UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant, v. Jeremy J. Nash Staff Sergeant (E-6) U. S. Marine Corps, Appellee.	**APPELLEE'S BRIEF ON THE MERITS** **USCA Dkt. No. 11-5005/MC** **Crim. App. No. 201000220**

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

KIRK SRIPINYO
Major, U.S. Marine Corps
Bar No. 34753
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris St., SE
Suite 100
Washington, D.C. 20374-5124
(202) 685-7093

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Statement of Statutory Jurisdiction

The lower court reviewed Appellee's case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1). The Judge Advocate General (JAG) of the Navy ordered this case sent to this Court for review under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Statement of the Case

Appellee was tried on various dates in March, May, July, and August of 2010, and on February 11th, 2011. He was convicted of multiple violations of Article 134, UCMJ. On Appeal, Appellee asserted, among other things, that the trial judge erred in refusing to grant his challenge for cause against MGySgt S. The lower court agreed and on June 28th, 2011 set aside the findings and the sentence and authorized a rehearing. On July 28th, 2011, the government moved for *en banc* reconsideration, but that motion was denied. Then, the JAG, using the authority given to him under Article 67(a)(2), UCMJ, forwarded the case to this Court for review on September 16th, 2011.

Statement of Facts

During the defense's presentation on the merits, MGySgt S, one of the members, asked a question that troubled the trial defense counsel. The problematic question was directed towards Mrs. Mari Nash, a Japanese woman (JA at 77) and Appellee's wife,

who was testifying through a translator. It was: "Do you think Pedophiles can be rehabilitated?" (JA at 164.) Both sides objected to the question, and it was not asked. *Id.* Civilian defense counsel asked the military judge to *voir dire* the member, arguing that the question reflected that he had not kept an open mind. (JA at 121.) Initially, the military judge refused civilian defense counsel's request, but brought the entire panel in and asked them generic questions that addressed the importance of keeping an open mind. (JA at 122.) Eventually though, he changed his mind and brought MGySgt S in for individual questioning. (JA at 126.)

When he was asked about his question, MGySgt S said several things. First, he said that he understood the requirement to keep an open mind and that he believed he had done so. (JA at 129.) Next, he explained why he wanted to ask the question. He said that he was checking her "frame of mind," *id.*, and that he thought her answer would give him some insight into her credibility. *Id.* He also felt that his question might "knock her out of her naivete that [he] thought [Mrs. Nash] might be experiencing." *Id.* He explained that, in his experience, Japanese women are often "timid" and "naive" or "easily embarrassed." *Id.* In response to the military judge's questions, he claimed that he had "not made a judgment either way yet," *id.*, and that he would make his opinions known and

listen to the opinions of the other panel members during deliberations. *Id*.

After MGySgt S was excused, the defense challenged him "for cause." (JA at 131.) Civilian defense counsel explained that MGySgt S's answers did not make sense, because one would not ask the question he asked "just to see if a witness is timid or naive . . . ." *Id.* But Trial counsel gushed that he had "not heard a better response to difficult questions" posed to a member in "almost 20 years of experience." *Id.* And he remarked that the military judge has the ability to assess MGySgt S's demeanor that "anybody reviewing the written record" does not. *Id*.

The military judge denied the challenge for cause. (JA at 132.) He admitted that the question was "unusual," but opined that it was "not far from the questions proffered by trial counsel to probe the witness's bias." *Id.* Specifically, he mentioned that the question merely supported the proposition that "her testimony may be colored by [a] form of bias, that she didn't think anything wrong had gone on here." *Id.* He further found that MGySgt S "may have the most open mind of any member based on the voir dire that they . . . went through with him at [that] point." *Id*.

The lower court disagreed. It held that the military judge erred in refusing the challenge for cause, and explained that

the question “Do you think a pedophile can be rehabilitated?” indicated that MGySgt S had already concluded, prior to instructions on findings, that he believed Appellee was a pedophile. *Nash*, NMCCA No. 201000220 at 14. They further held that the colloquy did little to dispel this notion because “his responses seemed predicated on an assumption that [Appellee] was a pedophile and his wife, Mari, was naive in her assessment of pedophiles.” *Id*.

Summary of Argument

The lower court did not err in reviewing the implied bias issue de novo. It based its decision on this Court’s implied bias case law. That case law instructs that an implied bias ruling is normally reviewed with less deference than abuse of discretion, but more deference than de novo. But it also states that when a military judge makes a ruling without giving a clear signal that the correct law was applied to the challenge in question that the judge gets even less deference. Here, the lower court held that the military judge did not give a clear signal that he applied the correct law to the challenge in question. It therefore looked at the normal standards of review (plain error, abuse of discretion, de novo, and no deference) and interpreted this Court’s case law to require de novo review of the challenge.

