

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,)
Appellee)
)
)
v.) Crim. App. No. 20110935
)
Sergeant (E-5))
ERIC R. CASTILLO,) USCA Dkt. No. 14-0457/AR
)
United States Army,)
Appellant)

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U N I T E D S T A T E S,)	FINAL BRIEF ON BEHALF OF
Appellee)	APPELLANT
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v.)	
)	Crim. App. Dkt. No. 20110935
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Sergeant (E-5))	USCA Dkt. No. 14-0457/AR
Eric R. Castillo,)	
United States Army,)	
Appellant)	

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

Issue Granted

WHETHER, UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE IMPLIED BIAS CHALLENGE AGAINST LIEUTENANT COLONEL DS IN LIGHT OF HIS PERSONAL EXPERIENCE AS A SEXUAL ASSAULT VICTIM, HIS DIRECT SUPERVISORY ROLE OVER TWO OTHER MEMBERS, HIS ONGOING RELIANCE ON THE TRIAL COUNSEL FOR MILITARY JUSTICE ADVICE, THE PRESENCE OF FOUR OTHER MEMBERS WHO ALSO RECEIVED MILITARY JUSTICE ASSISTANCE FROM THE TRIAL COUNSEL, AND THE FACT THAT THE PANEL WAS SELECTED EXCLUSIVELY FROM SERGEANT CASTILLO'S BRIGADE?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On June 27 and October 17-20, 2011, a panel of officer and enlisted members sitting as a general court-martial tried Sergeant (SGT) Eric R. Castillo. Contrary to his pleas, the panel convicted SGT Castillo of rape and assault consummated by a battery, in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928 (2008). The panel sentenced appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for two years, and a dishonorable discharge. The convening authority approved only so much of the sentence as provides for reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for twenty-three months, and a dishonorable discharge.

On January 29, 2014, the Army Court summarily affirmed the findings and the sentence. (JA 1). On June 5, 2014, this Honorable Court granted SGT Castillo's petition for review.

Error and Argument

WHETHER, UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE IMPLIED BIAS CHALLENGE AGAINST LIEUTENANT COLONEL DS IN LIGHT OF HIS PERSONAL EXPERIENCE AS A SEXUAL ASSAULT VICTIM, HIS DIRECT SUPERVISORY ROLE OVER TWO OTHER MEMBERS, HIS ONGOING RELIANCE ON THE TRIAL COUNSEL FOR MILITARY JUSTICE ADVICE, THE PRESENCE OF FOUR OTHER MEMBERS WHO ALSO RECEIVED MILITARY JUSTICE ASSISTANCE FROM THE TRIAL COUNSEL, AND THE FACT THAT THE PANEL WAS SELECTED EXCLUSIVELY FROM SERGEANT CASTILLO'S BRIGADE?

Statement of Facts

Following individual voir dire the defense challenged six panel members for cause: Lieutenant Colonel (LTC) Duncan, LTC DS¹, Captain (CPT) Little, Chief Warrant Officer Two (CW2) Pinnegar, Command Sergeant Major (CSM) Felicioni, and CSM Merriwether. The military judge granted the request to excuse CW2 Pinnegar, but denied all other defense challenges for cause. (JA 135-45). Thereafter, the military judge granted the government's peremptory challenge of Staff Sergeant Stevens and the defense peremptory challenge of LTC Duncan. (JA 145-46). Ultimately, SGT Castillo's court-martial consisted of seven members. (JA 26-27, 149).

The defense challenged LTC Duncan, LTC DS, CPT Little, CSM Felocioni, and CSM Merriwether for similar reasons claiming actual and implied bias. (JA 135-45). The trial counsel served with and provided military justice assistance to each of these members. (JA 54-55, 135-45).

Lieutenant Colonels Duncan and DS were of particular concern to the defense. (JA 135-36). As battalion commanders, both officers rated and directly supervised other panel members. (JA 135-36). Both officers also regularly received substantive legal advice from the trial counsel on military justice matters.

¹ Because LTC DS informed the trial court he was the victim of a sexual assault, the member's name is abbreviated in this brief to respect his privacy.

