IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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 the Case

On June 5, 2014, this Honorable Court granted appellant's petition for review. On June 26, 2014, appellant filed his final brief with this Court. The government responded on July 28, 2014. Appellant replies herein.

Argument

a. The government cites *United States v. Clay,* 64 M.J. 274, 277 (C.A.A.F. 2007) out of context.

The government quotes, but provides no context to this Court's statement that "in the absence of actual bias, implied bias should be invoked rarely." (Gov't Br. 13 (quoting *United States v. Clay,* 64 M.J. 274, 277 (C.A.A.F. 2007)). However, as this Court explained in *Clay*,

> Taken at face value, that statement could be construed to be at odds with the liberal grant mandate. The statement, however, is not a reflection of a legal doctrine expressing judicial reticence or disdain for the finding of implied bias. Instead, the statement reflects that where actual bias is found, a finding of implied bias would not be unusual, but where there is no finding of actual bias, implied bias must be independently established.

64 M.J. at 277. This Court further explained it will not hesitate to find implied bias when warranted. *Id.*

b. Each asserted basis for challenge can establish implied bias.

Sergeant (SGT) Castillo does not concede that each asserted basis to challenge Lieutenant Colonel (LTC) DS, alone, would not merit excusal as the government suggests. (Gov't Br. 11 n.46). Sergeant Castillo merely recognizes that his bases for challenge are not *per se* disqualifying. (See Appellant's Br. 17-18). However, because this Court considers implied bias under the totality of the circumstances, *see, e.g., United States v. Richardson*, 61 M.J. 113, 119 (C.A.A.F. 2005), each basis for challenge must be considered both individually and collectively. *See also United States v. Townsend*, 65 M.J. 460, 465-66

(C.A.A.F. 2007) (upholding the military judge's denial of an implied bias challenge after examining the cumulative effect of multiple factors). As this Court explained in *United States v. Rome*, multiple grounds for challenge may establish implied bias even if none are separately sufficient or *per se* disqualifying. 47 M.J. 467, 469-70 (C.A.A.F. 1998). Thus, even if this Court finds SGT Castillo's bases for challenge separately insufficient "to support an implied-bias challenge, the combination of . . ." these may yet raise "substantial doubt about the fairness and impartiality of the proceedings . . . ." *Id*. at 470.

c. Voir dire cannot remedy implied bias.

The government erroneously relies on *Richardson* to assert that extensive voir dire remedied any "prejudice . . . or potential for a public perception of unfairness . . . ." (Gov't Br. at 19 (citing *Richardson*, 61 M.J. at 118)). In *Richardson*, this Court was unable to determine or discount the possibility of implied bias where the military judge denied a defense request for additional voir dire. 61 M.J. at 119. There, the appearance of bias "was heightened where three of the final members had prior professional contact with trial counsel and the military judge declined to explore fully, or to allow defense counsel to explore fully, the nature of the prior professional contact." *Id*. Ultimately, this Court held that the record must objectively demonstrate "that notwithstanding the relationships

at issue, the accused received a fair trial." *Id*. at 120. This Court has never held that voir dire alone can remedy the "prejudice" of implied bias if the record objectively establishes it. Indeed, the seating of even one biased juror mandates reversal. *Parker v. Gladden*, 385 U.S. 363, 365-66 (1966).

The government also fails to acknowledge the importance of the liberal grant mandate in a system where each side has only one peremptory challenge and the convening authority selects the panel. *Clay*, 64 M.J. at 276. The liberal grant mandate is essential "to address historic concerns about the real and perceived potential for command influence on members' deliberations." *Id.* at 276-77. Here, SGT Castillo asserted multiple reasonable grounds for challenge against LTC DS including his command relationship with the trial counsel and other panel members—the very sort of historic concerns discussed in *Clay*. Thus, granting SGT Castillo's challenge under the liberal grant mandate was the only appropriate remedy in this case.

d. Operational reasons cannot justify the military judge's denial of SGT Castillo's challenge for cause.

The government misconstrues the relevance of SGT Castillo's panel composition. (Gov't Br. 20). Even assuming the convening authority had a legitimate operational reason for selecting

members exclusively from SGT Castillo's brigade, the predictable result was a panel with multiple suspect relationships between themselves and their organizational trial counsel. Further, no operational reason could have justified maintaining LTC DS on SGT Castillo's panel when ample primary and alternate members remained available to meet quorum. (JA 8-15).

In this case, the appearance of bias created by LTC DS's relationship with the trial counsel and unequal influence over other members was heightened by the limited panel pool selected by the convening authority. Because this fact is directly related to SGT Castillo's challenge for cause, it should be considered under the totality of the circumstances when determining the "perception or appearance of fairness of the military justice system . . ." as viewed through the eyes of an objective public. *United States v. Wiesen*, 56 M.J. 172, 176 (C.A.A.F. 2001) (citation and internal quotation marks omitted).

e. Sergeant Castillo did not forfeit aspects of his argument.

The government erroneously relies on *United States v. Marshall*, 67 M.J. 418, 419-20 (C.A.A.F. 2008) to assert that SGT Castillo forfeited aspects of his argument. (Gov't. Br. 16). However, *Marshall* only requires the military judge have an opportunity to address and correct potential errors at trial. *Id.* at 419; *see also United States v. Brandell*, 35 M.J. 369, 372 (C.M.A. 1992) (holding that while defense counsel must provide

specific grounds supporting an objection, "this duty is met when 'all parties at trial fully appreciate the substance of the defense objection and the military judge has full opportunity to consider it.'" (citation omitted)). Here, counsel adequately apprised the military judge of his bases for challenge.