The lower court also did not err when it asked whether the

member's circumstances would injure the perception of fairness in the military justice system. The test that the government endorses——the test it claims is the *only* test for measuring implied bias——is inapt for use here. It asks whether most people would be biased in the member's circumstances. But here, one of the allegations was that the member made up his mind prematurely. The government's test is ineffective for determining bias in this kind of case. The question it presents can always be answered: "no, most people would have done as instructed and kept an open mind." Because of this, the lower court did not apply the "most people" test and instead used a test that presented actual analytical value. It looked at whether the implication that the member had prematurely made up his mind impacted the perception of fairness in the military justice system. Using this test, the lower court determined that the risk that the public would think Appellee received something less than a fair trial was too great and set aside the findings and the sentence. This was not error.

The totality of the circumstances surrounding the member challenge revealed three things about the challenged member. First, it revealed that he had not maintained an open mind. Second, it revealed his belief that Japanese women are naive, timid, and easily embarrassed, suggesting that he would not impartially evaluate Appellee's case since it relied heavily

upon the testimony of Appellee's Japanese wife. And finally, it revealed that he had an inelastic attitude about the rehabilitative potential of pedophiles, suggesting that he would not be able to give proper consideration to Appellee's rehabilitative potential. Each of these things gives rise to the implication of bias. And each of them is a proper basis for reversing the military judge's decision here. Accordingly, the lower court did not err in its decision.

Argument

I.

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN REVIEWING THE IMPLIED BIAS ISSUE DE NOVO, RATHER THAN REVIEWING THE IMPLIED BIAS ISSUE UNDER THE STANDARD OF "LESS DEFERENCE THAN ABUSE OF DISCRETION BUT MORE DEFERENCE THAN DE NOVO" AS SET FORTH IN *U.S. v. BAGSTAD*, 68 M.J. 460 (C.A.A.F. 2010)?

Standard of Review

Whether the lower court gave the trial judge the correct amount of deference is a question of law reviewed de novo. Rule for Courts-Martial 912(f) requires the removal of a court-martial member upon challenge for cause "whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). Likewise, a member shall be excused upon

challenge for cause when the member "[h]as 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).

These rules address both actual and implied bias in a member. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). Actual bias and implied bias, however, are "separate legal tests, not separate grounds for challenge." *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000).

When testing for actual bias, a reviewing court looks for bias that "will not yield to the evidence presented and the judge's instructions." *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006) (citation and internal quotation marks omitted). A military judge's ruling on actual bias is "afforded great deference." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007).

The test for implied bias is objective. It 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.'" *Id.* (quoting *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006)). It can exist when "most people in the same position as the court member would be prejudiced." *Moreno*, 63 M.J. at 134. Typically, a ruling on implied bias is reviewed with less deference than abuse of discretion but more deference than de novo. *United States v.*

Bagstad, 68 M.J. 460, 462 (C.A.A.F. 2010). But a military judge who rules on a member challenge without addressing the liberal grant mandate and the proper law on the record receives less deference than one who does. *Clay*, 64 M.J. at 277. A reviewing court, when determining how much deference to give in an implied bias case, looks for a "clear signal that the military judge applied the right law." *Id.* (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

The determination of whether a member is biased or not is "based on the 'totality of the circumstances particular to [a] case.'" *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007)(quoting *Strand*, 59 M.J. at 456).

Discussion

1. The military judge did not signal his application of the correct law.

The level of deference given to the military judge's decision here should not be "less than abuse of discretion, but more than de novo" because the military judge failed to give a clear signal that he applied the correct law to the challenge at issue. As explained by the court below, the military judge "did not articulate any treatment of implied bias and its attendant test." *Nash*, NMCCA No. 201000220, slip op. at 13. "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." *Id*. The judge should therefore

get less deference than he would receive had he signaled and recorded his correct application of the law.

The government disagrees. They argue that the military judge's decision should be reviewed under the "less than abuse of discretion, but more than de novo" standard because the military judge "knew the implied bias test and considered the liberal-grant mandate," as evidenced when he "enunciated [the concepts] three days earlier during general voir dire." Appellant's Brief at 20. Not so. The fact that the military judge mentioned the implied bias test and the liberal-grant mandate three days earlier says nothing about whether he properly applied those concepts to the challenge at issue. It shows only that he knew the law (three days prior). This alone is not enough. Enunciation is not application.

