IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Nixon KEAGO Midshipman U.S. Navy, Appellant	**REPLY ON BEHALF OF APPELLANT** Crim. App. Dkt. No. 202100008 USCA Dkt. No. 23-0021/NA

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

MATTHEW E. NEELY
Lieutenant Colonel, USMC
Appellate Defense Counsel Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7663
matthew.e.neely.mil@us.navy.mil
CAAF Bar no. 37746

Table of Contents

Table of Authorities

Court of Appeals for the Armed Forces

Other Authorities

Rules For Courts-Martial

Argument

I. The Government's implied bias analysis erroneously considers facts in isolation rather than the totality of circumstances.

The Government suggests that this Court deconstruct the members' answers to apply the implied bias test.[1] For example, the Government separates LCDR Cox's "indelible" experience from the attempted rape of his mother and LCDR Cox's service as a fleet mentor.[2] But reviewing courts test for implied bias based on "the totality of the circumstances"—not based on facts in isolation.[3] Dividing circumstances is the opposite of considering them in their totality and undermines the implied bias test's ability to protect military justice against the perception that it is unfair.[4]

II. The Military Judge should have removed Lieutenant Commander Cox from the panel.

A. The totality of the circumstances demonstrates his implied bias.

The Government's deconstruction of LCDR Cox's answers and reliance on *United States v. Schlamer* is misplaced.[5]

---

[1] *See* Appellee Ans. at 25, 31, 33, 35, 38, 41, 43, 44, 45, 46.
[2] Appellee Ans. at 31-34.
[3] *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004).
[4] *Id*. at 458.
[5] Appellee Ans. at 25 (citing *United States v. Schlamer*, 52 M.J. 80 (C.A.A.F. 1999)).

In *Schlamer*, this Court found a member's answers on a questionnaire were concerning, but that her answers during voir dire rehabilitated her.[6] There, the member "made clear that her answer on the questionnaire meant only that she thought an accused ought to have the opportunity to be heard, but that she would not draw an adverse inference if the accused elected not to testify or present evidence."[7] "[S]he answered the questions [on the questionnaire] from the perspective of a lawmaker, stating what she thought the maximum punishment should be."[8] But in voir dire, her rehabilitative answers were given "unequivocally[.]"[9] "She was not pushed by either the military judge or trial counsel into giving the 'correct' answers on voir dire. To the contrary, she gave thoughtful answers [when she rehabilitated herself], frequently disagreeing with her questioners or explaining her responses."[10] Ultimately, this Court held that "[w]hile those [questionnaire] responses might cause concern if considered standing alone, they would not cause a reasonable person to question the fairness of the proceedings, when considered in the context of the entire record, including her thoughtful and forthright responses on voir dire."[11]

---

[6] *Schlamer*, 52 M.J. at 93-94.
[7] *Id.* at 93.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*. at 94.

Here, LCDR Cox provided thoughtful and forthright responses on voir dire that were *adverse* to his suitability rather than rehabilitative. During individual voir dire, he unequivocally admitted that the topic of sexual violence was "closely" personal to him because of an impactful "series" of conversations he had with his mother.[12] He believed, based on his professional experience, that sexual assault is a prevalent problem at the Naval Academy that needs to be fixed.[13]

Not surprisingly, as he explained during voir dire, LCDR Cox volunteered to be a Fleet Mentor at the Naval Academy quickly after checking in as an instructor.[14] As LCDR Cox saw it, the Fleet Mentor is supposed to, at least in part, fix the Naval Academy's prevalent sexual assault problem.[15] Lieutenant Commander Cox found this experience helping fix the Naval Academy's sexual assault problem "really really rewarding."[16] He admitted that he got involved in programs addressing sexual assault because it was "something [he] wanted to do."[17]

Therefore, unlike *Schlamer*, a member of the public informed of these circumstances would undoubtedly question the fairness of LCDR Cox serving as a

[12] J.A. at 324.
[13] J.A. at 326-27.
[14] J.A. at 317-19.
[15] J.A. at 317-18, 325-27.
[16] J.A. at 317.
[17] J.A. at 317-18.

