IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Marshand A. WOODS, Lieutenant Junior Grade (O-2) United States Navy, Appellant	BRIEF ON BEHALF OF APPELLANT Crim.App. Dkt. No. 201300153 USCA Dkt. No. 14-0783/NA

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

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Index of Brief

Table of Cases, Statutes, and Other Authorities

Supreme Court Cases

Court of Appeals for the Armed Forces Cases

Military Courts of Criminal Appeals Cases

Other Appellate Cases

Statutes

Manual for Courts-Martial

Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY DENYING A CHALLENGE FOR CAUSE AGAINST THE COURT-MARTIAL PRESIDENT, WHO SAID THE "GUILTY UNTIL PROVEN INNOCENT" STANDARD IS "ESSENTIAL" TO THE MILITARY'S MISSION?

Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that includes a punitive discharge, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice.[1] This Court, therefore, has jurisdiction under Article 67, UCMJ.[2]

Statement of the Case

A panel of members sitting as a general court-martial found Lieutenant Junior Grade (LTJG) Woods guilty, contrary to his plea, of one specification of aggravated sexual assault in violation of Article 120, UCMJ.[3] On December 21, 2012, the members sentenced LTJG Woods to confinement for five months, total forfeitures, and a dismissal.

On April 11, 2013, the Convening Authority approved the sentence and, except for the punitive discharge, ordered it executed. Per a defense request, the convening authority suspended adjudged forfeitures and waived automatic forfeitures

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[1] 10 U.S.C. § 866(b)(1) (2012).
[2] 10 U.S.C. § 867 (2012).
[3] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 552, 119 Stat. 3136, 3257 (2006) (prior to 2011 amendment).

contingent on LTJG Woods establishing an allotment for the benefit of his dependent spouse.

On June 26, 2014, the lower court affirmed the findings and sentence as approved by the convening authority.[4] LTJG Woods petitioned this Court for review on August 18, 2014. This Court granted the petition on December 8, 2014.

Statement of Facts

In October 2012, Navy Captain (CAPT) Martha Villalobos filled out a questionnaire for prospective court-martial members.[5] The questionnaire asked, "What is your opinion of the military's criminal justice system?"[6] CAPT Villalobos answered:

> There is not [a] perfect system, and I understand why the enforcement of 'you are guilty until proven innocent' (just the opposite as in the civilian sector) is essential because the military needs to be held to a higher standard just for reasons of our mission. It is a voluntary force and you come into the service knowing that you will be held to this higher standards [sic] and give up your civil rights.[7]

In December 2012, upon reading CAPT Villalobos's questionnaire, the convening authority handpicked her to serve as a court-martial member for LTJG Woods's trial.[8]

During voir dire, trial counsel asked CAPT Villalobos leading questions about whether she could follow the military

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[4] *United States v. Woods*, No. 201300153 (N-M. Ct. Crim. App. Jun. 26, 2014).
[5] J.A. at 183.
[6] J.A. at 182.
[7] *Id.*
[8] J.A. at 20.

judge's instruction on the presumption of innocence and the burden of proof.[9] To these leading questions, CAPT Villalobos replied, "Yes."[10]

Defense counsel then asked CAPT Villalobos why she believed that the "guilty until proven innocent" standard was "essential" in the military service.[11] She said that her beliefs were rooted in conversations she had with her husband--a soldier in the U.S. Army's special forces.[12] She said military members should be "held to a higher standard" because "we raise our hand, and we are defending our country."[13]

Defense counsel then asked, "do you hold [LTJG Woods] to a higher standard, because we're in a military court than you would if we were in a civilian court?"[14] CAPT Villalobos once again said, "we should be held to a higher standard."[15] She continued by saying that once a case gets to court, "it's up to the *parties*" to present a case so the members can determine whether the accused is guilty.[16]

The military judge then asked a series of leading questions. He established that CAPT Villalobos had not only

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[9] J.A. at 74.
[10] *Id.*
[11] J.A. at 79.
[12] *Id.*
[13] *Id.*
[14] J.A. at 80.
[15] *Id.*
[16] *Id.* (emphasis added).

"arrived at this court-martial with an erroneous understanding of the burden of proof," but also the belief that "there would be a good reason" for courts-martial to presume guilt.[17] But in response to further leading questions, CAPT Villalobos averred that she was nonetheless prepared to apply the correct standard in accordance with the military judge's instructions.[18]

The defense challenged CAPT Villalobos on the grounds of bias.[19] The trial defense counsel pointed out that even after trial counsel had first attempted to rehabilitate CAPT Villalobos, she reverted to statements that were exactly in line with her answers on her member questionnaire.[20] Trial defense counsel argued this was an indicator that CAPT Villalobos's beliefs about holding military members to a higher standard were deeply ingrained and could not be disregarded.[21] Trial defense counsel reminded the military judge that the discussion of a "higher standard" was in response to questions specifically implicating court-martial proceedings, not merely a discussion of standards of personal conduct.[22] The military judge denied the challenge for cause.[23]

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[17] J.A. at 87.
[18] J.A. at 87-88.
[19] J.A. at 89-90.
[20] J.A. at 91.
[21] *Id.*
[22] *Id.*
[23] J.A. at 99-100.