This Court's case law requires not just that the military judge know and make mention of the relevant law; it requires that the military judge properly apply the law on the record. If knowledge of the correct law were enough, then the presumption that military judges know the law would obviate the need for any analysis at all. Yet that is not how the implied bias analysis works. This Court's precedent requires that judges apply the liberal grant mandate and the proper law on the record to the particular challenge at issue. *Clay*, 64 M.J. at 277. A "dissertation" is not necessary, but a "clear signal

that the military judge applied the right law" is. *Id*. And that is what is missing here.

The military judge held that MGySgt S had "an open mind," (JA 132) but as the lower court noted, this does not address implied bias; it addresses actual bias. So while it may be true that MGySgt S was sincere in his assertions that he had maintained an open mind, it is also irrelevant. Bias and sincerity can co-exist. And sincerity does not necessarily erase the implication of bias. An avowed racist can sincerely believe that he will set aside his racial prejudices when deciding a racially-charged case, and he can sincerely and honestly say that he will do so. That does not mean he will. But even if he could——and did——any resulting findings of guilt would still be tainted by his admitted prejudices. This is the problem that the implied-bias test addresses. And it is the exact problem the lower court addressed here.

The lower court ruled on implied bias. While it did determine from "the call of [MGySgt S's] question" that he had "already reached the conclusion" that Appellee was guilty and that he "had not maintained an open mind," *Nash*, slip op. at 14-15, it also explicitly held that it could not "state with any certainty what MGySgt S actually thought of the state of the evidence . . . ." *Id.* at 14. Thus, its determination that MGySgt S had not kept an open mind was a basis for its

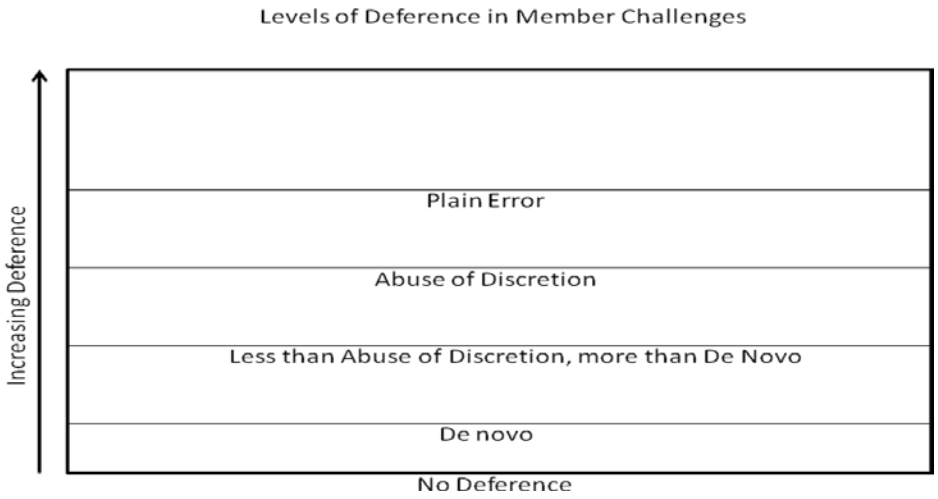
conclusion that the public might find likewise. In other words, the lower court held that if it thought MGySgt S had made up his mind prematurely then the public might think so too. The lower court focused not just on what MGySgt S said, but rather on what the record as a whole implied; it focused on the appearance of fairness. *Id.* at 15. And it was the appearance of fairness that the military judge did not address. As the lower court explained, 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" Appellee's guilt when he proposed his question. *Id.* at 12. Instead, the military judge held that MGySgt S had maintained an open mind—— an actual bias finding.

While one might argue that the military judge simply did the inverse of what the lower court did (i.e., he found that MGySgt S had maintained an open mind therefore the public might as well), the logic does not work in reverse. A finding of actual bias necessarily implies bias. But it does not follow that a finding that there is no actual bias means there is no implied bias. If it did, there would be no need for the implied bias tests in the first place. Likewise, there would be no need to categorically bar people such as the Staff Judge Advocate in a case from sitting as a member.

As for the liberal-grant mandate, the lower court held that the record gave no "indication that the [liberal-grant mandate] was deployed as a judicial tool, or even considered by the trial judge to this set of facts . . . ." *Nash*, slip op. at 15. This is correct, and the government makes no claim to the contrary because it cannot. Instead, it talks about how the military judge mentioned the concepts three days prior. But as discussed above, this does not constitute a clear signal that the correct law was applied to the challenge at issue. And because there is no clear signal, the military judge should not be evaluated under the "less than abuse of discretion, but more than de novo" standard of deference.

