

7 July 2014

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

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UNITED STATES,	)	REPLY BRIEF ON BEHALF OF
<i>Appellee,</i>	)	APPELLANT
	)	
	)	
v.	)	Crim. App. No. 37438
	)	
	)	USCA Dkt. No. 14-0501/AF
JESSICA E. MCFADDEN	)	
Airman First Class (E-3)	)	
United States Air Force,	)	
<i>Appellant.</i>	)	

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

COMES NOW Appellant, by and through undersigned counsel, and pursuant to Rule 19(b)(3) of this Honorable Court's Rules of Practice and Procedure and this Honorable Court's Docketing Notice of 24 April 2014, and files reply to the United States' final brief.

I.

**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.**

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). The government inaccurately contends that there is a lack of "factual grounds

for challenge" against Maj Cereste and incorrectly asserts that this Court should conduct a plain error review. Appellee Brief at 15.

*1. Standard of Review*

This Court has stated that it will not reverse the military judge's decision on a motion for mistrial absent clear evidence of abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 92 (C.A.A.F. 2003). An accused enjoys the right to an impartial and unbiased panel; this right is provided in the military justice system by the Constitution, federal statutes, regulations and directives, and case law. *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012).

When a trial error is of constitutional dimension, an appellate court must determine whether the error and the military judge's curative efforts rendered it harmless beyond a reasonable doubt; in analyzing this question, an appellate court asks whether there is a reasonable possibility that the error complained of might have contributed to the conviction; the question is not whether the members were totally unaware of the error; rather, the essence of a harmless error is that it was unimportant in relation to everything else the members considered on the issue in question; the error is analyzed in the context of the entire court-martial. *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2008).

*2. Specificity of objection*

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 both R.C.M. 915 and 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 party is not necessarily required to refer to a specific rule by citation." *United States v. Datz*, 61 M.J. 37, (C.A.A.F. 2005). "A party is required to provide sufficient argument to make known to the military judge the basis of his objection and, where necessary to support an informed ruling, the theory behind the objection." *Id.*

Maj Cereste's question posed to Appellant was Defense counsel's articulated reason for a mistrial. 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. A member shall be excused having formed or expressed a definitive opinion as to the guilt or innocence of the accused or in the interest of keeping a court-martial free from substantial doubt as to legality, fairness, and impartiality. R.C.M. 912(f)(1)(M)-(N). "A challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist." R.C.M. (f)(2)(B).

3. *The error is not harmless beyond a reasonable doubt*

The error is clear - 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. *Id.* 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.

The government contends that Appellant made her credibility an issue to be considered and had the opportunity to explain her actions to the fact-finders while on the stand. Appellee Brief at 16. This line of reasoning misses the point elaborated on 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. 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.**

The military judge allowed Maj Celeste 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. The government bears the burden of establishing that this constitutional error is harmless beyond a reasonable doubt. The government contends that any error is "...unimportant' in relation to everything else considered by the members." Appellee Brief at 21-22.

The error here strikes at the most fundamental part our jurisprudence - the fundamental right to fair and impartial trial and to be considered innocent until proven guilty. 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." See *Nash*, 71 M.J. at 89. Although this Court articulated that a curative instruction can be a proper remedy in the context of R.C.M. 915, it is not a proper or adequate remedy here where the objection by trial defense counsel also implicated R.C.M. 912. See *Ashby*, 68 M.J. at 122.

The question is whether "there is a reasonable possibility that the evidence [or error] complained of might have contributed

to the conviction." *Id.* at 122. The plain language of her question indicates a conclusion as to Appellants guilt. No statement can more clearly illuminate how this member contributed to the conviction and whose view negatively pervaded the panel. The subsequent instruction did not relieve the concern that Maj Cereste had made up her mind prior to all evidence and argument. The only clear rationale for asking the questions indicated a presumption of guilt.

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

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'Michael A. Schrama', enclosed in a rectangular box.

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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 July 7, 2014.

A handwritten signature in blue ink, appearing to read "Michael A. Schrama", is enclosed in a thin black rectangular border.

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