member on Appellant's panel. Appellant embodied the attempted sexual violence against his mother *and* the sexual assault problem LCDR Cox believed plighted the Naval Academy. A member of the public would reasonably wonder whether LCDR Cox—not one to be uninvolved in fixing the problem—also saw his responsibility as a member as a "really really rewarding" opportunity.[18] Asking LCDR Cox to serve as an impartial member asked too much of him and the system.[19]

B. The Government fails to distinguish *United States v. Woods* and *United States v. Clay* from the circumstances here.[20]

As in *Woods*, LCDR Cox's answers repeatedly reflected a mistaken belief about a "fundamental tenet[]" of criminal law—the burden of proof and presumption of innocence.[21] Lieutenant Commander Cox confessed in his questionnaire to believing "something happened" because the Government charged Appellant with offenses.[22] He doubled down on that position during individual voir dire, again claiming "something had to have happened" because the Government

[18] *See* J.A. at 317.
[19] *See United States v. Daulton*, 45 M.J. 212, 218 (C.A.A.F. 1996) (citing *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995)) (holding the military judge erred in not dismissing a member for implied bias when the member's sister and mother were sexually abused).
[20] Appellee Ans. at 27-29.
[21] *United States v. Woods*, 74 M.J. 238, 244 (C.A.A.F. 2015).
[22] J.A. at 303.

charged Appellant with a crime.[23] **Lieutenant Commander Cox thus repeatedly admitted that he entered the court-martial predisposed to side with the Government**.

His incredibly problematic answers were not isolated. While answering his questionnaire, he explained that his deliberations would be "help[ed]" if he saw "some . . . evidence or witness *to corroborate* [Appellant's] innocence" if Appellant did not testify.[24] He also declared it would be "self-defeating" for Appellant not to prove his innocence.[25] Then, during voir dire, LCDR Cox admitted wanting Appellant to testify about what happened and indicated he would think about his decision not to testify during deliberations.[26] Therefore, despite the Government's assertion to the contrary, this Court should rely on *Woods* because LCDR Cox's answers during voir dire did not "convincingly demonstrate[] a departure" from his mistaken belief that an accused servicemember must be presumed innocent and has a right not to testify—a matter of concern to any reasonable member of the public.[27]

---

[23] J.A. at 322.
[24] J.A. at 303 (emphasis added).
[25] J.A. at 294.
[26] J.A. at 320-21, 328-29.
[27] *See Woods*, 74 M.J. at 244 (finding the Military Judge should have dismissed the member for an implied bias because, in part, her answers during voir dire did not rehabilitate her "mistaken belief as to the burden of proof to be employed in a court-martial" that she articulated on her questionnaire).

Moreover, and just as in *Clay*, all the evidence revealing LCDR Cox's disqualifying biases diluted his other assurances that he could presume Appellant's innocence and respect his right not to testify.[28] Indeed, his other "declarations of impartiality, [however] sincere," were not an adequate remedy.[29] His presence on the panel intolerably strains the public's perception of fairness and impartiality in military justice. Therefore, the Military Judge abused his discretion by failing to consider the totality of LCDR Cox's answers. He should have granted the defense challenge, especially in light of the mandate that military judges considering implied bias must "liberally grant defense challenges."[30] Even if it were a close case, "the challenge should [have] be[en] granted."[31]

C. The Military Judge failed in his duty to investigate for biases and to liberally grant the for-cause challenge. The Record does not support the Government's arguments to the contrary.

The Government argues no objective member would view LCDR Cox as unfair given how long ago his mother's attempted rape was "and the dissimilarity to Appellant's offenses."[32] But we do not know how similar or dissimilar

---

[28] *See United States v. Clay*, 64 M.J. 274, 278 (C.A.A.F. 2007) (finding the member's answers to questions designed to rehabilitate his otherwise obvious inelastic view toward sentencing were insufficient).
[29] *See United States v. Nash*, 71 M.J. 83, 89 (C.A.A.F. 2012) (finding the Military Judge erred for failing to excuse the member for actual bias despite the member's "declarations of impartiality").
[30] *Clay*, 64 M.J. at 277.
[31] *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015).
[32] Appellee Ans. at 31.