The military judge also denied a challenge for cause against Commander (CDR) Donald Smith.[24] The defense used its peremptory challenge against CDR Smith.[25] Thus, the issue of CAPT Villalobos's challenge was preserved for appellate review.[26]

Summary of Argument

The convening authority handpicked CAPT Villalobos to serve on the court-martial panel even though she said "guilty before proven innocent" was "essential" to the military's mission. On voir dire, the military judge tried to rehabilitate CAPT Villalobos with leading questions and boilerplate instructions. But these efforts were ineffectual. Accordingly, the panel was tainted by actual bias, as well as implied bias.

Yet CAPT Villalobos was allowed to stay on the panel over defense objection. In denying the defense challenge for cause, the military judge relied on a clearly erroneous finding of fact and applied the law incorrectly. This was an abuse of discretion. As such, LTJG Woods was deprived of his constitutional right to an impartial and unbiased panel. His conviction should therefore be reversed.

[24] J.A. at 100.
[25] J.A. at 109.
[26] *See* R.C.M. 912(f)(4).

Argument

THE MILITARY JUDGE ERRED BY DENYING A CHALLENGE FOR CAUSE AGAINST THE COURT-MARTIAL PRESIDENT, WHO SAID THE "GUILTY UNTIL PROVEN INNOCENT" STANDARD IS "ESSENTIAL" TO THE MILITARY'S MISSION.

A. LTJG Woods was denied his right to an unbiased panel.

LTJG Woods had a constitutional right to an impartial and unbiased members panel.[27] Indeed, impartiality of members is "the sine qua non for a fair court-martial."[28]

To ensure substantive fairness, as well as the appearance of fairness, military judges should liberally grant challenges for cause brought by the accused.[29] Challenges for cause are evaluated based on the totality of the factual circumstances.[30] In ruling on a challenge for cause, there are two distinct legal tests for assessing member bias: actual bias and implied bias.

1. The panel was tainted by actual bias.

Actual bias is "bias which will not yield to a military judge's instructions and the evidence presented at trial."[31] A

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[27] *See United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012).
[28] *United States v. Terry*, 64 M.J. 295, 301 (C.A.A.F. 2007) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)).
[29] *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005).
[30] *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).
[31] *Nash*, 71 M.J. at 88 (citing *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)).

military judge's assessment of actual bias is reviewed for an abuse of discretion.[32]

It was an abuse of discretion for the military judge to deny the defense challenge for cause against CAPT Villalobos. A military judge abuses his discretion when he predicates his decision on a clearly erroneous finding of fact or applies the law incorrectly.[33] Here, the military judge did both.

a. The military judge predicated his ruling on a clearly erroneous finding of fact.

In denying the defense challenge for cause, the trial judge predicated his ruling on a finding that when CAPT Villalobos was speaking about a "higher standard," she was not referring to the burden of proof at court-martial.[34] Rather, the military judge found that she was referring to a belief that military members are held to a higher standard of personal conduct than civilians.[35] On appeal, the lower court endorsed this finding.[36] But this finding is clearly erroneous because it is not fairly supported by the record.[37]

The question that prompted the statements at issue was, "What is your opinion of the military's criminal justice

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[32] *Nash*, 71 M.J. at 88-89.
[33] *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).
[34] J.A. at 99-100.
[35] J.A. at *Id.*
[36] *Woods*, slip op. at 7.
[37] *See United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004) (explaining that a clearly erroneous finding of fact is one that is not fairly supported by the record).

system?"[38] From the beginning, this line of questioning focused on the court-martial system, not the personal conduct of military members.

Then, in addition to writing that the "guilty until proven innocent" standard is "essential" to the military's mission, CAPT Villalobos wrote, "It is a voluntary force and you come into the service knowing that you will be held to this higher standards [sic] ***and*** give up your civil rights."[39] Thus, it is clear that CAPT Villalobos's response was not concerned only with standards of personal conduct, but also about the civil rights due a service member in the court-martial process. She was unequivocal in her belief that service members "give up" their civil rights, "just the opposite as in the civilian sector."[40]

It is true that at one point during voir dire, CAPT Villalobos said that she expects a petty officer on liberty to conform his conduct to a "higher standard" and to "not get drunk and not act like this or that, you know."[41] But CAPT Villalobos did not back down from her views about "guilty until proven

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[38] J.A. at 182.
[39] *Id.* (emphasis added).
[40] *Id.*
[41] J.A. at 81.

innocent" until she was fed a series of leading questions by the military judge at the very end of her individual voir dire.[42]

In light of these facts, the record does not fairly support the benign gloss the military judge gave to CAPT Villalobos's statements.[43] By straining to conclude that CAPT Villalobos meant something other than what she actually said, the military judge predicated his decision on a clearly erroneous finding. This was an abuse of his discretion.

b. The military judge applied the law incorrectly.