Contrary to the government's argument, the defense counsel did place the number of members LTC DS rated squarely before the military judge. (Gov't Br. 15-16). During his challenge of LTC Duncan, the defense counsel asserted that thirty percent of the panel served under his command. (JA 136). The military judge corrected the defense counsel stating: "No, including him it's 40 percent." (JA 136). When challenging LTC DS, the defense counsel asserted "a nearly identical argument with the addition of the two--of two issues."* (JA 139). The military judge then discussed LTC DS's rating relationship with both Captain (CPT) Little and Command Sergeant Major (CSM) Merriwether when denying the challenge for cause. (JA 140-41). Hence, the military judge had ample opportunity to fully address SGT Castillo's challenge of LTC DS based on the number of members he rated.

The military judge was on notice that the convening authority only selected members from SGT Castillo's brigade. (Gov't Br. 20). Before trial, the government informed the

* Together, LTC DS and the two members he rated equal thirty percent of the original ten members; forty percent after the military judge granted one causal and two peremptory challenges.

military judge that the convening authority removed SGT Castillo's brigade commander, battalion commander, and the investigating officer from the convening order. (JA 2-3, 10, R. at 17-18). The unit designations on the convening orders and charge sheet together with voir dire made it apparent that the trial counsel and all ten potential members were assigned to SGT Castillo's brigade. (JA 2-3, 8-15, 68-70, 71-73, 78-80, 94-96, 102-04, 111-15, 122-25, 130-33). During his challenge for cause, the defense counsel specifically objected that a panel member's "organizational counsel, is serving as the prosecutor." (JA 136). Also, the defense counsel relied on the multiple command relationships between members and with the trial counsel during his challenges. (JA 136-38, 139). Thus, the military judge was, or should have been, fully aware that every member was assigned to SGT Castillo's brigade and that the defense had significant concerns with the appearance of bias as a result.

Sergeant Castillo did "raise the issue, as he does now, of the cumulative effect of the member's relationship with trial counsel." (Gov't Br. 9). First, when the defense counsel attempted to challenge members by category, the military judge cut him off stating: "Just do them one at a time, please." (JA 135-36). Second, while challenging LTC Duncan the defense counsel argued:

> CDC: If, I may add, Your Honor. Did at any time you have a trial counsel who's the legal advisor to *members* of the panel? The conflict to me, both--and I would go so far to say even as an ethical matter, is so plain that it can't survive the implied bias test that the public can have confidence in the panel, particularly if they return a guilty finding, and a panel where the prosecuting attorney was literally the legal advisor to the *jurors*. To me it's just a painfully obvious conflict and that he can't [sic] muster implied bias.

(JA 137-38) (emphasis added). Third, counsel then challenged LTC DS, CSM Merriwether, CSM Felicioni, and CPT Little adopting the same arguments he applied to LTC Duncan. (JA 139-45). Finally, as the government recognizes, the parties at trial treated SGT Castillo's argument challenging LTC Duncan as equally applicable to all affected members. (Gov't Br. 7 n.29). Therefore, the government's assertion that SGT Castillo forfeited the cumulative argument he makes now is incorrect. The defense adequately framed the issue and the military judge had a reasonable opportunity to consider it.

Also, this Court must evaluate challenges for implied bias based upon the totality of circumstances. *Richardson*, 61 M.J. at 119 (C.A.A.F. 2005). Consequently, the cumulative effect of multiple grounds for challenge is inherent in this Court's implied bias analysis even if a defense counsel does not expressly make a "cumulative" argument at trial. *See Rome*, 47 M.J. 467, 469-70; *Townsend*, 65 M.J. 460, 465-66.

f. A member's disclaimer of implied bias is not dispositive.

The government incorrectly cites *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996) when asserting the military judge's "in-court assessment of demeanor [for implied bias] should not be second-guessed on appeal." (Gov't Br. 15, 15 n.63). In fact, *Daulton* expressly held that "[w]hile the military judge's assessment of . . . credibility is useful and warrants great deference on the issue of actual bias, it is not dispositive on the issue of implied bias." 45 M.J. at 218. In this case, the military judge's assessment of LTC DS's credibility should not be a significant factor.

Sergeant Castillo's implied bias argument relies, in large part, on factors unique to the military justice system as opposed to factors unique to the challenged member himself. These include the relationship between commanders and their organizational trial counsel, the relationship between a trial counsel and non-commander members of his unit, and the relationship between a commander and his primary staff. Further, these grounds for challenge are attributable, in part, to the convening authority's decision to select members only from SGT Castillo's brigade. Regardless of disclaimers, the mere existence of these circumstances implicates "the unique nature of military courts-martial panels, particularly that those bodies are detailed by convening authorities and that the

accused has only one peremptory challenge." *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006) (citations omitted). Thus, these facts, together with LTC DS's prior experience as a sexual assault victim, establish implied bias notwithstanding the military judge's in-court assessment of his demeanor.

Conclusion

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

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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, Crim. App. Dkt. No. 20110935, Dkt. No. 14-0457/AR, was delivered to the Court and Government Appellate Division on **August 7, 2014**.

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