IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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Issue Presented

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Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006), because Appellant's approved sentence included a dismissal. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with sitting as a general court-martial convicted Appellant, contrary to his plea, of one specification of aggravated sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.

The Members sentenced Appellant to confinement for five months, total forfeitures, and a dismissal. The Convening Authority approved the sentence as adjudged, but suspended adjudged forfeitures for a period of three months and waived automatic forfeitures contingent upon Appellant establishing an allotment for his spouse. The Convening Authority ordered the remainder of the sentence, except for the dismissal, executed.

On June 26, 2014, the lower court affirmed the findings and sentence. *United States v. Woods*, No. 201300153, 2014 CCA LEXIS 371 (N-M. Crim. Ct. App. June 26, 2014). Appellant filed a Petition for Review, which this Court granted on December 8, 2014.

Statement of Facts

A. Appellant was convicted of sexually assaulting a fellow officer while she was sleeping in a shared hotel room after a command party.

Following a command holiday party, Appellant, the Victim, and two other junior officers——a male and female——stayed overnight in a hotel room with two queen beds. (J.A. 2.) After the party, the Victim fell asleep in the same bed as the other female. (J.A. 2.)

Later that night, she awoke and felt someone putting their hand into her underwear, and then in and out of her vagina. (J.A. 2-3.) Because she had been in deep sleep, it took her several moments to realize she was being touched. (J.A. 3.)

She rolled over and saw Appellant lying next to her. (J.A. 3.) As she sat up, Appellant touched her shoulder and asked if she was okay. (J.A. 3.) The Victim brushed Appellant's hand away, and went into the bathroom. (J.A. 3.) She wanted to leave, but felt too intoxicated to drive and did not want to leave the other female in the room with Appellant. (J.A. 3.)

The next day, Appellant and the Victim exchanged several text messages where she complained about his "touchy hands," and he said he was "sorry about that" and wanted to keep her trust. (J.A. 3.)

B. CAPT Villalobos' answers on her member questionnaire evidenced her unfamiliarity of military justice standards and the court-martial process.

CAPT Villalobos was the senior member detailed to Appellant's court-martial. (General Court-Martial Amending Order 1I-11 dated Dec. 11, 2012.) Prior to arriving for duty as a member, she completed a member questionnaire. (J.A. 182.) In response to Question 20 on that questionnaire, which read "What is your opinion of the military's criminal justice system?", Captain (CAPT) Villalobos wrote:

> There is not a perfect system, and I understand why the enforcement of "you are guilty until proven innocent." (just the opposite of the civilian sector) is essential because the military needs to be held to a higher standard 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 and give up your civil rights.

(J.A. 182.)

C. During *voir dire* by the Government, CAPT Villalobos stated she would follow the Judge's instructions, and understood that Appellant was presumed innocent and could only be convicted if the Government proved guilt beyond a reasonable doubt.

Trial Counsel, Trial Defense Counsel and the Military Judge all questioned CAPT Villalobos extensively during *voir dire*.

(J.A. 71-88.) Trial Counsel asked her, "If [the Military Judge] advises you that the standard for proof is that Lieutenant [Junior Grade] Woods is, in fact, innocent until proven guilty, and he's innocent as he sits here right now and that it's the government's burden to prove guilty beyond a reasonable doubt, could you follow the judge's instruction on that?" (J.A. 74.) CAPT Villalobos responded, "Yes." (J.A. 74.)

Trial Counsel asked CAPT Villalobos "[W]ould you also be able to follow the instruction that the burden of proof never shifts to the accused. The government always retains the burden of proof." (J.A. 74.) CAPT Villalobos replied, "Yes." (J.A. 74.)

D. During *voir dire* by Trial Defense Counsel, CAPT Villalobos explained she had no prior experience with courts-martial. She also explained her idea about the "guilty until proven innocent" originated in colloquial conversations with her husband. Defense challenged her for cause.

Trial Defense Counsel then conducted *voir dire* of CAPT Villalobos. (J.A. 78-86.) Trial Defense Counsel asked what she "meant by" her response to Question 20 on her questionnaire. (J.A. 79.) CAPT Villalobos responded that this idea had originated from discussions she had with her husband, a member of Army Special Forces. (J.A. 79.) She stated:

> I've never dealt officially in a court-martial, and have been told "No, this isn't the way it works," and so I understand the rules of the game, and I, you know, I don't have a problem following them. What I

> meant by that is yes, us military think we should be held to a higher standard since our behavior, because you know, we raise our hand, and we are defending our country.