2. The proper level of deference.

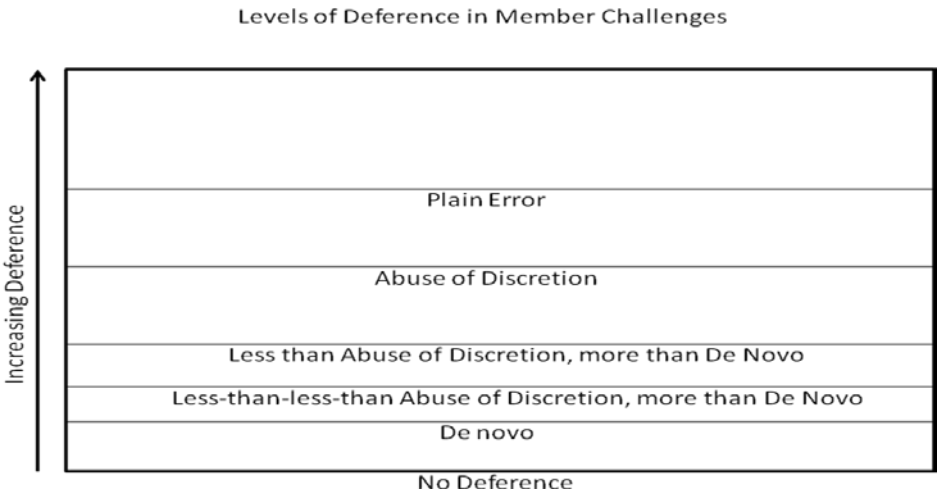
In light of the above, the lower court reviewed the military judge's ruling de novo rather than under the "less than abuse of discretion, but more than de novo standard"; this was a logical decision resulting from the application of this Court's case law. There are generally three standards of review. In decreasing order of deference they are: plain error, abuse of discretion, and de novo. A ruling on implied bias, however, is reviewed with less deference than abuse of discretion but more deference than de novo, so this adds an additional level of review in implied bias cases. The relative levels of deference can be visualized like so:



Unfortunately, the situation gets more complex. A military judge who addresses implied bias by applying the liberal grant mandate on the record is entitled to "more deference on review than one that does not." *Clay*, 64 M.J at 277. 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). And with a formidable string cite, the government points out that in cases where the record did 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." Appellant's Brief at 18.

Here, the lower court held that the military judge did not provide a clear signal that he applied the correct law. It therefore had to determine whether *Clay* created yet another level of deference below the "less than abuse of discretion, but more than de novo standard" (i.e., a "less-than-less-than abuse of discretion, but more than de novo standard") or if *Clay*

simply means a court should go to the next lower level of review (i.e., de novo). If there is a less-than-less-than standard, the spectrum would look like this:



And at least one military legal scholar has argued that this is exactly what the spectrum looks like. *See* Col Louis J. Puleo, USMC, *Implied Bias: A Suggested Disciplined Methodology*, 2008 Army L. Rev. 34, 36 (Explaining his belief that in cases where the military judge does not signal his application of the correct law "his decision is given even less deference than the less deferential than abuse of discretion, but more deferential than de novo standard.")

The government takes this position, arguing that "[i]f a military judge does not clearly signal that he applied the correct law, his decision is still reviewed within the standard of less-deference-than-abuse-of-discretion, but-more-deference-than-de-novo-review." Appellant's Brief at 18. And it explains there is a sliding scale for deference "spanning the range from

less-than-abuse-of-discretion [to] more-than-*de-novo.*" Appellant's Brief at 22. From this it concludes that a judge who fails to properly signal the application of the correct law in an implied bias case is entitled to "a modicum of deference by appellate courts, which means appellate courts cannot review the decision de novo." *Id*.

The problem with this is that it equates de novo with "no deference". But as this Court has explained, de novo review does not mean that the military judge receives no deference. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Rather, it means that he receives no deference save for the statutorily imposed duty of the CCA to take into account the fact that he saw and heard the witnesses. *Id*.

De novo review therefore satisfies this Court's precedent. It complies with *Hollings*, because it gives more deference than "no deference". At the same time, it also meets the requirement that a military judge who clearly signals the application of the correct law be given more deference than one who does not. No doubt, the lower court considered these points when it chose to review the military judge's ruling here de novo.

3. De novo review avoids confusion and addresses the appearance of fairness better.

This Court should validate the lower court's use of de novo review for several reasons. First, doing so would settle the question of what the appropriate amount of deference is.