(JA 94-96, 102-04). While arguing for LTC Duncan's removal for cause, the civilian defense counsel (CDC) observed that LTC Duncan viewed the trial counsel's advice favorably and the two would continue working together after trial. (JA 136). The CDC asserted the public could not have confidence in a trial "where the prosecuting attorney was literally the legal advisor to the jurors." (JA 137). "[S]uch a painfully obvious conflict" constitutes implied bias. (JA 137-38). Also, the CDC argued that LTC Duncan rated three other panel members. (JA 136).

"With respect to Lieutenant Colonel DS [the CDC asserted] a nearly identical argument with the addition of . . . two issues." (JA 139). These additional issues included LTC DS's personal experience as a child molestation victim and his civilian sexual assault training. (JA 139).

The military judge found no actual or implied bias applicable to LTC Duncan, LTC DS, CPT Little, CSM Felocioni, or CSM Merriwether. (JA 138-39, 141-45). With each denial, the military judge announced that, viewed through the eyes of the public, an objective observer would not have substantial doubt about the fairness of SGT Castillo's court-martial panel. (JA 138-39, 141-45). In each case, the military judge recited he considered the liberal grant mandate. (JA 138-39, 141-45).

Sergeant Castillo was assigned to "F Company, 3-2 Aviation Regiment [general support aviation battalion] (GSAB), 2d Combat

Aviation Brigade, 2d Infantry Division." (JA 2-3). Though his court-martial was convened by the Commander, Headquarters, 2d Infantry Division, only members from SGT Castillo's aviation brigade were selected to serve on his panel. (JA 2-3, 8-15, 18-19, 36, 71-72, 94, 101-02, 123-24, 136-45). At the time of his arraignment, his case was convened under Court-Martial Convening Order Number 4, dated June 13, 2011. (JA 8-9, 16). The government later issued an amended convening order, Court-Martial Convening Order Number 10, dated October 14, 2011, to remove SGT Castillo's brigade commander, Colonel Barker, battalion commander, LTC Gilbert, and the investigating officer, Major Zimmerman. (JA 2-3, 10, R. at 17-18). The trial counsel was also assigned to SGT Castillo's brigade. (JA 71-72, 94, 102, 123, 136-45).

Before addressing member challenges, the military judge understood the comparative credibility of SGT Castillo and the alleged victim, Specialist (SPC) CC, was a key issue in this case. (JA 20-22, 59). Sergeant Castillo and SPC CC were married at the time of the incident. (JA 149). At trial, the government relied on the couple's tumultuous relationship as among SGT Castillo's motives for the offenses. (JA 149, 174-75). The government also attacked the veracity of SGT Castillo's exculpatory trial testimony. (JA 179-86). Similarly, the defense relied on the couple's dysfunction as a

motive for SPC CC to lie and offered evidence of her untruthfulness. (JA 158-63, 187-99). Both parties understood the outcome of the case turned upon which spouse the panel chose to believe. (JA 20-22, 177, 198-99, 200-01).

The panel ultimately convicted SGT Castillo of assault consummated by a battery against SPC CC, and of raping SPC CC by rendering her unconscious. (JA 2, 202).

Additional facts are provided in the argument below.

Summary of the Argument

The military judge erred by denying SGT Castillo's implied bias challenge for cause of LTC DS. At the time of SGT Castillo's trial, the trial counsel served as LTC DS's primary legal advisor for military justice matters. Lieutenant Colonel DS was one of four panel members who maintained a professional relationship with the trial counsel, each of whom held a favorable opinion of the trial counsel's competence in military justice matters. Lieutenant Colonel DS commanded and rated two of these panel members who worked with him daily on his primary staff. The convening authority's decision to select members exclusively from SGT Castillo's brigade substantially increased the probability that these intertwined relationships would occur. Moreover, LTC DS was himself a victim of sexual assault as a child. Cumulatively, these multiple grounds for cause

created the appearance of bias. The military judge abused his discretion by failing to apply the liberal grant mandate.

Law

Courts review rulings on implied bias challenges under a standard less deferential than abuse of discretion, but more deferential than de novo review. *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006) (citations omitted).

Impartial members are essential to a fair court-martial. See *United States v. Richardson*, 61 M.J. 113, 119 (C.A.A.F. 2005). For this reason a member "shall be excused 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." Rule for Courts-Martial [hereinafter R.C.M.] 912(f)(1)(N).