Appellant's alleged offenses are to LCDR Cox's mother's experience *because no one ever asked*. All we know is that discussing the incident with his mother indelibly impacted LCDR Cox.[33]

After LCDR Cox agreed that his conversations with his mother about her being kidnapped and nearly raped were "pretty impactful,"[34] the Military Judge neither attempted rehabilitation nor inquired further.[35] Instead, the Military Judge found, "[i]t's not even clear from the voir dire if that incident is at all closely related to this incident that it might have an impact on someone."[36] This was an abuse of the Military Judge's discretion. His conclusion was based on insufficient facts, and he was unable to preclude the possibility that those conversations implicated the implied bias doctrine.[37]

Moreover, the Government uses his mother's incident as a straw man. Lieutenant Commander Cox's conversations with his mother about her experience created LCDR Cox's bias, not the experience itself.[38] Therefore, when the

---

[33] J.A. at 324.
[34] J.A. at 324.
[35] *See* J.A. at 330-31.
[36] J.A. at 473.
[37] *See United States v. Richardson*, 61 M.J. 113, 119-20 (C.A.A.F. 2005) (finding the Military Judge abused his discretion by failing to inquire further during voir dire into relationships between the members and the trial counsel).
[38] J.A. at 324 (Lieutenant Commander Cox agreed that "it was a pretty impactful *conversation*." He then described the conversation as "indelible" rather than his mother's experience itself.) (emphasis added).

Government argues "[n]o objective member of the public would believe [LDCR Cox] was unfair given the five decades between the mother's kidnapping and attempted rape," it is intentionally setting up an argument that is easier to defeat.[39] The real issue is LCDR Cox had a "series" of conversations with his mother about sexual assault that have indelibly "stuck" with him, making the allegations, as he said, more "closely" relatable to him.[40]

No one asked how long this "series" of conversations lasted and when the most recent one occurred. Instead, all we know is that these were impactful conversations for LCDR Cox.[41] The Military Judge not only failed to inquire into the bias but did not even instruct the member not to consider his mother's experiences during trial and deliberations.[42]

D. Like the Government's Answer, the Record does not support the Military Judge's findings. His findings of fact were clearly erroneous.

The Government argues the Military Judge's findings deserve increased

[39] Appellee Ans. at 31.
[40] J.A. at 324.
[41] J.A. at 324.
[42] *See Richardson*, 61 M.J. at 119-20 (finding the military judge erred by failing to inquire into a potential bias "for the purpose of determining whether and how [it] might have implicated the doctrine of implied bias"); *cf. United States v. Rogers*, 75 M.J. 270, 274-75 (C.A.A.F. 2016) (holding that a military judge's failure to specifically instruct a member who offered a firmly held and incorrect opinion about the law to disregard that opinion would cause an objective member of the public to have substantial doubt about the fairness of that member sitting on the court-martial panel because they were not explicitly told to disregard their personal belief).

deference.[43] But when the Military Judge makes clearly erroneous findings of fact, deference is not warranted.[44] Here, the Military Judge made clearly erroneous factual findings.

1. *The Military Judge misconstrued LCDR Cox's belief that something must have happened because the Government charged Appellant with a crime.*

During individual voir dire, LCDR Cox said that because the Government charged Appellant with a crime "means that it is not a simple he said/she said or some other scurrilous—I feel like *something had to have happened*."[45] But the Military Judge found, "[LCDR Cox] indicated that the fact that we're here *may* mean that some sort of event had to have happened but not necessarily an illegal event."[46]

The record does not support the Military Judge's finding. Lieutenant Commander Cox stated that the presence of charges means something more than "scurrilous…had to have happened."[47] The trial counsel, trying to rehabilitate that answer, asked, "do you mean that something illegal had to have happened *even if*

[43] Appellee Ans. at 22-23 (citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *Clay*, 64 M.J. at 277).
[44] *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017); *see Downing*, 56 M.J. at 422 (holding deference is appropriate where there is "a clear signal that the military judge applied the right law" and that law is applied "to the facts").
[45] J.A. at 322 (emphasis added).
[46] J.A. at 474 (emphasis added).
[47] J.A. at 322.

it's not what's charged?"[48] Lieutenant Commander Cox responded, "[p]ossibly."[49] He never indicated that the charge sheet meant something may have happened and that, if something happened, it might have been legal. If anything, LCDR Cox implied he could not presume innocence when he proclaimed he would not "lean one way or the other" while considering the evidence.[50]

2. The Military Judge erroneously found LCDR Cox "might" think about Appellant's decision not to testify during deliberations.