(J.A. 79.)

Trial Defense Counsel asked CAPT Villalobos if she intended to hold Appellant to a higher standard because he was "in a military court." (J.A. 80.) She replied:

> Well, I so do I think we should be held to a higher standard as when we put the uniform on and as we behave and as we go about our business, we should be held to a higher standard . . . . [But o]nce you are in a court of——you know, in a court, a court of law is, you know, then it's up to the parties to——to them to find him to present a case so that we were presented with the facts and see if he's guilty or not.

(J.A. 80.)

CAPT Villalobos further explained to Trial Defense Counsel her views about this "higher standard" of behavior:

> If I see Mr. Smokatellie [sic] and Petty Officer Smokatellie out in the town, I expect that Petty Officer Smokatellie to a higher standard and not get drunk and not act like this or that, you know. That's what I'm talking about as far as like we're held to a higher standard.

(J.A. 81.)

Trial Defense Counsel challenged CAPT Villalobos for cause, stating she was biased based on her answer on the court-martial questionnaire, and her statements that military members should be held to a higher standard. (J.A. 89-91.) Trial Defense Counsel did not specify whether they were challenging CAPT

Villalobos for implied bias or actual bias. (J.A. 91.) Trial Defense Counsel also challenged six other Members for cause. (J.A. 89-99.)

E. The Military Judge granted six of Trial Defense Counsel's challenges for cause, but denied the challenge to CAPT Villalobos. The Judge explicitly considered the liberal grant mandate.

The Military Judge granted challenges for cause for the other six Members, but denied the challenge as to CAPT Villalobos and one other member, Commander (CDR) Smith. (J.A. 99.) The Military Judge explicitly considered the liberal grant mandate, and stated he had examined CAPT Villalobos' answers for actual and implied bias. (J.A. 99.)

The Military Judge stated that although CAPT Villalobos initially had "a misapprehension of what the burden of proof is," he did not find her now-corrected misunderstanding to be disqualifying. (J.A. 99.) He stated:

> I disagree with defense counsel's assessment about her comments relating to holding people in uniform to a higher standard. I did not find that they were related to burdens of proof or the allocation of burdens of proof in courts-martial or civilian trials. I think in the full context of her answers she——it was clear that she was discussing expectations of officers and Petty Officers and members of the service generally...

(J.A. 100.) The Military Judge specifically found CAPT Villalobos "credible" when she both acknowledged that she had previously misunderstood the relevant legal standard at a court

martial, and that she could now follow the correct burden of proof upon instructions by the Military Judge. (J.A. 99-100.)

He also found CAPT Villalobos credible when she stated that she had no mental reservations about applying the "guilt beyond a reasonable doubt" standard. (J.A. 100.) He stated that he was convinced that CAPT Villalobos was capable of following instructions and that she was willing to do so. (J.A. 100.)

F. The Military Judge granted, under a theory of implied bias, Trial Defense Counsel's challenge to another member.

In considering and granting Trial Defense Counsel's implied bias challenge against Lieutenant Commander (LCDR) Kern, the Military Judge articulated his understanding of the standard for implied bias:

> I am going to grant the defense's challenge with respect to Lieutenant Commander Kern mostly under the theory of implied bias, having been in a position to work so closely with the trial counsel and received so much legal advice from trial counsel in the context of his job in law enforcement. This is an officer who truly has spent the great weight of his career in law enforcement and while that by itself certainly isn't qualifying, I think that the perception that's created when that fact is combined with a good amount of reliance on trial counsel for legal advice in the execution of those duties in his recent past, does create an issue of implied bias, so I am going to grant the defense's challenge there.

(J.A. 101-102.)

