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	REPLY 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:

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 the Case

This Court granted LTJG Woods's petition for review on December 8, 2014. LTJG Woods filed his brief on January 7, 2015. The Government answered on February 6, 2015.

Argument

A. The defense agrees with the Government that this Court should give no deference to the military judge's implied-bias analysis.

In its brief, the Government urges this Court to conduct a de novo review of the military judge's ruling on implied bias.[1]

[1] Govt. Br. 17.

The defense agrees that if this Court reaches the implied-bias issue, it would be appropriate to review de novo.

Implied bias involves a question of law.[2] The analysis involves application of an objective standard, and does not hinge on determinations of credibility.[3] As such, there is little reason to defer to the trial judge's analysis. Moreover, it is unlikely that de novo review of implied-bias rulings will have the practical effect of upsetting the finality of a great many courts-martial because the doctrine of implied bias is invoked sparingly.[4]

Even if this Court declines the Government's invitation to adopt de novo review as the standard for all implied-bias cases, de novo review is still appropriate in this particular case. After all, "deference is warranted only when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts."[5] Here, the military judge's ruling focuses on his observations of the challenged member's demeanor and credibility.[6] While this is a crucial

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[2] *See United States v. Wood*, 299 U.S. 123, 133 (1936) (noting that implied bias is a "matter of law").
[3] *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007).
[4] *But see United States v. Lavender*, 46 M.J. 485, 489-90 (C.A.A.F. 1997) (Effron, J., concurring) (suggesting that unique features of military law justify a more robust application of the implied-bias doctrine).
[5] *Briggs*, 64 M.J. at 287.
[6] J.A. at 99-100, 105.

factor in determining actual bias, it is all but irrelevant in the objective test for implied bias.

The military judge did not address whether most people in the challenged member's situation would be biased, nor did he address the effect that allowing the challenged member to remain on the panel would have on the public's perception of fairness in the military justice system. Thus, while the military judge did say he was "bearing in mind again the liberal grant mandate and actual or implied bias,"[7] he neither enunciated the test for implied bias nor made findings of fact that would be relevant to an implied-bias analysis. Accordingly, no deference is warranted. This Court should review de novo if it reaches the implied-bias issue.

B. There is no need for the change in the law that the Government is asking for.

The Government insists that the test for implied bias is "confusing" and should therefore be abandoned.[8] Central to this argument is the contention that although this Court has repeatedly said the the implied-bias test is an objective test, "it is in fact subjective."[9] On this point, the Government is wrong.

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[7] J.A. at 100.
[8] Govt. Br. 24.
[9] Govt. Br. 22.

The test for implied bias does not require a judge to take a public-opinion survey to determine what individual members of the public *actually* –- i.e. subjectively -- think about the military justice system. Rather, the test for implied bias calls for the judge to employ a legal fiction: a ***hypothetical*** public assumed to be familiar with the military justice system.[10]

There is nothing particularly novel about this legal fiction. Indeed, the test for implied bias is a close cousin to the "reasonable person" standard, which is the foremost exemplar of an objective standard in Anglo-American jurisprudence. Like the "public" in the implied-bias test, the "reasonable person" is hypothetical –- a legal fiction that is useful as an objective benchmark.[11] Is the concept of the "reasonable person" confusing? To an extent; that's why it takes the whole first year of law school to come to grips with. Likewise, the hypothetical "public" of the implied-bias test may not be immediately intuitive to laymen. But that does not mean trained practitioners should jettison a useful legal fiction in favor of the nose-counting "most people" standard that the Government argues for.

Accordingly, the Government's attempt to problematize the implied-bias test falls flat. The Government says, "there are

[10] *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010).
[11] *See Black's Law Dictionary* 1457 (10th ed. 2014) (defining "reasonable person").

members of the public who may always find military justice proceedings unfair."[12] Be that as it may, the implied-bias test is not concerned with what actual members of the public may or may not believe.[13] The hypothetical "public" -- like the "reasonable person" -- is presumably free of such unbending prejudices and can view each case in an objective manner on its own merits. Yet the Government complains that the implied-bias test does not provide guidance on "where in the public courts should look to."[14] The answer is simple: courts should look nowhere in the actual public, neither to the public as a whole nor to a subset within it. Rather, the courts should employ a legal fiction.[15] The Government asks:

> Should [the courts] look to the public that has recently viewed unfavorable news on military justice with similarities to the member in question?[16]

No, the courts should look to a hypothetical public assumed to be familiar with the military justice system; no more, no less.[17] This concept is not as problematic as the Government's brief makes it out to be.

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[12] Gov. Br. 22.
[13] *See Bagstad*, 68 M.J. at 462 (explaining that the "public" is hypothetical and assumed to be familiar with the military justice system).
[14] Govt. Br. 22.
[15] *See Bagstad*, 68 M.J. at 462.
[16] Govt. Br. 22.
[17] *Bagstad*, 68 M.J. at 462.