The military judge also abused his discretion by applying the law incorrectly. There are two errors in particular.

First, the military judge's attempt to rehabilitate CAPT Villalobos relied entirely on leading questions.[44] In *United States v. Nash*, when the issue of member bias was raised, the military judge questioned the challenged member in an effort to rehabilitate him.[45] This Court found that the resulting colloquy was "ineffectual" and did not ameliorate the taint of bias.[46] "The military judge asked a series of leading questions which led to predictable answers but also some irrelevant and problematic responses."[47] The same thing happened here. In an

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[42] *See* J.A. at 87-88.
[43] *Contra Woods*, slip op. at 7.
[44] J.A. at 87-88.
[45] *Nash*, 71 M.J. at 89.
[46] *Id.*
[47] *Id.*

effort to rehabilitate CAPT Villalobos, the military judge asked a series of leading questions with predictable answers.[48] Such an attempt to rehabilitate a biased member with leading questions was just as ineffectual here as it was in *Nash*.

And here, as in *Nash*, the voir dire responses raised more problems than they solved. In response to a defense question, despite having just been instructed by the military judge that the burden of proof is on the Government and never shifts to the accused,[49] CAPT Villalobos still said "it's up to the *parties*"--plural--to present a case so the members can determine whether the accused is guilty.[50] Thus, if anything, the voir dire in this case magnified concerns about the court-martial president's bias and her ability to follow the military judge's instructions.[51]

Second, the military judge relied too much on the tainted member's own disclaimer of bias. In *Nash*, this Court said that "in certain contexts mere declarations of impartiality, no matter how sincere, may not be sufficient" to ameliorate concern about actual member bias.[52] The Supreme Court has said, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of

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[48] *See* J.A. at 87-88.
[49] J.A. at 50.
[50] J.A. at 80 (emphasis added).
[51] *Contra Woods*, slip op. at 7.
[52] *Nash*, 71 M.J. at 89.

failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[53]

This principle is illustrated by *United States v. Deain*, which came before the Court of Military Appeals (CMA) in 1954.[54] In that case, a Rear Admiral serving as a court-martial member made several comments that drew a defense challenge. He expressed a view that military members do not have constitutional rights.[55] Yet he acknowledged that Congress had allowed for a presumption of innocence by statute.[56] On voir dire, when asked whether he had previously said that an accused "must be guilty of something," he answered:

> I have stated that in the Navy, that as a rule, that if a case is referred for trial, that there is a likelihood that some offense has been committed; that it is very likely in the light of the accurate identification usually effective in the service, that identification in the case is likely to be correct. However, the presumption of innocence goes with him until evidence has been produced to show that the individual before the court has committed an offense.[57]

Defense counsel then called a witness who had heard the Admiral say "anyone sent up here for trial must be guilty of something."[58]

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[53] *Bruton v. United States*, 391 U.S. 123, 135 (1968).
[54] *United States v. Deain*, 5 C.M.A. 44 (1954).
[55] *Id.* at 49.
[56] *Id.*
[57] *Id.*
[58] *Id.*

The CMA did not find that the Admiral's legal ignorance (e.g. "that he did not regard military personnel as possessing any constitutional rights") was sufficient by itself to sustain a challenge for cause.[59] Yet the CMA was troubled by the Admiral's statements about a "likelihood that some offense has been committed" and that the presumption of innocence lasts only until the introduction of inculpatory evidence.[60] "Expressions of opinion of this kind indicate a frame of mind unwilling and unprepared to weigh the evidence impartially."[61] As such, the Admiral's explanations and equivocations on voir dire notwithstanding, the appellate court reversed the conviction.

The similarities between LTJG Woods's case and *Deain* are remarkable. In both cases, courts-martial were presided over by career military officers who were under the mistaken belief that military members do not have constitutional protection of their civil rights. In both cases, the senior member made pre-trial statements antithetical to the presumption of innocence and the burden of proof. And in both cases, the senior member offered explanations and equivocations on voir dire. The Court found bias in *Deain*, and it should do so here.