G. The Military Judge reconsidered and reaffirmed his ruling on CAPT Villalobos.

After the Military Judge completed his articulation of his other rulings and noted that the Government would need to find additional new members as they had fallen below quorum, Trial Defense Counsel requested the Judge reconsider the ruling on CAPT Villalobos. (J.A. 103-04, 106-07.) The Military Judge reaffirmed his ruling. (J.A. 105-08.) He cited his personal observations and assessment of her demeanor and credibility:

> ...if the member's questionnaire were a civics quiz, I'd be more inclined to [agree]. ...[O]ne of the things that impressed me the most about Captain Villalobos...was her temperament. I observed her temperament here in court to be quite moderate and judicious actually, and she seemed to acknowledge... that her initial understanding about the allocation of burdens of proof in a court-martial was erroneous. That wasn't something that she seemed to be too startled by, the fact that she had gotten that wrong on the initial questionnaire. When I explained the error in her understanding to her, she seemed to readily accept the fact that she was wrong about that and to readily express an unreserved willingness to consider this case in accordance with my instructions including those concerning the burden of proof, and so even though she was incorrect initially...I was impressed with her temperament and her ability to be thoughtful about what would be required of her, and I was convinced by her demeanor in court during my questioning and the questioning of counsel that she was more than up to the task of listening to the evidence in this case and applying the law as I give it to her, and I'm going to adhere to my decision that she's an appropriate member in this case.

(J.A. 105.) He further elaborated:

> There's no doubt but that she arrived at the court-martial with a misapprehension about ... what the law

> is at a court-martial. In my mind, that's not disqualifying ... I think it's just evidence that this dentist didn't know what the law was, so I'm convinced that she's going to fairly apply the law as I give it to her ...

(J.A. 107.)

H. CAPT Villalobos asked multiple questions throughout the court-martial that indicated she was able to maintain an open mind during trial and presentation of evidence.

During court-martial the Members, including CAPT Villalobos, posed a variety of questions to the witnesses. (J.A. 115-161, 190-202.) CAPT Villalobos' questions included asking the Victim whether Appellant had ever previously told her that he was attracted to her, and why she did not move to another friend's hotel room down the hall after the incident occurred. (J.A. 190, 191.) CAPT Villalobos also requested another witness, in the room the night of the incident, be asked whether she witnessed Appellant flirt with the Victim, whether the Victim mentioned that Appellant was sexually interested in her, and why she got out of bed at 0300 to put on her jeans.[1] (J.A. 131, 133, 134.)

She asked Appellant how many alcoholic drinks he had that evening, and why he did not get into the next bed over where another male lieutenant was sleeping. (J.A. 137-138.) She also asked an expert witness whether he had treated patients

[1] The second and third of these questions were not asked as the Military Judge deemed them irrelevant.

suffering from sleep disorders, whether it was possible that the Victim could have confused the reality of being touched by Appellant with a possible dream, and whether Appellant could have been sleepwalking when he touched the Victim. (J.A. 197.)

Summary of Argument

CAPT Villalobos had neither actual nor implied bias. The Military Judge articulated that he had considered the liberal grant mandate before denying the challenge to CAPT Villalobos. The Military Judge's findings of fact are supported by the Record, and his observations of her credibility are due deference: CAPT Villalobos arrived at the court-martial with an incorrect understanding of the burden of proof; she had no mental reservations in applying the correct "guilt beyond a reasonable doubt" standard; and, her comments relating to holding service members to a higher standard were not related to standards of proof in court, but rather were her expectations for standard of behavior of servicemembers in daily life.

CAPT Villalobos' presence on the members panel also posed no threat of implied bias, as most people in similar circumstances as her would not be prejudiced. Objectively viewed, any person in similar circumstances——that is, holding servicemembers to higher standards of behavior and previously under a misapprehension of the law, but now educated and correctly instructed on the standard of proof——would not be

biased under R.C.M. 912(f)(1)(N). Her initial misunderstanding of the law likely affects many military court-martial and jury members. Furthermore, no factors are present to suggest implied bias against Appellant or his misconduct, such as a close personal relationship, involvement in law enforcement, or other situational factors.

Argument

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE CHALLENGE FOR CAUSE. CAPT VILLALOBOS WAS FULLY REHABILITATED DURING *VOIR DIRE*, AND THERE WAS NO ACTUAL OR IMPLIED BIAS.

A. The Military Judge did not abuse his discretion in finding that CAPT Villalobos was fully rehabilitated and had no actual bias.

A military judge's denial of a challenge for cause for actual bias may not be overturned by this Court unless there is a clear abuse of discretion in the military judge's application of the liberal-grant policy. *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F 2000) (citing *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993)).