Military judges must test the impartiality of potential panel members for both actual and implied bias. *Richardson*, 61 M.J. at 118 (citation omitted); *Nash*, 71 M.J. at 88. Implied bias exists when, regardless of an individual member's disclaimer of bias, "most people in the same position would be biased." *United States v. Wiesen*, 56 M.J. 172, 175, 174 (C.A.A.F. 2002). Unlike actual bias, this Court reviews an allegation of implied bias objectively through the eyes of the public with a focus upon the appearance of fairness. *Id.* (citation omitted). This Court evaluates challenges for implied

bias based upon the totality of circumstances. *Richardson*, 61 M.J. at 119.

In evaluating challenges for cause, military judges must consider the liberal grant mandate. *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007). The liberal grant mandate exists to address the convening authority's role in selecting panel members and the provision of only one peremptory challenge to the accused. *Id.* at 276. "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." *Id.* at 277. Military judges are required to liberally grant challenges for cause in close cases. *Id.*

In *Clay*, this Court emphasized that the liberal grant mandate best serves the interests of justice by addressing member issues before trial instead of after years of appellate litigation. *Id.* Liberally granting defense challenges spares alleged victims from returning to the stand, spares the government the cumbersome process of reconvening a court-martial, and avoids the risk that evidence will be lost or degraded over time. *See Id.*

Argument

The military judge erroneously denied SGT Castillo's challenge for cause against LTC DS. In explaining this decision, the military judge relied primarily on his

determination of LTC DS's credibility when he claimed his relationship with the trial counsel and his personal experience as a sexual assault victim would not influence his decisions. (JA 140-41). The military judge also relied upon the statements of CSM Merriwether and CPT Little that LTC DS's presence on the panel would not restrain their deliberations. (JA 140). However, the question of implied bias does not turn on panel member integrity. *Wiesen*, 56 M.J. at 175; see also *Nash*, 71 M.J. at 89 (stating that "in certain contexts mere declarations of impartiality, no matter how sincere, may not be sufficient" when assessing an *actual bias* challenge). Moreover, a military judge may not deny an implied bias challenge simply by finding each of several asserted grounds for excusal individually insufficient. *Cf. Wiesen*, 56 M.J. at 176; *United States v. Townsend*, 65 M.J. 460, 465 (C.A.A.F. 2007). Under the totality of the circumstances, the military judge erred in concluding the public would perceive LTC DS's presence on SGT Castillo's panel as fair. Viewed cumulatively, the multiple grounds asserted by the defense to challenge LTC DS established implied bias.

1. The trial counsel enjoyed an established rapport with LTC DS in military justice matters.

Lieutenant Colonel DS's professional relationship with the trial counsel reflects a professional bond between the two officers. (JA 139). While not *per se* disqualifying, a

professional relationship between a panel member and the trial counsel supports an implied bias challenge where that relationship includes the ongoing provision of military justice advice. *Cf. Richardson*, M.J. at 119 (stating that "the possibility that trial counsel may have already established a rapport with three of the six members on criminal matters or sentencing issues . . ." is a legitimate, though not a *per se*, basis for challenge). Presumably, this is the reason why the Military Judge's Benchbook includes standard voir dire questions regarding any dealings the members may have with counsel. Dep't of the Army, Pam. 27-9, Legal Services, Military Judges' Benchbook ch. 2 § V, para. 2-5-1 (1 Jan. 2010); see also *United States v. Bagstad*, 68 M.J. 460, 463 (C.A.A.F. 2010) (Baker, C.J. and Erdmann, J. dissenting); R.C.M. 912(f) Discussion ("Examples of matters which may be grounds for challenge [include when] the member: . . . is closely related to the accused, a counsel, or a witness in the case; . . . [or] has a decidedly friendly or hostile attitude toward a party"); *United States v. Polichemi*, 201 F.3d 858, 863-64 (7th Cir. 2000) (finding the trial judge erred by denying defendant's implied bias challenge of a Department of Justice secretary assigned to the same U.S. Attorney's office as the prosecutor even though the secretary

worked in the Civil Division and not directly with the Assistant U.S. Attorney).²

During voir dire, LTC DS confirmed that the trial counsel currently served as his primary legal advisor on military justice matters. (JA 94). Since assuming battalion command three months before trial, LTC DS personally consulted with the trial counsel on a weekly to bi-weekly basis. (JA 94). On at least one occasion, LTC DS forwarded charges with a recommendation for general court-martial relying upon the trial counsel's advice. (JA 95-96). Though LTC DS did not always accept the trial counsel's recommendations, he viewed the trial counsel's advice "[v]ery well" and "confident." (JA 94-95).