Here, the member's own statements on voir dire avowing impartiality are not enough to allay concern because her initial

[59] *Deain*, 5 C.M.A. at 50.
[60] *Id.* at 50-51.
[61] *Id.* at 50.

prejudice was so unequivocal and undercuts two fundamental pillars of due process--the presumption of innocence and the burden of proof. This was not a simple misunderstanding.[62] The court-martial president knew that the "guilty until proven innocent" standard is "just the opposite as in the civilian sector."[63] Yet she believed it was "essential" to the military's mission, noting that those who join the military "give up [their] civil rights."[64] The court-martial president was not merely expressing an opinion, she was sermonizing. Her later declarations of impartiality, no matter how sincere, were not sufficient to ameliorate concern about her bias. The military judge erred by ruling to the contrary.

2. The panel was tainted by implied bias.

Even if this Court defers to the military judge's ruling on actual bias, the conviction should still be overturned because of implied bias. The test for implied bias is focused on the appearance of fairness when viewed through the eyes of a public assumed to be familiar with the military justice system.[65] This is an objective test in which the Court asks whether the risk is too high that "the public will perceive that the accused received something less than a court of fair, impartial

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[62] *Contra Woods*, slip op. at 7.
[63] J.A. at 182.
[64] *Id.*
[65] *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010).

members."[66] A ruling on a challenge based on implied bias is reviewed with less deference than abuse of discretion, but with more deference than de novo review.[67]

Here, the risk is too high that the public will perceive that LTJG Woods was tried by "something less than a court of fair, impartial members."[68] Indeed, the credibility of the military justice system is at stake. The public can presumably forgive a multitude of harsh practices in our system. But here, the convening authority handpicked a senior officer who believes in "guilty until proven innocent" to serve on a court-martial panel. This officer, over defense objection, then served as the court-martial president.

It defies credulity to imagine that, viewed objectively, this circumstance would not raise doubt about the legality, impartiality, and fairness of the tribunal that convicted and sentenced LTJG Woods.

B. The denial of LTJG Woods's right to an unbiased panel was structural error.

Structural errors "involve errors in the trial mechanism so serious that a criminal trial cannot reliably serve its function

[66] *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008).
[67] *Bagstad*, 68 M.J. at 462.
[68] *Townsend*, 65 M.J. at 463.

as a vehicle for determination of guilt or innocence."[69] Often, it is difficult or impossible to assess the harm caused by structural errors.[70] As such, the "harmless error" doctrine does not apply to structural errors. Rather, a new trial is required.

Because impartiality of members is "the sine qua non for a fair court-martial,"[71] the presence of a biased member on the panel undermines the fundamental reliability of a trial's outcome. Moreover, the harm caused by a biased member is impossible to assess because members' deliberations are inviolable.[72] As such, the U.S. Court of Appeals for the Ninth Circuit has expressly stated that the presence of a biased juror cannot be harmless.[73] Likewise, this Court has not traditionally tested for prejudice when it finds member bias.[74] Accordingly, this Court should treat the error in this case as structural.

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[69] *United States v. Brooks*, 66 M.J. 221, 223 (C.A.A.F. 2008) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)) (internal quotation marks omitted).
[70] *Brooks*, 66 M.J. at 223 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006)).
[71] *Terry*, 64 M.J. at 301 (C.A.A.F. 2007) (quotation marks and citation omitted).
[72] M.R.E. 606.
[73] *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998).
[74] *See, e.g.*, *Nash*, 71 M.J. at 89-90 (overturning the conviction without testing for prejudice in an actual-bias case); *United States v. Moreno*, 63 M.J. 129, 133-35, 143 (C.A.A.F. 2006) (ordering a rehearing without testing for prejudice in an implied-bias case).

But even if the harmless error doctrine were applicable in this case, the burden would still be on the Government to prove beyond a reasonable doubt that the error was harmless.[75] The Government cannot meet that burden because it cannot pierce the members' deliberations.[76] LTJG Woods's conviction should therefore be reversed.

Conclusion

CAPT Villalobos's beliefs about "guilty before proven innocent" are antithetical to the presumption of innocence and the burden of proof. Her statements evince a mindset unprepared to weigh the evidence impartially. The fact that she was allowed to stay on the panel over defense objection undermines the substantive fairness of LTJG Woods's trial, as well as the appearance of fairness. This Court should therefore set aside the findings and sentence, and remand the case so that LTJG Woods can be tried by an untainted panel.

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[75] *See United States v. Bahr*, 33 M.J. 228, 231 (C.M.A. 1991) (explaining that the burden is on the government to prove harmlessness when the appellant has been denied a constitutional right).

[76] M.R.E. 606.

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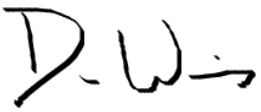

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I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on January 7, 2015.

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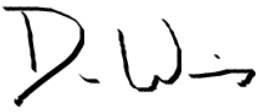

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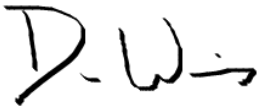

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