Second, it would avoid the confusion inherent in creating additional standards of deference. Finally, it would address the appearance of fairness better than a more deferential standard.

This Court has not explicitly stated that de novo review is the standard of review in cases like this. It should. As the government notes, there is a string of similar cases where the military judge did not apply the proper law and this Court did not "state it was using de novo review." Appellant's Brief at 18. But while this Court may not have stated it was using de novo review, the de novo standard is simpler and better.

Interpreting *Clay* to require the creation of a separate level of deference below the "less than abuse of discretion, but more than de novo" standard creates more problems than it solves. Additional standards of deference do not assist in resolving the underlying issue of implied bias. Instead, they provide an additional opportunity to argue about the level of deference that should be applied. An example of this is present here; both the government and the defense have had to address whether the military judge gave a clear signal that he applied the correct law.

Furthermore, adding more gradations between the standards of review blurs the difference between them. It is true of any system that the more gradations there are in the system, the

less difference there is between each one. Anyone can explain the difference between black and white. It is much harder to articulate the differences between black, gray, cream, off-white, and white. Likewise, the difference between abuse of discretion and de novo review is relatively clear. But the same cannot be said about the differences between plain error, abuse of discretion, less than abuse of discretion, less-than-less-than abuse of discretion, and de novo review.

Minimizing the number of standards that can be applied would alleviate this confusion. It would also focus the attention of the lower courts on the substantive underlying issue rather than on the standard of review applied. And if the point is to ensure the appearance of fundamental fairness, a de novo standard serves that function best. When the public evaluates a case, they most often will not have the benefit of observing the entire trial in person. Instead, they will learn about it through the cold record (at best) or through news reports (at worst). Appellate judges are similarly situated. They will learn about the trial solely through the record. Because of this, de novo review is completely appropriate. The lower courts and the public evaluate these cases on almost equal footing; therefore their opinions on whether the trials were fair are likely to coincide.

Conclusion

The lower court did not err when it reviewed the implied bias ruling de novo. It started out at the "less than abuse of discretion, but more than de novo" standard. Then, because the military judge failed to provide a clear signal that he had applied the right law to the challenge, the lower court complied with *Clay* and gave the military judge's ruling even less deference. To do so, the court applied a de novo standard of review because that is the next lower standard of deference. This was not error. It did not violate *Hollings* because de novo review is not the same as reviewing a case without giving any deference.

This Court should affirm the lower court's decision. But if this Court determines that de novo review is inappropriate, it should remand the case to the lower court so that the lower court can make a decision using the proper level of deference.

II.

WHETHER THE LOWER COURT FAILED TO APPLY THE IMPLIED BIAS TEST THAT ASKS 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?"

Standard of Review

The question of whether the lower court applied the correct test for determining if there was implied bias is a question of law reviewed de novo. The rules governing implied bias are the same as discussed above in section I.

Discussion

This Court should reject the government's invitation to circumscribe the implied bias test to situations where "most people in the same position would be prejudiced." *See* Appellant's Brief at 26-27. Implied bias focuses on the "perception or appearance of fairness" in courts-martial. *Moreno*, 63 M.J. at 134. And the appearance of fairness encompasses more than just situations where "most people in the same position would be biased."

This case illustrates the point. Here, one of the questions before the lower court was whether MGySgt S had "informed or expressed a definite opinion as to the guilt or innocence" of the defendant. R.C.M. 912(f)(1)(M). Looking

solely to whether "most people in the same position would be prejudiced" does not address this. The question could simply be answered: "no, most people would not have made up their minds prematurely." That misses the point. 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. If so, then there is a strong implication that the defendant did not receive a fair trial. And that implication is not erased by noting that most people would have remained impartial.

The "circumstances" test from *Terry* addresses this problem. It looks objectively to see whether the "challenged member's circumstances do injury to the 'perception of appearance of fairness in the military justice system.'" *Terry*, 64 M.J. at 302. And it suits this type of challenge better. Using this test, a reviewing court can look to the record and see if the things the member said during *voir dire* (i.e., the circumstances surrounding the challenge) imply that the member made up his mind before he should have. If so, then the danger that the member's presence on the panel would injure the military justice system's reputation for fairness is too great and any challenge for cause should have been granted.

This is the exact analysis the lower court performed. It noted that the call of the question asked by MGySgt S and the record as a whole revealed that he "had not maintained an open mind, but rather had prematurely and unfairly determined that [Appellee] was a pedophile, *ergo*, in some sense, guilty, prior to being instructed on the law by the military judge, and before deliberations had commenced." *Nash*, NMCCA No. 201000220, slip op. at 15. From this it concluded that the public would believe that Appellee did not get a fair trial and set aside the conviction and the sentence. *Id*. This was logical. More logical than if the lower court had said "MGySgt S made up his mind prematurely, but so what? Most people would not have made up their minds prematurely, so there was no error."

