27 May 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Airman First Class (E-3)
JESSICA E. MCFADDEN
USAF,
Appellant.

USCA Dkt. No. 14-0501/AF

Crim. App. No. 37438

BRIEF IN SUPPORT OF PETITION GRANTED

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INDEX

TABLE OF AUTHORITIES

SUPREME COURT

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Rules

Miscellaneous

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UNITED STATES, *Appellee,*	)	BRIEF IN SUPPORT OF PETITION GRANTED
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Airman First Class (E-3) **JESSICA E. MCFADDEN,** USAF, *Appellant.*	)	Crim. App. No. 37438

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

Granted Issues

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED WHEN IT HELD THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY FAILING TO EXCUSE FOR CAUSE A COURT MEMBER WHO ACCUSED THE APPELLANT OF LYING BY OMISSION BY EXERCISING HER ARTICLE 31(b), UCMJ RIGHT TO REMAIN SILENT.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING DEFENSE COUNSEL'S REQUEST FOR A MISTRIAL AFTER A COURT MEMBER ACCUSED APPELLANT OF LYING BY OMISSION BY EXERCISING HER ARTICLE 31(b), UCMJ, RIGHT TO REMAIN SILENT.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866. This Court has jurisdiction to review this case pursuant to Article 67, UCMJ, 10 U.S.C. § 867.

Statement of the Case

On 18-21 February 2009, Appellant was tried by a general court-martial composed of officer members at Lackland Air Force Base, Texas. Pursuant to her plea, the military judge found Appellant guilty of one specification of absence without leave in violation of Article 86, UCMJ.[1] Contrary to her pleas, the members found Appellant guilty of one specification of desertion, one specification of conspiracy to commit desertion, and one specification of making a false official statement in violation of Articles 81, 86, and 107, UCMJ. (J.A. 120).

The members sentenced Appellant to a bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, reduction to E-1, and to pay the United States a fine of $1,650.00 and in the event the fine is not paid, to an additional confinement for 36 days. (J.A. 121). On 27 April 2009, the convening authority approved the sentence as adjudged except for the portion that stated "and in the event the fine is not paid, to an additional confinement for 36 days." (J.A. 17).

On 15 March 2012, in an unpublished opinion, AFCCA affirmed the findings and sentence. (J.A. 1-3). On 19 September 2012, this Honorable Court granted Appellant's petition, vacated AFCCA's decision, and remanded the case to AFCCA for

[1] Appellant was charged with two specifications of desertion in violation of Article 85, UCMJ. Appellant pleaded guilty to the lesser included offense of

consideration of the above-granted issue in light of *United States v. Nash*, 71 M.J. 83 (C.A.A.F. 2012). On 19 March 2013, in an unpublished opinion, AFCCA again affirmed the findings and the sentence. (J.A. 4-9). On 4 September 2013, this Honorable Court granted Appellant's petition, vacated AFCCA's decision, and remanded the case to AFCCA for consideration of whether one of the judges who participated in the decision was unconstitutionally appointed. On 26 September 2013, in an unpublished opinion, AFCCA again affirmed the findings and the sentence. (J.A. 10-15). The Appellate Records Branch notified the Appellate Defense Division that a copy of the Court's decision was deposited in the United States mail by first-class certified mail to the last address provided by Appellant on 20 March 2013.

On 26 November 2013, Appellant again petitioned this Court for a grant of review and moved for an extension of time to file the supplement. On 16 December 2013, Appellant filed the supplement with this Court. On 24 April 2014, this Court granted review of the above-referenced issues.

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absence without leave in violation of Article 86, UCMJ, but the government opted to move forward with proving the greater offense of desertion.

Statement of Facts

Prior to counsel from both sides making opening statements, the military judge gave the members preliminary instructions. (J.A. 25-34). Specifically, the military judge told the members:

> You must determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court and upon the instructions I will give you. Because you cannot properly make that determination until you have heard all the evidence and received the instructions, it is of vital importance that you keep an open mind until all the evidence has been presented and the instructions have been given.

(J.A. 27).

The military judge further instructed the members:

> You must keep an open mind throughout the trial. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to whether the accused is guilty or not guilty[.]

(J.A. 29-30).

Anticipating that the government was going to offer Appellant's signed statement into evidence, the defense requested an Article 39(a), UCMJ session to request redaction of the statement. (J.A. 35). In that statement, Appellant refused to answer the following two questions from an investigator: "[D]id you ever plan on turning yourself in?" and "Where did you plan on going after tonight?" (J.A. 125-27). The defense sought to have these questions redacted from the statement because it reflected Appellant's right to remain silent pursuant to Article 31(b), UCMJ. (J.A. 35). Before the military judge ruled on the defense

request, the defense acknowledged that trial counsel had already redacted the statement and it was later admitted into evidence. (J.A. 135-36; 122-24).

