude in determining whether it is present in a prospective member. *Id*. (citing *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)). The military judge is specially situated in making this determination because he was physically present during voir dire and watched the challenged member's demeanor. *Id*. (citing *Warden*, 51 M.J. at 81).

Here, MGySgt S did not have actual bias. As the lower court noted, the Military Judge did not abuse his discretion in ruling MGySgt S had no actual bias, since the Military Judge observed MGySgt S testify that he would maintain an open mind. *United States v. Nash*, No. 201000220, 2011 CCA LEXIS 116, *17 (N-M. Ct. Crim. App. June 28, 2011). Even with this conclusion, Appellant attempts to reshape the issue to actual bias:

> The question in these types of challenges is not whether other people would have made up their minds prematurely as well. That question can always be answered no. The pertinent question is whether the *challenged member* made up his mind prematurely.

(Appellee's Answer at 21.) This appears to argue that the real question is whether there was actual bias, but there was no actual bias because MGySgt S stated that he maintained an open mind throughout the trial as shown by the Record (J.A. 129-30),

the Military Judge's ruling (J.A. 132-33), and the lower court's opinion. *Nash*, 2011 CCA LEXIS 116, at *17.

Appellant and the lower court make the same mistake. Despite summarily affirming the military judge's actual bias finding, the lower court explicitly states no less than *five* times that it predicates its implied bias on its holding that MGySgt S had, *actually*, made up his mind: (1) "MGySgt S's question . . . indicated that he had already concluded . . . that he believed Mari's husband . . . was a pedophile"; (2) "MGySgt S had not maintained an open mind . . . [and had not] followed the military judge's instruction"; (3) "MGySgt S had already reached a determination as to [Appellee's culpability]"; (4) "his responses seemed predicated on an assumption that the appellant was a pedophile"; (5) "it is clear . . . that he had already reached the conclusion that the appellant was guilty." *Nash,* 2011 CCA LEXIS 116, at *23, 25-26.

These are "actual bias" findings. The lower court couches these findings with prefatory words like "appears" and "indicates": but the explicit contradiction and discarding of the military judge's findings on the *identical* factual issue is clear. As is the lower court's holding that pays lip service to the military judge's actual bias holding, but then reviews the identical factual issue and finds the opposite, calling it "implied bias." This evisceration of the implied bias test

should be reversed and corrected in this case, and prospectively for practitioners.

The proper test is and should be: whether despite the record and testimony indicating a member has *not* made up his mind (actual bias), the circumstances of the member are such that *any* member with identical or similar circumstances would be biased (implied bias), thus risking the reputation of the military justice system in leaving the member on the panel. Such an inquiry here would ask whether MGySgt S' rank, billet, past experiences, or similar "circumstances" would give rise to bias in "most members." But finding an "appearance of bias" by holding a Member "appeared" to "*actually*" make up his or her mind badly misconstrues and muddles the application of the implied bias test.

At least three versions of the "implied bias" test exist for judges and practitioners to apply: (1) one mimes "actual bias" and allows appellate courts to simply ignore the deference afforded to actual bias findings; (2) one permits reversal on appeal when the trial seems "unfair"; and, (3) one requires excusal when any member with the same circumstances would be biased. The test applied below holds that *despite* affirming a finding of no actual bias based on a member's responses, an appellate court may nonetheless find implied bias *based on the same exact words or testimony,* rather than an objective, and

easily applied, review of the member's circumstances. This expansive version of implied bias guts the actual bias test, and permits service courts to supplant actual bias findings by disregarding the deference due to trial judge's actual bias findings, all in the name of "implied bias."

Duplication of legal tests is confusing and counterproductive. One statutory exception is factual sufficiency, where service courts may simply supplant the findings of guilt entered by the factfinder at trial. But other legal tests must mean something, and have clear boundaries for both practitioners, judges, and appellate courts.

"Implied bias" cannot mean, simply, "actual bias without the deference." For two legal tests to not occupy precisely the same legal space, this court must be clear: implied bias should be an easy, single test for judges to apply and one that reviews, objectively, whether a Member's circumstances are such that *despite no actual bias evinced on the record,* most members in the same circumstances would be biased. Here, no such circumstances existed. Thus, this Court should affirm the finding of no actual bias, and articulate that the proper implied bias test is found in *Moreno*. (Appellant's Br. at 23-28.)

III.

REGARDLESS OF WHETHER THE LOWER COURT APPLIED THE CORRECT STANDARD OF REVIEW OR SUBSTANTIVE TEST, THE LOWER COURT ERRED IN REVERSING THE MILITARY JUDGE AND SETTING ASIDE THE FINDINGS AND SENTENCE. REVIEWED EITHER DE NOVO OR FOR "MIDDLE DEFERENCE," 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.

Appellee argues that MGySgt S's question showed that he had an inelastic attitude towards rehabilitation and that it would affect his decision on confinement. (Appellee's Answer at 33.) Appellee strains the possible readings of MGySgt's question to make this argument, without support from the Record. And, again, Appellant conflates actual and implied bias. *See Section II, supra,* at 3-7. *But see Martinez,* 67 M.J. 61-62 (explicitly not ruling on actual bias, but finding implied bias by combining and conflating actual bias——"his response was qualified and inelastic as to the necessity of some responses . . . "——with implied bias——". . . combined with the fact that LtCol Donovan was the senior member of the panel, . . . .")

And, Appellee both adopts and identifies the mistaken position of the lower court: he argues that MGySgt S' question is implied bias precisely because, he argues, MGySgt S had

*actually* already made a decision about Appellee's guilt; that is, Appellee effectively argues for *actual bias*. (Appellee's Reply at 4-5.) In fact, MGySgt S's question was neither a statement, nor did it express an opinion: it specifically focused on Mrs. Nash and did not express an inelastic attitude toward a punitive outcome. (J.A. 129-30.)

MGySgt S here expressed no opinion as to Appellee's guilt. A member is excused for cause when it appears the member "informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged." R.C.M. 912(f)(1)(M). "Definite" means "clearly *defined* or determined; not vague or general; fixed; precise; exact: *a definite quantity; definite directions*." Dictionary.com, http://dictionary.reference.com/browse/definite (last visited Dec. 12, 2011).

MGySgt S wanted to ask "Do you think a pedophile can be rehabilitated?" (J.A. 101-02, 164.) The question contains no definite opinion as to Appellee's guilt, with regard to actual bias; nor, with regard to implied bias, does it suggest anything about MGySgt S' circumstances that would militate toward a finding that other members in such circumstances would be prejudiced. Rather, it is simply a straightforward *question,* by definition, suggests it states no opinion, but rather seeks an

answer from another. Thus, actual bias appears nowhere on this Record. The relevant question is one of implied bias.

There is no implied bias because MGySgt S had no relationship with an aspect of trial, such as emotional involvement, personal ties with a victim or party. (Appellant's Br. at 29-37.) No relationship, personal or working, or personal history, is reflected on the Record that would prejudice most members in the same circumstances. It is *not* the case that most people in the same circumstances would be prejudiced: thus, no implied bias exists.

And, there was no actual bias: he was an engaged Member that wanted to ask a question. (Appellant's Br. at 29-37.) He repeatedly stated that he made no decision on Appellee's guilt. (J.A. 129-30.) Thus, MGySgt S had no inelastic view towards Appellee's findings or sentence.

**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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I certify that the original of the foregoing was electronically delivered to the Court on December 12, 2011 and that a copy of the foregoing was electronically delivered to Major Kirk Sripinyo, USMC, on December 12, 2011.

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