This does not mean that there is no place for the "most people in the same position" test in analyzing implied bias. To the contrary, the *Terry* court specifically said that whether most people would be biased in the member's situation is a consideration in determining the overall question. *Terry*, 64 M.J. at 295. The test is just inapt for use here.

The government disagrees, however, arguing that the "most people in the same position" test is the *only* test for determining implied bias. It says that *Terry* "erroneously" made the test an additional consideration. Appellant's Brief at 27.

And it paints *Terry* as an abomination that "mixes and bifurcates the proper implied bias analysis . . . ." *Id*. This is wrong.

The government compares two cases to support its position: *United States v. Terry*, 64 M.J. 295 (C.A.A.F. 2007) and *United States v. Albaaj*, 65 M.J. 167 (C.A.A.F. 2007). Appellant's Brief at 27. Even though these cases were decided just a few months apart, the government believes that this Court got *Terry* wrong but *Albaaj* right. It explains its position through the following quotes:

The government says this position is wrong:	**But that this one is right:**
[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 considering this question, courts also consider whether "most people in the same position would be prejudiced [i.e., biased]." *-United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007).	[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).

The quotes are, of course, substantively identical save for the fact that the *Terry* court used the word "also" in the second sentence. Still, the government finds significant error in that innocuous "also", arguing that it makes the "most people" test,

which it believes is the only test for implied bias, an afterthought. Appellant's Brief at 26-28.

But this analysis ignores the first sentences of both quotes completely. And since both quotes begin with the phrase "the test for implied bias is objective, and asks whether . . . ," the language seems particularly germane to the question of what the test for implied bias actually is and what it looks at. In fact, one could reasonably conclude that the first sentence *is* the test for implied bias since that is what the language seems to say, after all.

If this is the case, then the "most people" test is not an afterthought, as the government suggests, but rather a factor for determining whether the member's circumstances would do injury to the perception of fairness in courts-martial. That is, if most people would be biased in the member's position, then one can safely say that their circumstances would do injury to the perception of fairness. In some cases whether "most people would be prejudiced" in the member's situation may be the only thing a reviewing court need consider to come to a conclusion on the greater issue. *See*, *e.g.*, *United States v. Bagstad*, 68 M.J. 460 (C.A.A.F. 2010). In others, it may be one of many things the reviewing court looks to in making its determination.

Regardless, the virtue of the *Terry* "circumstances" test is that it has the flexibility to identify implied bias in situations where "most people in the same position would be" biased as well as in other less foreseeable situations where bias may also be implied. This flexibility comes from the fact that the test addresses the important question; the question that is at the heart of the matter in implied bias cases: whether the trial appeared fair.

Conclusion

The lower court did not err in determining whether implied bias existed by looking at whether the circumstances surrounding the challenged member did injury to the reputation of fairness of the military justice system. Its ruling was a straightforward application of the test for implied bias articulated by this Court. The standard enunciated in *Terry* encompasses the "most people would be prejudiced" test and is the appropriate test for determining implied bias in a case, like this one, where a member is alleged to have prematurely made up his mind.

This Court should affirm the lower court's decision.

III.

WHETHER THE LOWER COURT ERRED IN REVERSING THE MILITARY JUDGE AND SETTING ASIDE THE FINDINGS AND SENTENCE FOR IMPLIED BIAS WHERE THE MEMBER SUBMITTED A WRITTEN REQUEST, WHICH WAS DENIED, THAT THE MILITARY JUDGE ASK A WITNESS "DO YOU THINK THAT PEDOPHILES CAN BE REHABILITATED?"

Standard of Review

Whether the lower court erred in reversing the military judge and setting aside the findings and sentence for implied bias is a question of law reviewed de novo. The rules governing implied bias are the same as discussed above in section I.

Discussion

The lower court did not err in reversing the military judge here for three reasons: (1) MGySgt S's question implied that he had made up his mind about Appellee's guilt prematurely; (2) MGySgt S's answers during the voir dire session implied that he would be unable to fairly consider the evidence presented by the defense on the merits; and (3) MGySgt S's answers during *voir dire* suggested he would be unable to consider evidence regarding Appellee's rehabilitative potential presented by the defense and in sentencing.