During Appellant's testimony, the military judge asked Appellant did she ever tell either Investigator Steven Vaughn or Investigator Sean Garretson if she was "intending to come back."[2] (J.A. 69). Appellant stated she didn't "believe they ever asked" so she "didn't tell them one way or another." *Id.* Immediately after, during re-cross examination, trial counsel asked Appellant whether SrA David Acree, a third investigator, asked Appellant if she intended to come back. (J.A. 70). Despite a defense objection that the question was "beyond the scope," Appellant responded "yes, sir but I used my right to remain silent at the time." *Id.*

Immediately following examination by trial counsel and without the parties having an opportunity to review her question, Major (Maj) Cereste, one of the members, asked Appellant:[3]

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[2] The military judge specifically asked about these investigators after Appellant told him she talked to two investigators "about her absence." (J.A. 69). Apparently, Appellant spoke with at least one other military investigator. Though not raised as an issue nor granted as one, the military trial judge's questioning of a witness or an accused in a members' trial can result in the appearance of unfairness. *See United States v. Martinez*, 70 M.J. 154, 157-58 (C.A.A.F. 2011).

[3] The military instructed the court members on how they may ask a witness a question: " And the way I handle that in my court is once counsel finish their direct and cross-examination of the witness or any other questions they have, I'll then turn to you and ask, "Does any member have any questions for this witness? If you do, just raise your hand, I'll call on you, and then you can ask whatever questions you have." (J.A. at 30).

> My next question is: You testified today on numerous accounts of overt deception, and to me you seem to have a heightened intuition of other people's motives. For example, you were aware that perhaps Airman [K.D.] might tell people X, Y, Z, so you told her certain things. **Have you also heard of lying by omission –- so –- exercising your right to remain silent.** So, how is your testimony today regarding never intending to desert the Air Force permanently different from your previous pattern of deception?

(J.A. 72) (emphasis added).

During a subsequent Article 39(a) session, the defense moved for a mistrial based on the military judge's, trial counsel's, and Maj Cereste's questions to Appellant. (J.A. 93). The military judge denied the motion and opted to give the members an instruction. (J.A. 95). Specifically, the military judge told the members, "You may not consider the accused's exercise of her right to remain silent in any way adverse to the accused. You may not consider such exercise as lying by omission." (J.A. 97).

Summary of the Argument

Appellant's court-martial was injected with prejudice when the military judge allowed a court member to display her belief of Appellant's guilt and her skepticism against the Appellant in front of the other court members prior to the close of evidence and opening of deliberations. Particularly egregious is that the court member's skepticism was a result of the member's improper conclusion of constitutional significance. AFCCA decided this issue in a manner that is inconsistent with this Honorable Court's decision in *Nash*.

Argument

I.

THE AFCCA ERRED WHEN IT HELD THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY FAILING TO EXCUSE FOR CAUSE A COURT MEMBER WHO ACCUSED THE APPELLANT OF LYING BY OMISSION BY EXERCISING HER ARTICLE 31(b), UCMJ RIGHT TO REMAIN SILENT.

Standard of Review

When reviewing a decision of a Court of Criminal Appeals (CCA) on a military judge's ruling, this Court "typically pierces through that intermediate level and examines the military judge's ruling and then decides whether the CCA was right or wrong in its examination of the military judge's ruling." *United States v. Cabrera-Frattini*, 65 M.J. 241, 246 (C.A.A.F. 2007) (citing *United States v. Shelton,* 64 M.J. 32, 37 (C.A.A.F. 2006) (quoting U*nited States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996)). "The standard remains … an abuse of discretion." *Nash*, 71 M.J. at 89.

Law and Analysis

AFCCA decided this issue in a manner that is inconsistent with this Honorable Court's decision in *Nash*. AFCCA improperly gave the military judge "great deference" for a ruling the military judge never made. (J.A. 15). Moreover, despite this Court's remand to consider *Nash,* AFCCA failed to address the fact that Maj Cereste's question was predicated on the belief that Appellant was guilty, violating the military judge's instruction to keep an open mind. *See Nash*, 71 M.J. at 88.