² This Court should also consider *Polichemi's* observation that federal common law has long recognized that the mere existence certain types of relationships between counsel and prospective jurors implicate presumptive bias even if the relationship otherwise has no direct connection to the trial. 201 F.3d at 863-64. Under this analysis, an *ongoing* relationship between a commander and his/her *current* organizational trial counsel would result in presumptive bias. While a trial counsel's client is the service, commanders act as the representative of their service. As such, commanders rely on their trial counsel not only to explain UCMJ options, but also to provide counsel regarding which option is appropriate in a given context. Moreover, commanders have a right to expect conversations with trial counsel will remain confidential unless disclosure is necessary for an official purpose. These factors create a quasi-attorney-client relationship between commanders and their organizational trial counsel unlike other personal or professional relationships counsel may have with potential members. Therefore, regardless of any other facts, this Court should hold such relationships necessarily imply bias because "in general persons in a similar situation would feel prejudice." *Id.* at 864 (quoting *United States v. Burr*, 25 Fed. Cas. 49, 50 (No. 14692g) (C.C. Va. 1807)).

These facts show LTC DS established a rapport with trial counsel and lent deference to his advice concerning military justice matters. This type of rapport between a panel president and a prosecutor would cause any reasonable member of the public to question the fairness of SGT Castillo's trial.

2. A majority of the members held a favorable view of the trial counsel.

Lieutenant Colonel DS was one of four members on SGT Castillo's seven member panel who received military justice assistance from the trial counsel. While not a *per se* disqualification, that trial counsel already established rapport with four of the seven members on military justice matters is a legitimate ground for challenge. *Cf. Richardson, M.J. at 119.* Furthermore, the number of members associated with the same potential bias is a valid consideration when conducting an implied bias analysis. *Cf. Wiesen, 56 M.J. at 175.*

Here, CSM Merriwether met with the trial counsel on four to five occasions to discuss ongoing military justice matters within his battalion. (JA 124). He described the trial counsel's legal advice as "[p]retty good." (JA 124). Captain Little consulted with the trial counsel regarding a sexual assault-related officer separation board. (JA 112-13). Though primarily limited to informational assistance, CPT Little agreed that the trial counsel provided him sound legal advice. (JA

115). Finally, CSM Felicioni knew the trial counsel from talking or listening "to him in different cases that are addressed in [his] battalion." (JA 78). On at least one occasion CSM Felicioni played cards with the trial counsel after duty hours. (JA 78-79). Therefore, including LTC DS, more than half of SGT Castillo's panel members looked to the trial counsel for military justice assistance within their units and valued his opinion.

3. Lieutenant Colonel DS maintained a position of influence over two other members.

Lieutenant Colonel DS was the commander and direct supervisor of CSM Merriwether and CPT Little. While not a *per se* disqualification, the number of senior-subordinate relationships between members is a valid consideration when conducting an implied bias analysis. See *Wiesen*, 56 M.J. at 175. Though the American people maintain great confidence in the integrity of their servicemembers, "public perception of the military justice system may nonetheless be affected by more subtle aspects of military life." *Id.* at 176. Among these is the deference afforded to senior officers by their subordinates. *Id.*; see also *Bagstad*, 68 M.J. at 463 (dissent stating that "some military relationships are just too close to sustain public or military confidence in the fair administration of justice where such members sit together") (Baker, C.J. and Erdmann, J. dissenting)).

Here, CSM Merriwether served as LTC DS's battalion CSM. (JA 122-23). Captain Little served as LTC DS's battalion intelligence officer. (JA 111-112). As primary battalion staff members, both CSM Merriwether and CPT Little worked closely with LTC DS and relied upon him for their performance evaluations. (JA 111-112, 122-23). Regardless of actual bias, an objective member of the public would reasonably question whether CSM Merriwether and CPT Little instinctively followed LTC DS's lead or otherwise deferred to his judgment.