1. The question MGySgt S wanted to ask and the *voir dire* that followed show that he had made up his mind.

The challenge for cause against MGySgt S should have been granted because the "rehabilitative potential" question he wanted to ask implied that he had made up his mind about

Appellee's guilt. Rule for Courts-Martial 912(f)(1)(M) requires that a member shall be excused for cause whenever the member has "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).

Here, during the defense case on the merits, MGySgt S wanted to ask Mrs. Nash, the Japanese wife of the defendant and a lay witness, whether she thought pedophiles could be rehabilitated. As the lower court explained, this indicated that MGySgt S had already made up his mind about Appellee's guilt. *Nash*, NMCCA No. 201000220, slip op. at 13. If he had not, he would not have been asking sentencing questions while the defense was making its case. Likewise, he would not have asked a witness who had no knowledge of criminal recidivism rates whether she thought a pedophile could be rehabilitated.

The conclusion that MGySgt S made a premature decision is reinforced by his struggle to come up with a legitimate explanation for why he wanted to ask his question. He answered "yes" when the military judge asked him——in a leading question——if he posed the question to gain "some insight into" Mrs. Nash's credibility. But he went on to explain that his question was motivated by his belief that Japanese women were naive and that he was trying to knock her out of any naivete that she might be experiencing. (JA at 129.) These statements, when considered together in context, show that MGySgt S believed that Appellee

was a pedophile and that pedophiles cannot be rehabilitated. And it shows that MGySgt S believed that anyone who might think pedophiles could be rehabilitated is naive.

The government, however, argues on appeal that the question was a strange kind of credibility check. If Mrs. Nash had answered "yes", then she would have been more likely to lie on the stand——even if she believed her husband was a pedophile!—— because she would not be worried about him getting acquitted and returning to their home where their children live since pedophiles can be rehabilitated. Appellant's Brief at 33. This explanation seems unlikely. It is predicated on the premise that MGySgt S asked his question because he believed that a mother would be willing to lie on the stand for someone she knew was a pedophile and then would trust her children with that pedophile solely because of her belief that pedophiles can be rehabilitated. Most parents would not take such risks with their children's safety. And MGySgt S, who is himself a parent, (JA at 30) would know this.

The simpler, more plausible explanation is that MGySgt S believed that Appellee was a pedophile——i.e., a person sexually attracted to children who would be a repeat offender——that committed the crimes he was charged with; that he believed pedophiles cannot be rehabilitated; and that his question reflected these beliefs. In other words, that he had made up

his mind. And the question *was* a test of Mrs. Nash's credibility but if she answered "yes", then she would be revealed to be the naive Japanese woman MGySgt S reckoned she was, and he could discount her testimony. By his own admission, he asked the question in hopes of "knocking [Mrs. Nash] out of" whatever naivete that she might be experiencing. (JA at 129.) This, of course, is not the responsibility of a member. And the fact that MGySgt S took this responsibility upon himself speaks volumes about whether he remained impartial.

It is true, of course, that MGySgt S claimed to have maintained an open mind; (JA at 128) that the trial counsel gushed that he had "in almost 20 years of experience, not heard a better response to difficult questions with somebody trying to do his absolute best to listen to all the evidence, not to be predisposed [and to] listen to the instructions on the law from the military judge;" (JA 131) and that the military judge proclaimed that he "may have the most open mind of any member based on the voir dire that [they had done]" (JA 132). But these comments should be ignored. They sound too much like the praise of the eager-to-please subjects telling the emperor his new clothes are exquisite. So much so that a cynic might suggest they were made solely for the purpose of appellate review. Especially in light of the trial counsel's specific comment to the military judge that "one of the things [the judge

had] the ability to do that, obviously, anybody reviewing a written record can't, is [the judge could] also assess whether the master gunnery sergeant looked [him] in the eyes, responded to [the judge's] questions, his demeanor in providing those responses." (JA at 131.)

The lower court was certainly unconvinced. It examined the colloquy and characterized it as an ineffectual exercise in leading questions that resulted in "very predictable answers, or additionally problematic non-sequitur response." *Nash*, NMCCA No. 201000220, slip op. at 14. It did little, the court explained, to "dispel the concern that MGySgt S had already reached a determination as to [Appellee's] culpability." *Id*. This Court should come to the same conclusion.

2. MGySgt S's bias against Japanese women implied that he would not properly consider the evidence presented in the case.

MGySgt S's belief that Japanese women were timid or naive and easily embarrassed came out as one of the "additionally problematic non-sequitur" responses the lower court hinted at, and this belief also casts doubt on the fairness of Appellee's trial. The implied bias test looks at whether most people would be biased if put in the member's shoes. Here, MGySgt S had a personal belief that Japanese women are naive and timid. And the pertinent question is whether MGySgt S could impartially evaluate Appellee's case with this bias.