This Court has repeatedly emphasized the importance of the Courts of Criminal Appeals adhering to its case law. *See*, *e.g.*, *United States v. Kelly*, 45 M.J. 259, 262 (C.A.A.F. 1996); *United States v. Allbery*, 44 M.J. 226, 228 (C.A.A.F. 1996). This Court reiterated that point recently. *See United States v. Goings*, 72 M.J. 202, 208 (C.A.A.F. 2013) (citing *Allbery*). AFCCA's decision in this case violated the doctrine of vertical stare decisis.[4] The law governing vertical stare decisis is both simpler and stricter than the law governing "horizontal stare decisis," which deals with a court's treatment of its own case law: "A lower court must *always* follow a higher court's precedents." Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024 (1994). Even if the result would be "moth-eaten," "wobbly," and "unsound," a lower court must abide by their higher court's decision. *See State Oil Co. v. Khan*, 522 U.S. 3 (1997).[5]

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[4] Stare decisis "compels a court to follow strictly the decisions rendered by a higher court." *State v. Menzies*, 889 P.2d 393, 399 n.3 (Utah 1994). "Under this mandate, lower courts are obliged to follow the holding of a higher court, as well as any 'judicial dicta' that may be announced by the higher court." *Id*.

[5] In *State Oil Co. v. Khan*, the United States Supreme Court wrote:

> Despite what Chief Judge Posner aptly described as *Albrecht*'s "infirmities, [and] its increasingly wobbly, moth-eaten foundations," 93 F.3d, at 1363, there remains the question whether *Albrecht* deserves continuing respect under the doctrine of stare decisis. The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents.

522 U.S. at 20. The Court eventually did overrule the wobbly decision. *Id.*

AFCCA incorrectly found that the military judge's instructions to the members cured the issue and in an attempt to distinguish the *Nash* case from Appellant's case, AFCCA determined that the "potential bias" of Maj Cereste went solely to Appellant's "credibility." (J.A. 14-15).

1. Curative instruction did not cure the harmful error.

Upon trial defense counsel for a mistrial, the military judge, despite multiple cases wherein this Court instructed to do so, did not conduct any additional voir dire to ferret out whether she was a proper panel member. *See United States v. Diaz*, 59 M.J. 79, 92 (C.A.A.F. 2003). Instead, the military judge gave a generic instruction reminding the panel members that they were not to consider the Appellant's right not to make incriminating statements against herself. AFCCA found that a curative instruction was given to all of the panel members, they presume that court members will follow the military judge's instructions, and that there was no evidence that the court member who asked the question would "not yield to the military judge's instruction." (J.A. 15).

This rationale is not in line with this Court's ruling in *Nash*. The curative instruction did not relieve the concern that Maj Cereste made up her mind and did not alleviate the obvious rationale for asking such a question – that she presumed guilt. Like *Nash*, the military judge asked the panel members, to include

Maj Cereste, whether they would be able to keep an open mind and instructed them not to make any determination of guilt before all of the evidence had been presented. And like the panel member in *Nash*, Maj Cereste's question demonstrated that she had not kept an open mind until the close of evidence and was therefore unable to follow the military judge's instructions. *See Nash*, 71 M.J. at 89. This demonstrates that Maj Cereste's bias could not yield to the military judge's initial instructions. AFFCA erred in finding that the curative instruction was an appropriate remedy because they ignored the evidence before them that showed Maj Cereste already chose not to follow the military judge's instructions.

2. Comments displayed Maj Cereste's bias.

AFFCA determined that the potential bias went to the Appellant's credibility, not to the ultimate issue of guilt. This rationale is not in line with this Court's ruling in *Nash*. Contrary to the military judge's initial instructions, Maj Cereste prematurely formed an opinion that Appellant was guilty of the contested issues which included an allegation of making a false official statement. *See Nash*, 71 M.J. at 88 ("[A] member must be excused when he or she '[h]as informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged.'"). Additionally in *Nash*, this Court found that the member's question "demonstrated that he had not kept an open mind until the close of evidence and was therefore unable to

follow the military judge's instructions." *Id*. at 89. AFFCA is correct that courts presume court members will follow the instructions given to them. *See* J.A. 15; *Nash*, 71 M.J. at 89 (citing *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002) (citing *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991))). However, this is only a presumption until "demonstrated otherwise." *Id*. Here, like in *Nash*, Maj Cereste's question expressed a definite opinion as to the guilt of the Appellant. This went squarely towards her bias – not her credibility. As a result, AFCCA erred in finding no presumption of bias.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the Appellant's findings and sentence.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING DEFENSE COUNSEL'S REQUEST FOR A MISTRIAL AFTER A COURT MEMBER ACCUSED APPELLANT OF LYING BY OMISSION BY EXERCISING HER ARTICLE 31(b), UCMJ, RIGHT TO REMAIN SILENT.