1. The Military Judge's findings of fact are not clearly erroneous, and his carefully documented findings on credibility support the finding of no actual bias.

A "military judge is given great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged

member." *Napolitano,* 53 M.J. at 166 (citing *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)). Actual bias is personal bias that 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).

The Military Judge stated that he had evaluated CAPT Villalobos' demeanor as she answered questions, and found her to be credible when she stated that she had previously been under a misapprehension of the burden of proof standard, and when she stated that she had no mental reservations about applying the correct "guilt beyond a reasonable doubt" standard. (J.A. 100-02.)

The Military Judge also found that CAPT Villalobos' comments related to holding service members to a higher standard were not related to the burden of proof, but rather were statements about holding service members to a higher standard of public decorum and behavior. (J.A. 100.) These findings are clearly supported by CAPT Villalobos' answers on *voir dire*, specifically when she stated during *voir dire* questioning by Trial Defense Counsel that, "If I see Mr. Smokatellie [sic] and Petty Officer Smokatellie out in the town, I expect that Petty Officer Smokatellie to a higher standard and not get drunk and not act like this or that, you know. That's what I'm talking about as far as like we're held to a higher standard." (J.A.

81.)

Appellant's argument urges this Court to adopt a *per se* and binary test which would require members to correctly enunciate the legal standard before instruction, or otherwise be subject to removal for cause. But court-martial members seldom express themselves with the legal precision of lawyers, and often use colloquialisms and "small talk" in the court-room until instructed otherwise. From CAPT Villalobos' hypothetical and colloquial scenario, her views were simply statements of a non-lawyer Navy Captain expressing her expectations for how fellow service members should represent the Navy and their country.

CAPT Villalobos stated that she had no prior experience with a court-martial, and had no problem following the rules as instructed. (J.A. 79.) She affirmed that she would follow the Military Judge's instructions, and affirmed that Appellant was innocent unless and until the Government proved that he was guilty beyond a reasonable doubt. (J.A. 74.) She acknowledged that she understood that the burden of proof was always on the Government, and that she would follow the instructions to hold the government to that standard. (J.A. 74.)

2. The Military Judge did not err in his conclusions of law.

Contrary to Appellant's characterization, many of the Military Judge's Findings of Fact came from narrative answers

made by CAPT Villalobos. Indeed, many derived from *voir dire* by Trial Defense Counsel. (J.A. 78-86.)

CAPT Villalobos' answers confirmed that she had not fully understood the court-martial process, but her misunderstanding was corrected after instructions by the Military Judge, as well as questions from Trial Counsel and Trial Defense Counsel. (J.A. 78-86.) This fully supports the Military Judge's conclusion that she had no bias against Appellant or his case, but simply needed to be educated on the proper standards at a court-martial. (J.A. 105.)

Furthermore, her revealing "Petty Officer Smokatellie" illustration frames her "higher standard" comments as personal expectations of moral conduct and public behavior. (J.A. 81.) CAPT Villalobos, instructed and empanelled Member, had no misperception as to the burden of proof in criminal court.

Appellant relies on *United States v. Nash* in arguing that the Military Judge's *voir dire* of CAPT Villalobos was ineffectual and, more importantly, that is the only portion of her *voir dire* that this Court should examine. (Appellant's Br. 9-10 (citing *United States v. Nash,* 71 M.J. 83 (C.A.A.F. 2012)).) But the facts of *Nash* make it easily distinguishable from the case at hand. In *Nash*, during trial on the merits, a member asked the victim's mother: "Do you think a pedophile can be rehabilitated?" *Nash*, 71 M.J. at 85. The military judge

attempted to rehabilitate the member by asking a series of *voir dire* questions, including "And you just wanted to see if that would give you some insight into her credibility as a witness? Is that a fair statement?," "So the question wasn't an indication that you had determined that Staff Sergeant Nash might be a pedophile, but to try to knock her out of her naïveté that you thought she might be experiencing?", and several other leading questions. *Id.* at 86. No other *voir dire* was conducted by either the trial or defense counsel.

The *Nash* court determined that the colloquy resulting from the military judge's questions was ineffectual, as his questions were primarily leading——*i.e.*, his questions were feeding the member the "right" answers——and that, the "discussion did not relieve the concern that MGySgt S had made up his mind because he did not state a clear rationale for asking the question." *Id.* at 89. Although the service court set aside the conviction, on these facts, finding they constituted "implied bias," this Court in *Nash* found that the judge should have excused the same member for actual bias. *Id.* at 89-90.