Contrary to the government's argument, it does not matter that MGySgt S did not have some close relationship with some aspect of the trial. That inquiry asks the wrong question. The right question is whether someone like MGySgt S, who believes that Japanese women are timid and naive, can serve as an impartial panel member in a case involving multiple sexual assaults against children where one of the defendant's main witnesses is a Japanese woman that must testify through a translator. Those are the circumstances of this trial that cast doubt on the appearance of fairness in the military justice system.

MGySgt S's statements that he believed Japanese women were "timid" and "naive" suggest that he would give less weight to Mrs. Nash's testimony *solely* because she was a woman and Japanese. This is impermissible. It robs Appellee of his right to have the evidence he presented fully and fairly considered, and it cast serious doubt on the fairness of the trial. While it is true that a member must evaluate the credibility of each witness presented, when it is clear that the member made this evaluation primarily on the basis of racial and gender prejudices he holds the fairness of the trial is called into question.

A brief example illustrates the point. Imagine a situation where the defense case rests primarily on the scientific

testimony of an expert witness who is the world's leading expert in the pertinent scientific field and happens to be black. Imagine further that during *voir dire* one of the members unapologetically said that he believed black people were "bad at science." Would the defendant's trial seem fair with this member sitting on the panel? Of course not. The implication that the member would ignore or discount the evidence presented by the expert witness is too great. And the member's presence on the panel would cast substantial doubt on the legality, fairness, and impartiality of the trial.

This same problem exists here. Mrs. Nash was a critical witness for the defense. She had been with Appellee for seven years (JA at 78) and gave testimony that was significant to Appellee's case. For example, she testified:

- That she had never seen Appellee look at child pornography on their computer; (JA at 78)
- That she had observed Appellee interact with the R children; (JA at 79)
- That the R children appeared scared of JR (the biological father of MR and the step-father of LR); (JA at 79)
- That JR would come over when Appellee was stationed elsewhere; (JA at 79)
- That JR had told her "that for ten years [he'd] always wanted to marry [her] . . . instead of [her] sister"; (JA at 96)
- That LR would want to go with Appellee on trips to the store; (JA at 82) and

- That LR did not act any differently when she would come back from those trips; (JA at 83).

But because of MGySgt S's personal prejudices, he likely discounted or ignored this important evidence. And his explanation that he asked his question to knock Mrs. Nash out of her naivete suggests that he did just that.

3. MGySgt S had an inelastic sentencing attitude.

The challenge for cause against MGySgt S should also have been granted because he held an inelastic attitude towards the punitive outcome. *United States v. Martinez*, 67 M.J. 59, 61 (C.A.A.F. 2008). His rehabilitative potential question and the *voir dire* that followed it implied that he held a personal belief that pedophiles cannot be rehabilitated, and this suggested that he would not properly consider any evidence presented during the pre-sentencing proceedings regarding rehabilitative potential. As a result of his biases, he would therefore be more likely to give confinement, or even an excess amount of confinement. But as this Court has explained, a defendant "is entitled to have his case heard by members who are not predisposed or committed to a particular punishment." *Id.* And since MGySgt S's personal belief that pedophiles cannot be rehabilitated predisposes him towards confinement, he should not have served as a member on Appellee's panel.

Conclusion

The question that MGySgt S wanted to ask and the *voir dire* that followed implied that MGySgt S had made up his mind about Appellee's guilt, that he would not give the appropriate weight to the "naive Japanese woman" Mrs. Nash's testimony, and that he would not properly consider any evidence of rehabilitative potential presented during the presentencing proceedings. Any one of these is sufficient to cast substantial doubt on the fairness of Appellee's trial regardless of the level of deference applied. Accordingly, the challenge for cause against MGySgt S should have been granted, and the lower court did not err in overturning the decision of the trial judge.

This Court should affirm the lower court's decision.

/s/
KIRK SRIPINYO
Major, U.S. Marine Corps
CAAF Bar No. 34753
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris St., SE
Suite 100
Washington, D.C. 20374-5124
(202) 685-7093

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/S/
KIRK SRIPINYO
Major, U.S. Marine Corps
Bar No. 34753
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris St., SE
Suite 100
Washington, D.C. 20374-5124
(202) 685-7093

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/s/
KIRK SRIPINYO
Major, U.S. Marine Corps
Bar No. 34753
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris St., SE
Suite 100
Washington, D.C. 20374-5124
(202) 685-7093