It is especially hard to credit the Government's assertion that judges are befuddled by the implied-bias standard's focus on the appearance of fairness.[18] Canon 2 of the Code of Conduct for United States Judges says, "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities." Thus, in both professional and personal conduct, judges are constantly asked to consider whether "reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired."[19] If judges can apply this standard to themselves when determining whether to hear a case, it should be no great leap to apply a similar standard in determining whether a challenged court-martial member should hear a case.

The Government asks not for a clarification of the law, but a change in the law. The Government asks this Court to depart from an unbroken line of precedent,[20] and replace it with the

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[18] Govt. Br. 24.
[19] Code of Conduct for United States Judges canon 2A cmt. (Mar. 20, 2014).
[20] *Bagstad*, 68 M.J. at 462; *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008); *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008); *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008); *Briggs*, 64 M.J. at 286; *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007); *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004); *United States v. Downing*, 56 M.J. 419, 423 (C.A.A.F. 2002); *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000); *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998).

rationale from a Supreme Court concurrence written in 1982,[21] back when the Supreme Court didn't even have certiorari jurisdiction over military cases. The Government's proposed test for implied bias would substantively limit the already narrow doctrine of implied bias. The Government wants a test that simply counts noses, asking whether "most people" in the member's shoes would be prejudiced, without regard to the impact that leaving the member on the panel would have on the public's perception of the military justice system.

The Government's approach is inadvisable because unique features in the military justice system militate against further constraining the already narrow doctrine of implied bias. Unlike in civilian systems, the same official who refers charges also chooses the members. Thus, "the Government has the functional equivalent of an unlimited number of peremptory challenges" while the accused has but one.[22] Moreover, unlike in civilian systems, a military accused is tried by a panel of handpicked superiors rather than a jury of randomly selected peers.[23] "These differences mean that the ability of an accused to shape the composition of a court-martial is relatively

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[21] Govt. Br. 20 (citing *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring)).
[22] *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring).
[23] *United States v. Witham*, 47 M.J. 297, 304 (C.A.A.F. 1997) (Effron, J., concurring).

insignificant compared to the influence of the convening authority and trial counsel who represent the interests of the Government."[24] The liberal grant mandate and the implied-bias doctrine provide a modest bulwark against those features of military law that increase the risk of an accused being denied his right to a panel of impartial members. It would be moving the law in exactly the wrong direction to place further constraints on the already narrow doctrine of implied bias.

If this Court desires to clarify rather than change the law, this Court might consider making the notion of reasonableness explicit in the test, thereby making it abundantly clear that the test is concerned with the objective application of a legal fiction.[25] This would avoid the potential for confusion that the Government simultaneously warns against and falls prey to in this case. Appellant suggests: "The test for implied bias is whether the risk is too high that a reasonable member of the public, familiar with the military justice system, would perceive that the accused received something less than a court of fair, impartial members."

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[24] *United States v. Witham*, 47 M.J. 297, 304 (C.A.A.F. 1997) (Effron, J., concurring).

[25] *See United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001) (identifying "reasonableness" as "a traditional legal standard" that poses no special difficulty for courts in application).

C. In this case, the risk is too high that a hypothetical public, familiar with the military justice system, would perceive that the accused received something less than a court of fair, impartial members.

Having argued for a change in the law concerning implied bias, the Government goes on to apply its preferred test and concludes that there was no implied bias in this case.[26] Yet the Government's brief fails to address the law as it is, rather than how the Government would like it to be. The Government's brief does not attempt to argue that the hypothetical public would have no qualms about allowing CAPT Villalobos to serve as the senior member of LTJG Woods's court-martial.

CAPT Villalobos's beliefs about "guilty before proven innocent" are antithetical to the presumption of innocence and burden of proof. This career officer said it is "essential" to the military's mission that service members at court-martial be held to a standard that is "just the opposite as in the civilian sector" because they have given up their civil rights.[27]

The fact that this officer was handpicked by the convening authority to be the senior member on the panel, and then allowed to stay on the panel over defense objection, undermines the appearance of fairness, the credibility of the military justice system, and the reliability of this trial as a vehicle for determination of guilt or innocence. This Court should

[26] Govt. Br. 24-26.
[27] J.A. at 182.

therefore set aside the findings and sentence, and remand the case so that LTJG Woods can be tried by an impartial panel.

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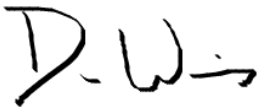

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Certificate of Filing and Service

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 February 12, 2015.

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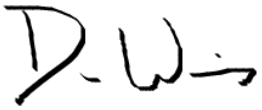

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