4. An objective member of the public would expect LTC DS to sympathize with other sexual assault victims.

Lieutenant Colonel DS was a sexual assault victim. While not a *per se* disqualification, a military judge may commit reversible error by "denying challenges for cause where court members have been victims of similar violent or traumatic crimes." *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). During individual voir dire, LTC DS revealed that an eighteen-year-old man sexually molested him as a child. (JA 93). Lieutenant Colonel DS testified that the incident occurred over twenty years prior and that his assailant was never brought to justice. (JA 93-94). When asked if this incident would affect his judgment in SGT Castillo's case, LTC DS replied, "No, I don't see it as the same issue at all." (JA 94).

The military judge's finding that LTC DS credibly disclaimed any actual bias associated with his experience is not dispositive. See *Daulton*, 45 M.J. at 218. Under an implied bias analysis, asking LTC DS to "serve as an impartial member was 'asking too much of both [him] and the system.'" *Id.* (citation omitted). Despite LTC DS's subjective assessment, the offense he suffered objectively shares much in common with the rape allegation against SGT Castillo. Here, the government accused SGT Castillo of raping his wife by rendering her unconscious. Like LTC DS's experience, the rape allegation involved the sexual exploitation of a physically weak or helpless victim by a much stronger assailant. That LTC DS's assailant was never brought to trial potentially exacerbates his bias. Regardless of his subjective disclaimers, an objective member of the public would view LTC DS as sympathetic toward SGT Castillo's wife and her quest for justice. Moreover, at sentencing, LTC DS, more than any other panel member, could commiserate with the alleged victim's impact testimony. See (JA 203-04) (government sentencing argument asserting SGT Castillo took advantage of SPC CC "[w]hen she was in her most vulnerable state . . ." and that as a consequence SPC CC must bear the burden of emotional scars for the rest of her life)).

5. Only members of SGT Castillo's brigade were selected to serve on his panel.

Though not specifically mentioned by the CDC, the convening authority's decision to select panel members exclusively from SGT Castillo's brigade should be considered within the totality of the circumstances.³ Even if operational considerations apply, objective members of the public with a basic understanding of military law would know that derogating from the eligibility criteria provided under Article 25(d)(2), UCMJ, is a non-standard practice. And even if the convening authority had a legitimate operational reason for including geography or unit of assignment as factors in the panel selection process, the predictable effect is to substantially increase the potential for members to have command relationships between each other and professional relationships with the trial counsel.⁴ Moreover, even if operational considerations justified limiting the panel pool to a single brigade generally, the record provides no arguable operational need to retain LTC DS specifically. See

³ Both the primary and alternate members selected by the convening authority were drawn from the 2nd CAB. (JA 8-15). According to the convening authority's panel selection memorandum these selections were "indicated on the spreadsheet labeled '2011 2ID Area III Officer Selections' and the spreadsheet labeled '2ID Area III Enlisted Panel Selections . . .'" (JA 11-13). Thus, the record indicates the convening authority considered unit of assignment and/or geographic location during the panel selection process.

⁴ The defense did not challenge the convening authority's panel selection procedures at trial nor is that the purpose of this argument. Sergeant Castillo merely asserts the liberal grant mandate is particularly important under these circumstances to ensure members both are, and appear to be, selected through an impartial process.

Wiesen, 56 M.J. at 176 (stating that the Government "failed to demonstrate that operational deployments or needs precluded other suitable officers from reasonably serving on this panel, thus necessitating the Brigade Commander's participation").

Here, the limited pool of panel members did result in a significant number of suspect relationships among the members. The government's opposition to SGT Castillo's challenges because of these relationships creates the appearance that the trial counsel actively sought to maintain members with whom he had regular professional interactions. Therefore, the military judge should have been all the more sensitive to SGT Castillo's concerns about these relationships "to address questions that may linger in public perception regarding the appearance of bias in the selection of members." *Townsend*, 65 M.J. at 467 (Baker, C.J., *dubitante*).