Standard of Review

The military judge had an independent duty to ensure Appellant received a fair trial. *United States v. Fleming*, 38 M.J. 126, 129 n* (C.M.A. 1993). This Court reviews the military judge's failure to excuse the panel member and grant a mistrial for an abuse of discretion. *Nash*, 71 M.J. at 89; *United States v. Thompkins*, 58 M.J. 43, 48 (C.A.A.F. 2003).

Law and Analysis

1. Maj Cereste was challenged by trial defense counsel.

Defense counsel's articulated reason for a mistrial was largely due to Maj Cereste's question posed to Appellant. Thus, the objection to Maj Cereste – a court member – necessarily included an analysis into whether she should be subjected to further voir dire and ultimately removed for cause. Although the defense counsel requested a mistrial pursuant to Rule for Court-Martial (R.C.M.) 915 and did not specifically request the member be challenged for cause, the defense's request for a mistrial triggered an analysis in accordance with R.C.M. 912. Both rules pose a question that is fundamental to a fair trial – whether the court-martial is free from "substantial doubt" as to "fairness." *See* R.C.M. 912, 915.

"A member shall be excused for cause whenever it appears that 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). "Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie." R.C.M. 912(f)(2)(B)(4). Even if the trial defense counsel mischaracterizing the objection is tantamount to no formal objection, the failure to remove a member *sua sponte* "raise[s] a significant question of legality,

fairness, [or] impartiality, to the public observer..." *United States v. Strand,* 59 M.J. 455, 460 (C.A.A.F. 2004).

2. Maj Cereste's question displayed bias and assumption of guilt.

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). Maj Cereste's question relayed much more than an interest in Appellant's overall credibility and exhibited "a personal bias which will not yield to the military judge's instructions and the evidence presented at trial." *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987).

As a follow-up to both the military judge's and trial counsel's questions challenging Appellant, Maj Cereste's manner of questioning Appellant was "akin to impeachment," effectively communicating her premature personal belief to the other court members that Appellant was guilty and "less than creditable." *United States v. Clower*, 48 C.M.R. 307, 310 (C.M.A. 1974). This Honorable Court found plain error when military judges engaged in such behavior in front of the court members and should apply the same rule to a court member. *See United States v. Holmes*, 1 M.J. 128, 129 (C.M.A. 1975); *see also Clower*, 48 C.M.R. at 310. Maj Cereste's question revealed that she believed that Appellant lied by omission when Appellant exercised her right to remain silent.

It also showed that Maj Cereste already had decided that Appellant was guilty. Thus, in violation of R.C.M. 912, Maj Cereste "express[ed] a definite opinion as to the guilt" of Appellant for the second specification alleging desertion, as supported by the members' guilty finding.

3. The military judge failed to adequately address the issue.

The military judge failed to conduct additional voir dire and instead give an instruction to all of the members reiterating the Appellant's right to remain silent. This instruction did not address the issue of Maj Cereste's presumed bias and pre-determination that Appellant was guilty. Typically, when a witness or other trial participant brings up improper matters, the solution is to voir dire the panel. *See United States v. Sidwell,* 51 M.J. 262 (C.A.A.F. 1999). Further, this Honorable Court recently found that a member "must be excused" when he expressed an opinion as to the guilt of an accused. *Nash*, 71 M.J. at 88-89; *see also* R.C.M. 912(f)(1)(M). Because "the plain language of [Maj Cereste's] question indicates a conclusion as to Appell[ant]'s guilt," the military judge's instruction about a general understanding of one's right to remain silent was not corrective. *See Nash*, 71 M.J. at 89.

Consequently, Appellant's court-martial was injected with prejudice when the military judge allowed Maj Cereste to express her skepticism and belief of Appellant's guilt in front of the

other court members, thus sanctioning such conduct. Despite the military judge's initial instructions, Maj Cereste had clearly formed an opinion as to Appellant's guilt, demonstrating she "could not yield to the military's judge's instructions and the military judge should have excused [her] from the panel." *Id*.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the Appellant's findings and sentence.

Conclusion

The military judge abused his discretion by not dismissing a panel member who demonstrated that she had not kept an open mind until the close of evidence, presumed guilt, and was unable to follow the military judge's instructions. AFCCA further abused their discretion by misapplying this Court's ruling in *Nash*.

Very Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on May 27, 2014.

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