As the Government concedes, "Lieutenant Commander Cox noted several times he wanted to hear from Appellant."[51] He even confessed Appellant's failure to testify "*will* come to mind" during deliberations.[52] But the Military Judge found LCDR Cox "*might* think about it."[53] Not only is the Military Judge's finding of fact unsupported by the Record, but this inconsistency also strikes the heart of LCDR Cox's ability to be fair. Indeed, the totality of LCDR Cox's statements were:

(1) LCDR Cox said, "I do want to hear from Midshipman Keago during the trial, and I do think he should testify;"[54]

---

[48] J.A. at 322 (emphasis added).
[49] J.A. at 322.
[50] J.A. at 322.
[51] Appellee Ans. at 5.
[52] J.A. at 321, 327 (emphasis added).
[53] J.A. at 474 (emphasis added).
[54] J.A. at 320, 328.

(2) LCDR Cox repeatedly said he would "wonder" why Appellant did not testify and assured the Military Judge, "[i]t will come to mind [during deliberations] that he didn't;"[55] and

(3) LCDR Cox did not articulate any reasons why an accused may choose not to testify, elusively asserting, "[t]here's a lot of like possibilities."[56]

The sum of these answers reveals LCDR Cox likely considered Appellant's decision not to testify, and the Military Judge abused his discretion in finding that he "might think about it."[57]

III. The Military Judge should have removed Lieutenant Commander Middlebrook from the panel.

A. The Government waived the argument it makes on appeal regarding LCDR Middlebrook's bias. The trial counsel's concession to the Defense challenge underscores the member's unsuitability.

The trial counsel conceded that he had "no argument" against the trial defense counsel's challenge against LCDR Middlebrook.[58] But on appeal, the Government changed course and now argues the opposite.[59] The Government has waived this argument because it did not make it at trial.[60] This Court should

---

[55] J.A. at 321, 327.
[56] J.A. at 320-21.
[57] J.A. at 474.
[58] J.A. at 466-67.
[59] Appellee Ans. at 35-41.
[60] *See United States v. Schmidt*, 82 M.J. 68, 80 (C.A.A.F. 2022) (Maggs, J., concurring) (citing 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4477 (2d ed. 1992 & Supp. 2021) ("to tell the military judge one thing

therefore hold the Government to its position at trial, where the trial counsel heard the member's answers and observed her demeanor: that there is no argument against the trial defense counsel's challenge to LCDR Middlebrook.[61]

Ultimately, when the Government tells a trial judge that there is no argument against a member's actual and implied bias, then it certainly "appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[62]

B. The Government improperly isolates Lieutenant Commander Middlebrook's answers to apply the implied bias test.

Contrary to the Government's approach at looking to LCDR Middlebrook's statements in isolation, this Court should consider the entire Record regarding the challenge to LCDR Middlebrook.[63] Lieutenant Commander Middlebrook said that the complaining witnesses should be "believe[ed] over disbelie[ved]," that

---

. . . and then . . . assert something else on appeal . . . would go against the general prohibition against taking inconsistent litigation positions."); *See also Hartmann v. Prudential Ins. Co. of Am.*, 9 F.3d 1207, 1212 (7th Cir. 1993) ("Failure to press a point (even if it is mentioned) and to support it with proper argument and authority forfeits it") (internal citations omitted).

[61] *Cf. Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) (approving courts' use of the doctrine of judicial estoppel to preclude changes in position to protect the judicial process's integrity); *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) (identifying one of the policies underlying judicial estoppel doctrine as "preventing internal inconsistency").

[62] R.C.M. 912(f)(1)(N).

[63] Appellee Ans. at 35, 38, 41. The Government writes three separate subsections addressing her implied bias.

Appellant should "automatically" receive a lengthy prison sentence for sexually assaulting multiple women, and that she could not think of a scenario where someone could mistakenly believe another person consented to sexual activity.[64] Her answers, "considered in the context of the entire record," would cause a reasonable person to question the fairness of the proceedings.[65]

C. The Military Judge failed to rehabilitate LCDR Middlebrook's incorrect understanding of consent and mistake of fact as to consent.