Unlike the member in *Nash*, CAPT Villalobos during *voir dire* explained to Trial Defense Counsel that she had no prior experience with courts-martial, that her misapprehensions had been corrected, as well as that she was ready, willing and able to follow the instructions of the Military Judge on the burden

of proof. (J.A. 79-80.) She clarified that her belief that service members should be held to a higher standard referred to their behavior in society, and not used as a legal burden of proof. (J.A. 81.)

Moreover, unlike the member in *Nash*, whose mid-trial question indicated he had already concluded that the *Nash* appellant was guilty, CAPT Villalobos here asked questions throughout trial that indicated she was seeking a better understanding the evidence of the case, and kept an open mind throughout trial. Her questions to the expert——regarding whether the Victim could have dreamed that Appellant had touched her or whether Appellant could have unintentionally touched the Victim while experiencing an incident of sleepwalking—— demonstrate that she was attempting to ascertain whether the government is meeting its burden of proof. (J.A. 145, 147, 197, 201.) In other words, whereas the *Nash* member's question could have indicated he was already thinking about sentencing, CAPT Villalobos' questions all indicated that she was still attempting to determine what occurred the night of the alleged assault, well through the late stages of the Defense case on the merits.

Thus, CAPT Villalobos showed that she was capable of following the law and instructions given by the Military Judge, that she actually did follow those instructions, and that she

held no actual bias in Appellant's case.

B. Examined objectively, CAPT Villalobos had no implied bias because most people in the same position as her would not be prejudiced.

1. The standard of review for a military judge's ruling on implied bias should be reviewed *de novo*.

This Court has previously stated that a military judge's decision on whether to grant a challenge for cause based on implied bias is reviewed with less deference than abuse of discretion, but more deference than *de novo* review. *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citations omitted).

However, this Court should now adopt the test used by other federal courts——that is, implied bias is reviewed *de novo*. *Caterpillar Inc. v. Sturman Indus,* 387 F.3d 1358, 1367 (Fed. Cir. 2004) ("[I]n cases of implied bias...whether a juror's partiality may be presumed from the circumstances is a question of law, which an appellate court reviews de novo); *Skaggs v. Otis Elevator Co.,* 164 F.3d 511, 517 (10th Cir. 1998) ("The determination of implied bias is a question of law reviewed de novo."); *Fields v. Brown*, 503 F.3d 755, 770 (9th Cir. 2007)("Review is *de novo* because implied bias is a mixed question of law and fact.")

2. Implied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced.

The implied bias test has been enunciated by this Court in varying ways from case to case and year to year. When stated precisely, it asks whether most people, in the same position as the court member, would be prejudiced; if so, such members should be excused. *See United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); *United States v. Briggs,* 64 M.J. 285, 287 (C.A.A.F. 2007) (explicitly considering circumstances of member but implicitly concluding that any member in those circumstances would be biased); *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006) (same); *Warden,* 51 M.J. 78 (same).

The test for implied bias is an objective one. *Moreno*, 63 M.J. at 134; *see also United States v. Bragg*, 66 M.J. 325, 326-27 (C.A.A.F. 2008). The burden of persuasion rests with the party making the challenge. R.C.M. 912(f)(3); *see also United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

In typical implied bias cases, but not all, potential bias is identified at the beginning of trial, where the member may have some relationship with an aspect of the trial. Such a relationship includes: (a) some substantial emotional involvement, *United States v. Clay*, 64 M.J. 274, 278 (C.A.A.F. 2007) (moral convictions and harsh punishment for rape); (b) close personal ties with someone who was a victim of the same or

similar crime before the court, *United States v. Terry*, 64 M.J. 295, 305 (C.A.A.F. 2007) (ex-girlfriend was raped); or, (c) a close relationship with one of the parties, witnesses, or another member. *Downing*, 56 M.J. at 422-23 (member knew trial counsel); *Leonard*, 63 M.J. at 403 (member's professional relationship with the victim was one of trust); *Bagstad*, 68 M.J. at 460 (senior reporting officer of another member).

