IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Matthew A. ROGERS Electrician's Mate Third Class (E-4) United States Coast Guard, Appellant.	APPELLANT'S REPLY BRIEF USCA Dkt. No. 16-0006/CG Crim. App. No. 1391

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

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Argument

Appellant, Electrician's Mate Third Class (EM3) Matthew A. Rogers, United States Coast Guard (USCG), through counsel, hereby replies to the United States' Answer of February 16, 2016.

1. The Government attempts to minimize CDR K's role in sexual assault prevention.

While the Government may attempt to minimize CDR K's role in sexual assault prevention in the Coast Guard's Atlantic Area, the broad scope of her role is undeniable. As they did before the court below and at trial, the Government focuses disproportionately on the fact that one portion of the plan written by CDR K addressed barracks safety concerns like lighting. (Appellee's Brief at 20-21.) While this is accurate, it ignores the other aspects of the broad plan.

The plan CDR K wrote touched on all aspects of sexual assault policy. CDR K testified the plan included indoctrinating incoming personnel on how the Coast Guard's Core Values applied to sexual assault – attempting to prevent members from become perpetrators of assault. (J.A. at 55, 71.) Part of the plan focused on best practices for personal responsibility and safety – to avoid members becoming victims. (J.A. at 72.) Physical security measures like lighting and safety

patrols were included. (J.A. at 55.) Although responding to sexual assault reports was not part of her duties, she did work with the sexual assault response coordinators and victim advocates. (J.A. at 66.) In order to carry out her work she was required to do extensive reading and research about sexual assault. (J.A. 58, 61.)

The Government placed great emphasis on the fact that CDR K did not work directly with assault victims. The problem with CDR K's professional role is not that is not that she is too close to victims. Rather, the problem is she is too involved in the service's response to enormous political pressures to deal harshly with sexual assault. While she asserted she was impartial, the appearance of unfairness remains.

Most of all, CDR K's understanding of the role of alcohol in sexual assault based on her research and training should concern this Court. The Government is dismissive of this concern. Again, the Government's position is that CDR K said she would be impartial and follow the law. However, the Government failed to address the question CDR K asked during deliberations for clarification of the definition of "competence." This shows CDR K's confusion about capacity to consent while intoxicated continued throughout the case. She said she would follow

the law, but she did not understand it. The senior member – who thought of herself as well-read in the area of sexual assault – did not understand the law of consent. She had an erroneous view of the law that persisted.

2. The Government attempts to minimize CDR K's family experience with sexual assault.

The Government emphasizes CDR K's assertions she would be even-handed because she knew an accusation of sexual assault is detrimental. (Appellee's Brief at 31.) While CDR K claimed her brother's crimes made her more careful because she understood the damage a conviction causes, it is important to highlight that CDR K also believes her brother is guilty. She referred to him as a pedophile. (J.A. at 56.) Therefore, the damage to CDR K's family was caused by him – the perpetrator of the offense – not a false accuser. There is a real concern she would be biased against people who commit sexual assaults based on this experience even if she would want to be impartial.

The Government makes much of the differences between the sex crimes EM3 Rogers was charged with and the sex crimes suffered by children in her family, citing to *United States v. Fulton*, 64 M.J. 295 (C.A.A.F. 2007). This is unconvincing. In *Fulton*, the accused was on

trial for larceny and fraud. The challenged member was a victim of a burglary – a much more harrowing and personal crime – in the distant past.

In this case, the Government's theme and theory at trial was that EM3 Rogers was a sexual predator who preyed on a helplessly incapacitated person. (J.A. at 7.) Similarly, CDR K's nieces and her foster children were preyed upon by adult predators against whom they would have also been helpless. *Fulton* is not helpful for the Government because CDR K's family did suffer similar crimes similar to the accusation at trial.

The Government also relies heavily on *United States v. Terry*, 64 M.J. 295 (C.A.A.F. 2007). In *Terry* the challenged member was married to someone who had been assaulted by her father. The crime occurred ten to twenty years before the court-martial and before the member met his wife. The family had reconciled. While CDR K's brother's crimes were a few years past, the consequences of that event still hung on the family. CDR K loves her brother, but she does not see him often because she will not allow him around her own children. (J.A. at 67.) Their relationship is no longer close. (J.A. at 67.)

The Government failed to address CDR K's experience as a foster parent to children who were victims of sexual assault. She specifically referred to the "damage" sexual assault does the victims with regard to her foster children. (J.A. at 57.)

The Government and the military judge place far too much emphasis on CDR K's disclaimers of bias. While she may disclaim bias – and even may believe herself to be unbiased – most people in her position would be biased after so many personal experiences with sexual assault. When testing for implied bias as opposed to actual bias, the question is whether "most people in the same position as the court member would be prejudiced." *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006). Her disclaimers are relevant, but they are not enough to dispel concerns of bias.

3. The Government's argument about the cumulative effect of CDR K's experiences is incorrect.

The Government urges this Court not to consider the cumulative effect of CDR K's life experiences. (Appellee's Brief at 37.) This is counter to law and common sense. An implied bias challenge is to be decided based on "the totality of the circumstances." *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004). While the Government recited

this test, it then urged the Court not to consider the various grounds together if each one was not sufficient to prevail on its own. While each of CDR K's potential sources of bias is concerning, the legal grounds for challenge is her voir dire answers as a whole. It is also common sense that a person's biases are based on their sum of their life experiences, not individual events in isolation.

Here, the senior member of the panel in a sexual assault case was responsible for writing the Atlantic Area's plan to respond to enormous political pressure to stop sexual assault. Furthermore, she also had personal reasons to be biased against sexual assault perpetrators. Her own brother preyed upon her nieces and she fostered children who were also victims of sexual assaults. On top of that, her experiences led her to have a strongly held and erroneous view of the law that was left unresolved. Based on the totality of the circumstances, CDR K should not have been a member in this court-martial. Her presence on the panel undermines the legitimacy of EM3 Roger's convictions and sentence.

Conclusion

For the foregoing reasons and those previously stated, the decision of the Court of Criminal Appeals should be reversed and the findings and sentence should be set aside.

Respectfully submitted,

/s/

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Certificate of Filing and Service

I certify that the foregoing Reply Brief was electronically filed with the Court and served on Appellate Government Counsel on 26 February 2016.

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This Reply Brief complies with the page limitations of Rule 24(c) because it contains less than 7000 words. Using Microsoft Word 2010 with 14-point-Century-Schoolbook font, it contains 1,575 words.

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