IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellant	**MOTION FOR ORAL ARGUMENT**
v.	Docket No. ARMY MISC 20200735
First Lieutenant (O-2) **SAMUEL B. BADDERS** United States Army Appellee	Tried at Fort Hood, Texas, on 21 January, 15 September, 22-24 September, 19 November 2020, before a general court-martial appointed by the Commander, 1st Cavalry Division, Colonels Douglas K. Watkins and Maureen A. Kohn, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Undersigned appellate defense counsel, pursuant to Rule 25 of this Court's Rules of Practice and Procedure, respectfully request oral argument on behalf of the Appellee, First Lieutenant (1LT) Samuel B. Badders.

This is a Government appeal pursuant to Article 62, Uniform Code of Military Justice [UCMJ]. Counsel request argument on the sole Assignment of Error, which is:

> **WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE GRANTED A MISTRIAL BECAUSE OF TWO NON-PREJUDICIAL EVIDENTIARY ERRORS AND A PANEL MEMBER MEETING WITH OSJA STAFF DURING A RECESS REGARDING A PRESS INQUIRY UNRELATED TO APPELLEE'S COURT-MARTIAL.**

Essential to the Court's consideration of the assigned error is the preliminary issue whether the Court has jurisdiction to hear this Government appeal. Counsel filed a separate Motion to Dismiss for lack of jurisdiction contemporaneously with the Answer. This is a question of first impression in this Court and there is no controlling authority from the Court of Appeals for the Armed Forces or the United States Supreme Court, making oral argument appropriate in this case.

On the merits, there are several complex issues raised regarding actual and apparent unlawful command influence, actual and implied bias of a member, and evidentiary issues. The military judge granted a mistrial based on the cumulative effect of two evidentiary issues plus an implied bias issue. On de novo review of the legal issues, the Court may affirm the military judge's order if there is any valid basis for the mistrial; oral argument will help clarify the relevant facts and legal principles applicable to this case.

Specifically:

1. There is a fundamental disagreement about what the main issue is with respect to the military judge's finding of implied bias. The Government's position is that there was no error in not disclosing the fact that the meeting occurred because no valid underlying challenge for cause existed. (Gov't Reply Br., p. 6-7). We agree with the military judge's conclusion that the circumstances do, in fact, lead to a finding of implied bias on the part of the member. (App. Ex. LXV, p. 23-25, 29-

30). This member met with the SJA, DSJA, and CoJ in the middle of this sexual assault trial to discuss a press release that pertained not only to the SGT EF case, but the 1CD's response to sexual assault in general – "eradicating corrosives." The Government's failure to disclose, especially in combination with their objection to re-opening voir dire, *did* preclude effective voir dire about this issue. *United States v. Modesto*, 43 M.J. 315, 316 (C.A.A.F. 1995);

2. The parties disagree about whether the other party waived an issue. The Government argues that 1LT Badders waived his post-trial claim regarding the failure to re-open voir dire. (Gov't Reply Br., p. 3-4). We respectfully submit that the Government did not present this argument (or anything related to this argument, despite the Government's contention at page 3 that it did so[1]) at the post-trial hearing. Therefore, neither undersigned counsel nor the military judge had an opportunity to flesh out this issue at the post-trial hearing – and because it is a new

[1] As authority, the Government cites App. Ex. XXXVII, but that exhibit is the Defense Motion to Compel Witnesses at the post-trial hearing. Also cited is App. Ex. LXIX, which is the Government's response to the Defense's Supplemental Post-Trial Motion. However, the waiver argument the Government advanced in that document is not the same argument the Government makes on appeal. After the post-trial hearing, the Defense filed a Supplemental Post-trial Motion based on the non-disclosure of the meeting (because they learned of the meeting after the original Motion was filed, the night before the hearing), but the Government's objection was that the issue should have been included in the original Post-trial Motions as opposed to a Supplemental Motion. The Government did not argue in that document that the Defense should have asked the military judge to voir dire on the issue of whether a meeting took place.

and different argument from what the Government argued below, the Government is estopped from raising it now on appeal. *United States v. Carpenter*, 77 M.J. 285, 288 (C.A.A.F. 2018).

3. Another novel argument the Government makes for the first time in its Reply Brief is that the "allegations of evidentiary error essentially amount to a claim that appellee's conviction was factually insufficient," which, according to the Government, is not appropriate to raise via a post-trial motion under Rule for Courts-Martial [R.C.M.] 1104. (Gov't Reply Br., p. 10). First of all, the Government never objected – either in its pleadings or at the post-trial hearing – to the military judge's authority to consider the issues raised in the Motion; the Government simply argued the merits of each claim. Therefore, that claim also is waived.

Secondly, while the Government is correct that R.C.M. 1104 specifically allows the military judge to reconsider rulings that affect the legal sufficiency of the findings, the Government ignores the language of Article 39(a), UCMJ, R.C.M. 915, and case law holding that a military judge is authorized to hold a post-trial hearing and take whatever action is necessary in the interest of justice. This includes acting on errors, not only traditional "legal sufficiency" claims involving a complete lack of evidence on an element, but also issues involving the Government's failure to disclose favorable information and jury misconduct – because those errors *also* affect the legal sufficiency of the findings. *United States v. Webb*, 66 M.J. 89, 91

(C.A.A.F. 2008) (affirming a military judge's new trial order because she properly exercised "her Article 39(a), UCMJ, authority to resolve matters that arise after trial that 'substantially affect the legal sufficiency of any findings of guilty,' R.C.M. 1102(b)(2) [R.C.M. 1104's precursor], based on the post-trial discovery of the trial counsel's failure to provide the defense with evidence that could have been used to impeach" a witness); *United States v. Scaff*, 29 M.J. 60, 65 (C.M.A. 1989) (citing *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988) (legally insufficient evidence); *United States v. Brickey*, 16 M.J. 258 (C.M.A. 1983) (failure to disclose favorable information); *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983) (juror misconduct)).

Third, the Government fails to acknowledge that in order to resolve a claim of evidentiary error, a harm analysis is required. *United States v. Roberson*, 65 M.J. 43, 47–48 (C.A.A.F. 2007) (citations omitted). That analysis includes evaluating the strength of the Government's and the Defense's cases along with the materiality and quality of the evidence. *Id.*

4. Finally, in both its Brief and Reply Brief the Government completely failed to address the military judge's conclusion that the cumulative effect of the *three errors* she identified deprived 1LT Badders of a fair trial. (Gov't Br., p. 48, addressing only the two evidentiary errors without considering the effect of the

implied bias). The Government also did not contest 1LT Badders' arguments in his Answer regarding cumulative error in its Reply Brief.

Oral argument will enable the parties to answer the Court's questions about these and any other issues raised by the pleadings. A thorough examination of the facts and the law is necessary in order to provide the Court with sufficient information to ensure a just resolution of this appeal.

WHEREFORE, counsel for 1LT Badders respectfully request that this Court grant this motion for oral argument.

Respectfully submitted,

[redacted]

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PANEL NO. 4

MOTION FOR ORAL ARGUMENT

GRANTED: _____

DENIED: [redacted]

DATE: 29 Sep 21

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court of Criminal Appeals and the Government Appellate Division on 5 May 2021.

[redacted]

TERRI R. ZIMMERMANN
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