The Government, on appeal, argues LCDR Middlebrook properly understood the legal definition of consent, claiming that she is "open-minded."[66] But the Government's argument relies on out-of-context, individual quotes—not her entire answer.[67] The quotes' context reveals LCDR Middlebrook unartfully attempted to explain to trial defense counsel that affirmative consent to sexual activity removes ambiguity about whether consent exists.[68] The trial defense counsel neatly summarized her answer for her:

> TDC: So you believe so a yes removes that ambiguity, that lack of clarity?
>
> Member: Yes.[69]

[64] J.A. at 350-51, 355, 387.
[65] *Schlamer*, 52 M.J. at 94.
[66] Appellee Ans. at 40.
[67] Appellee Ans. at 40.
[68] J.A. at 381.
[69] J.A. at 381.

Lieutenant Commander Middlebrook's answers, read in their entirety, reveal that she does not believe an alleged victim's silence can be mistakenly interpreted as consent.[70] She agreed that "somebody needs to essentially give sort of clear and unequivocal consent for sexual activity."[71] Indeed, her voir dire answer is consistent with her supplemental questionnaire answer: "If it is not a clear yes, then it should be taken as a 'no.'"[72] Thus, LCDR Middlebrook's unequivocal and inherent belief about what constitutes consent leads a reasonable member of the public to question the fairness of including her on the panel.

D. The Military Judge failed to rehabilitate LCDR Middlebrook's incorrect understanding of consent and mistake of fact as to consent.

Even if there is ambiguity as to LCDR Middlebrook's understanding of consent and mistake of fact as to consent, then the Military Judge had a duty to inquire further into it. Yet he did not. Further inquiry was necessary to create a factual record to "demonstrate to an objective observer that notwithstanding [her views on consent], the accused received a fair trial."[73] Therefore, the Military

[70] J.A. at 381.
[71] J.A. at 381.
[72] J.A. at 348.
[73] *See Richardson*, 61 M.J. at 119-20 (finding the Military Judge abused his discretion by failing to inquire further during voir dire into relationships between the members and the trial counsel).

Judge abused his discretion by failing to inquire further into her views on consent.[74]

IV. The Military Judge should have removed Lieutenant Skogerboe from the panel.

Finally, LT Skogerboe's relationship with his wife's recovery from a sexual assault gave him an intimate perspective of the emotional damage sexual assault survivors endure.[75] This experience provoked "a more personal feeling" for LT Skogerboe towards survivors.[76] The mere mention of sexual assault triggers LT Skogerboe.[77] His experience intolerably strains his ability to fairly and impartially deliberate during sentencing after the panel convicted Appellant for similar offenses that caused his wife so much anguish.

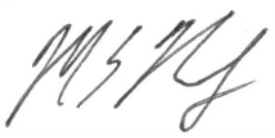
Notably, the Government fails to address LT Skogerboe's implied bias during members' sentencing.[78] Considering this portion of the Record is necessary in light of LT Skogerboe's journey with his wife's recovery. A member of the public, knowing LT Skogerboe's emotional journey with his wife, would question whether LT Skogerboe's sentencing deliberations were fair and impartial while he considered the offenses' psychological impact on the victims.[79] How could he not

---

[74] *See Richardson*, 61 M.J. at 119-20.
[75] J.A. at 439-41.
[76] J.A. at 442.
[77] J.A. at 427.
[78] Appellee Ans. at 44-46.
[79] *See* R.C.M. 1001(b)(4) (discussing proper evidence in aggravation).

be unfairly reminded of his wife as he considered the impact Appellant had on them? The Military Judge's inclusion of LT Skogerboe on the panel over Appellant's challenge for implied bias was outside his range of reasonable options.

Respectfully submitted,



MATTHEW E. NEELY
Lieutenant Colonel, USMC
Appellate Defense Counsel Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7663
matthew.e.neely.mil@us.navy.mil
CAAF Bar no. 37746

Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 24(c) because: This brief contains 3,394 words.

2. This brief complies with the typeface and type style requirements of Rule 37.

Certificate of Filing and Service

I certify that a copy of the foregoing was electronically mailed to the Court and that a copy was electronically delivered to the Director, Appellate Government Division, and to the Director, Administrative Support Division, Navy- Marine Corps Appellate Review Activity, on July 12, 2023.

MATTHEW E. NEELY
Lieutenant Colonel, USMC
Appellate Defense Counsel Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7663
matthew.e.neely.mil@us.navy.mil
CAAF Bar no. 37746