"[W]hen there is no actual bias, implied bias should be invoked rarely." *Warden*, 51 M.J. at 81-82 (citation and quotation omitted). Courts have found that the "doctrine of implied bias should be reserved for 'exceptional situations' in which objective circumstances cast concrete doubt on the impartiality of a juror." *United States v. Torres,* 128 F.3d 38, 46 (2d Cir. 1997)(citing *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring)).

3. <u>This Court has provided multiple, inconsistent, implied bias tests over the years</u>.

Implied bias, at its core, is a judicially-created test that implements the "fair and impartial" call by applying an objective test, easily reviewable by appellate courts. It allows dismissal of members where, in the absence of actual bias, most people in the same circumstances as the member would nonetheless be prejudiced. *Moreno*, 63 M.J. at 129; *Briggs*, 64 M.J. at 287; *Leonard*, 63 M.J. at 402; *Warden*, 51 M.J. at 81.

Justice O'Connor described an identical Federal test for implied bias in terms consistent with what military courts, at times, have applied. It is a test that is easily reviewable on appeal, simple for trial judges and practitioners to understand, and applies the objective test of "most people in identical circumstances." *Smith,* 455 U.S. at 222 (O'Connor, J., concurring).

This Court sometimes describes the objective lens and the implied bias test separately. *See Bagstad*, 68 M.J. at 462; *see also Bragg*, 66 M.J. at 326-27; *see also Briggs*, 64 M.J. at 286; *see also United States v. Strand*, 59 M.J. 455, 458-59 (C.A.A.F. 2004). The *Moreno* court, however, combined the two, stating: "Viewing the circumstances through the eyes of the public and focusing on the perception or appearance of fairness in the military justice system, we ask whether, despite a disclaimer of bias, most people in the same position as the court member would be prejudiced." *Moreno*, 63 M.J. at 134 (citing *Napolitano*, 53 M.J. at 167, and *Warden*, 51 M.J. at 81.)

A year later, the *Terry* court combined the objective lens with the implied bias test itself, yet broke the analysis into two seemingly distinct questions:

> Here, the military judge's privileged position at trial is less important because the test for implied bias is objective, and asks whether, in the eyes of the public, the challenged *member's circumstances do injury to the "perception of appearance of fairness in*

> *the military justice system."* In considering this question, courts *also* consider whether "most people in the same position would be prejudiced [i.e. biased]."

Terry, 64 M.J. at 302 (internal citations omitted) (emphasis added). With the *Terry* variation, the implied bias test that "most people in the same position would be prejudiced" became not "the" test, but simply an additional consideration.

Still later, this Court created a test within a test, asking whether "most people in the same position would be prejudiced", and then using that determination to evaluate whether the challenged member's circumstances would injure the public perception of the fairness of the military justice system:

> [T]he test for implied bias is objective, and asks whether, in the eyes of the public, the challenged member's circumstances do injury to the 'perception of appearance of fairness in the military justice system. In making this objective evaluation, we ask whether most members in the same position as [the member] would be prejudiced or biased.'"

United States v. Albaaj, 65 M.J. 167, 171 (C.A.A.F. 2007).

4. In the interest of predictability, this Court should consolidate the disparate implied bias tests, and announce that the test is whether "objectively, despite no actual bias, most members in the same position as the member would be prejudiced or biased." Moreover, this Court should announce that "appearance of fairness" is the goal that R.C.M. 912(f)(1)(N)'s actual and implied bias tests accomplish, but is not the test itself.

The version many judges apply asks how a member of the public might feel, rather than objectively looking to whether any reasonable member in the same circumstances would be biased. This test relies on a version of the implied bias test that is not susceptible to clear, consistent appellate review. And while it calls itself an "objective" test, it is in fact subjective. *See, e.g. Bagstad*, 68 M.J. 460; *United States v. Martinez*, 67 M.J. 59 (C.A.A.F. 2008); *Albaaj*, 65 M.J. 167. Indeed, there are members of the public who may always find military justice proceedings unfair. Nothing, under this version of the implied bias test, directs judges to where in the public courts should look to. Should they look to the public that has recently viewed unfavorable news on military justice with similarities to the member in question? What if a popular movie excoriating the military justice system as system of "kangaroo courts" has just been aired——would the "public perception" or "most people" tests garner the same result? More importantly, the "public perception" version fails to meet the

precise, reviewable appellate test posed by *Moreno* which implements R.C.M. 912(f)(1)(N), namely whether "most people in the same position as the court member would be prejudiced." *Moreno*, 63 M.J. at 134.