6. At a minimum, the cumulative effect of each ground for challenge creates a close case.

Military judges must grant challenges for cause in close cases. See *Clay*, 64 M.J. at 277. The cumulative impact of multiple bases to challenge a member for cause can result in a close case requiring application of the liberal grant mandate. Cf. *Townsend*, 65 M.J. at 467 (upholding the military judge's denial of an implied bias challenge after examining the cumulative effect of multiple factors). In this case, each

ground offered by the defense to challenge LTC DS *could* independently support an implied bias finding even if none assert a *per se* disqualification. Cumulatively, the reasons offered by the defense to challenge LTC DS, at the very least, created a close case triggering the liberal grant mandate.

Viewed objectively, LTC DS's voir dire testimony as a whole paints the picture of a highly influential panel member sympathetic to the government's case. Routinely, LTC DS turned to the trial counsel for military justice advice. Even if LTC DS did not accept the trial counsel's advice in some cases, he did in others. Either way, LTC DS respected the prosecutor's advice while he had no favorable impression of the accused's counsel. In a he-said-she-said case such as SGT Castillo's (JA 20-22, 177, 198-99, 200-01), tacit confidence in the prosecutor could appear to tip the scales in a panel member's mind toward guilt. Exacerbating this concern, three other panel members, though to a lesser degree, currently worked with the trial counsel and found him competent in military justice matters.

Lieutenant Colonel DS was not simply a fellow panel member to CSM Merriwether and CPT Little. An objective member of the public reasonably expects that a commander's direct subordinates view his opinions with high esteem. The public would further expect LTC DS to exert influence over these other members even if he did not intend to because his evaluations of them directly

affect their careers. Therefore, any implicit bias concern attributable to LTC DS multiplies threefold by his unequal influence over CSM Merriwether and CPT Little.

Lieutenant Colonel DS's potential bias is not limited to his regard for the trial counsel and influence over other members. Regardless of his personal opinion, to the outside observer LTC DS's experience as the victim of child molestation suggests empathy toward other victims of sexual assault. In combination, LTC DS's relationship with the trial counsel and personal experience create the perception of an influential panel member biased toward the prosecution.

Interrelated as they are, the four grounds asserted to challenge LTC DS, at a minimum, result in a close case. With a panel hand-selected by the convening authority exclusively from SGT Castillo's brigade, an objective public would reasonably ask: did the government stack the deck in this case? The military judge could have alleviated this concern by excusing LTC DS—the only remaining member exerting command authority over other members, most closely associated with the trial counsel, and most likely to commiserate with the victim.

7. The military judge cited but did not apply the liberal grant mandate.


Merely announcing that he considered the liberal grant mandate did not absolve the military judge of his responsibility

to apply it. "The intent of the drafters of the UCMJ was to 'prevent courts martial from being an instrumentality and agency to express the will of the commander,' or to appear to be such an instrumentality." *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007) (citations omitted). Given the totality of the circumstances, the risk is too high that the public will perceive that SGT Castillo received something less than a fair and impartial panel of seven members. See *Wiesen*, 56 M.J. at 176. In this case, the military judge treated the liberal grant mandate as little more than a conservative suggestion. As a result, the military judge abused his discretion by denying SGT Castillo's implied bias challenge of LTC DS.

As discussed in *Clay*, the time to correct panel issues is before trial. Sergeant Castillo provided a list legitimate reasons why LTC DS should be not be seated. The convening authority had at his disposal ample available members and alternates to replace those excused. (JA 8-15). Yet, the military judge's focus was on finding reasons why each individual basis for challenge was insufficient, rather than simply excusing LTC DS based on the appearance of those issues as a whole. There was no reason for this. As emphasized in *Clay*, this appellate issue could have been easily avoided had the military judge liberally granted the defense challenge for cause against LTC DS.

Conclusion


WHEREFORE, SGT Castillo respectfully requests that this Honorable Court set aside the findings and the sentence.



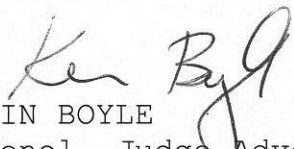
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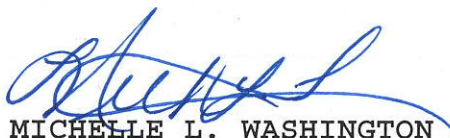
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Castillo*, Army Dkt. No. 20110935, USCA Dkt. No. 14-0457/AR, was electronically filed with both the Court and Government Appellate Division on June 26, 2014.



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