Indeed, the Government can only hypothesize that, after judicially and properly creating an implied bias test to implement R.C.M. 912(f)(1)(N) as an objective equivalent to the actual bias test, courts, inconsistently, combined the language of R.C.M. 912(f)(1)(N) regarding "fairness" and the "public" with the "most people" test itself. But, in combining R.C.M. 912(f)(1)(N) with the objective implied bias test that both implements R.C.M. 912(f)(1)(N) and complements actual bias, courts have created alternate versions of the implied bias test which work only to counteract the purpose behind the objective implied bias test. If "public perception" is the test, then objectively looking to whether a reasonable person in the member's shoes would be biased is pointless. Alternatively, looking to whether "the public" would find it "unfair" if most people were in the member's shoes likewise voids the objective test of the reason for its creation. Implied bias was created to complement actual bias. It should provide a R.C.M. 912(f)(1)(N) basis for dismissing a member, as in Federal courts where, despite a lack of actual bias, most people in identical shoes to the member would nonetheless be biased.

Thus, this Court should apply the objective "most people" test. Multitudes of overlapping but different legal tests are both confusing and counterproductive for both trial practitioners and trial judges, but also for appellate courts. Appellate review is inherently unpredictable unless errors can be reviewed under a single, clear legal test——rather than three different versions purporting to analyze the alleged error.

Thus in the interest of predictability, this Court should consolidate the disparate implied bias tests with a single test which implements the "fairness" rule of R.C.M. 912(f)(1)(N). Implied bias is: "assessed objectively, in the absence of actual bias, nonetheless, most people in the same circumstances as the member would be prejudiced."

5. The Military Judge did not err in finding the CAPT Villalobos posed no threat of implied bias.

The Military Judge correctly found that CAPT Villalobo had no implied bias. Indeed, nothing that CAPT Villalobos testified to during *voir dire* raised any of the typical circumstances that, despite a lack of actual bias, would cause most people to be biased. Unlike LCDR Kern, the challenge to whom the Military Judge granted for implied bias, CAPT Villalobos had no close contact with law enforcement or trial counsel for either personal or work reasons. Neither did she have any personal contact with any of the witnesses or the victim, or have any

personal experience with any similar crimes. Moreover, although more relevant to actual than implied bias, CAPT Villalobos explained her initial statements that service members were "guilty until proven innocent" was a misapprehension, and that her "higher standards" simply meant to convey her feeling that service members should be held to a higher moral standard of personal behavior. (J.A. 74.)

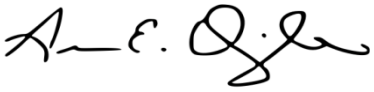
No circumstances relevant to implied bias are implicated merely by holding the view that service members ought to model a higher level of personal conduct. Most people might generally agree with that statement, but that does not mean that most people are disqualified as court-martial members. To clarify her views——again, relevant only to actual bias, and still not indicative of implied bias——CAPT Villalobos stated that if she saw a civilian and a petty officer out in town, she would hold the petty officer to a higher standard of behavior and expect him to not get drunk and act "like this or that." (J.A. 81.)

Furthermore, most other people arriving at the court-martial in similar circumstances to CAPT Villalobos——that is, under a misapprehension of the correct legal standards——would be easily able to fairly and impartially weigh the facts of Appellant's case once they had been adequately educated and instructed on the correct law. During voir dire, CAPT Villalobos stated that upon hearing the Military Judge's

instructions, she understood the law was that the Government had to prove beyond a reasonable doubt that the Appellant was guilty, and that he remained innocent until they did so. (J.A. 74.) Her explanations raise no circumstances that suggest that, despite her lack of actual bias, most other people in her position would be biased. Thus, the Military Judge did not err by denying the challenge for cause to CAPT Villalobos.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.



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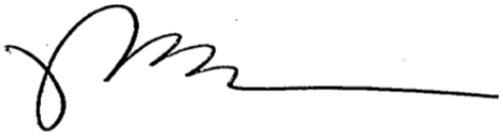

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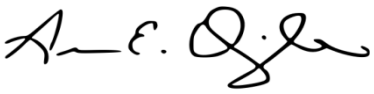

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