**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES, Appellee | ) | BRIEF ON BEHALF OF APPELLEE |
| | ) | |
| | ) | Crim. App. Dkt. No. 20110935 |
| v. | ) | |
| | ) | **USCA Dkt. No. 14-0457/AR** |
| Sergeant (E-5) | ) | |
| **ERIC R. CASTILLO** | ) | |
| United States Army, | ) | |
| Appellant | ) | |
| | ) | |


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## Index of Brief

## Table of Cases, Statutes, and Other Authorities

**United States Supreme Court**



**United States Court of Appeals for the Armed Forces**

**United States Courts of Appeals**



**Uniform Code of Military Justice**



**Other Statutes, Materials and Regulations**

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| Sergeant (E-5) **ERIC R. CASTILLO** United States Army, Appellant | |

**TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

Granted Issue

WHETHER, UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE IMPLIED BIAS CHALLENGE AGAINST LIEUTENANT COLONEL DS IN LIGHT OF HIS PERSONAL EXPERIENCE AS A SEXUAL ASSAULT VICTIM, HIS DIRECT SUPERVISORY ROLE OVER TWO OTHER MEMBERS, HIS ONGOING RELIANCE ON THE TRIAL COUNSEL FOR MILITARY JUSTICE ADVICE, THE PRESENCE OF FOUR OTHER MEMBERS WHO ALSO RECEIVED MILITARY JUSTICE ASSISTANCE FROM THE TRIAL COUNSEL, AND THE FACT THAT THE PANEL WAS SELECTED EXCLUSIVELY FROM SERGEANT CASTILLO'S BRIGADE.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. §866(b) (hereinafter UCMJ).[1]

[1] UCMJ, Art. 66(b), 10 U.S.C. § 866(b).

The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ.[2]

## Statement of the Case

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of rape by rendering another unconscious, in violation of Article 120, UCMJ, and assault consummated by a battery, in violation of Article 128, UCMJ. The panel sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for two years, and to be discharged from the military with a dishonorable discharge.[3] The convening authority reduced the sentence to confinement to 23 months, and otherwise approved the sentence.[4]

On January 29, 2014, the Army Court summarily affirmed the findings and sentence.[5] On June 5, 2014, this honorable court granted appellant's petition for review.

## Statement of Facts

Following voir dire, appellant challenged LTC DS, along with five additional panel members, for cause.[6] The trial court

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[2] UCMJ, Art. 67(a)(3), 10 U.S.C. § 867(a)(3).
[3] J.A. 205.
[4] J.A. 206. The SJA recommended disapproving one month of confinement to address any concerns about post-trial delay. R. SJAR.
[5] J.A. 1.
[6] J.A. 133-245.

granted appellant's challenge for cause against CW2 Pinnegar pursuant to the liberal grant mandate and denied appellant's additional challenges.[7] Appellant takes issue only with the trial court's denial of his challenge for cause of LTC DS for implied bias.[8] Appellant relies on the combination of five issues to argue that the military judge should have granted his challenge for cause. Additional facts on the five issues on which appellant relies are set forth below.

1. **Experience as a Sexual Assault Victim**

During individual voir dire, LTC DS disclosed that, "twenty, almost thirty years ago," he had been the complainant in a sexual assault by an 18 year old man when he was a child.[9] When asked by appellant's counsel whether this issue would affect his "ability . . . to judge this case," LTC DS responded, "[n]o, I don't see it as the same issue at all."[10]

In addressing this issue as part of his analysis of appellant's challenge of LTC DS for cause, the military judge noted that LTC DS had noted "without prompting," that "there

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[7] J.A. 153. CW2 Pinnegar disclosed during voir dire that his wife had previously been a victim of a sexual assault. J.A. 120-21.
[8] Brief for Appellant (AB) at 6.
[9] J.A. 093-094.
[10] J.A. 094.

would be no effect here and [said that] 'it is not the same issue at all.'"[11]

2. **Direct Supervisory Role over Two Other Members**

LTC DS's battalion command sergeant major, CSM Merriwether, and his battalion S2, CPT Little, served as members of appellant's court-martial panel.[12] LTC DS, who had been in command for approximately 90 days prior to appellant's court-martial, had not known CSM Merriwether prior to taking command, and, at the time of appellant's court-martial, had conducted only initial counseling with CSM Merriwether.[13] Likewise, at the time of appellant's court-martial CPT Little had known LTC DS only since LTC DS assumed battalion command.[14]

The military judge questioned all three members about this command relationship. During individual voir dire, the military judge asked CSM Merriwether whether he would "feel inhibited or restrained in any way in performing [his] duties as a court member, including freely expressing [his] views during deliberations because [LTC DS] is [his] battalion commander?"[15] CSM Merriwether responded that he would not.[16] Likewise, CPT Little indicated that LTC DS's presence on the court-martial

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[11] J.A. 141.
[12] J.A. 045.
[13] J.A. 095-096, 123.
[14] J.A. 111.
[15] J.A. 125.
[16] J.A. 125.

panel would not affect his performance as a court member in any way, to include deliberations.[17] Finally, LTC DS himself indicated that he would not be embarrassed or restrained in any way in performing his duties as a court member should either CSM Merriwether or CPT Little disagree with him during deliberations.[18]

During his discussion of appellant's challenge for cause of LTC DS, the military judge noted that he had "observ[ed] [the] demeanor [of LTC DS, CSM Merriwether, and CPT Little] when I asked them the questions and when counsel asked similar questions [about their command relationship]," and that all three had "credibly disclaimed that they would feel any restraint or discomfort in expressing their views during deliberations if they all three remained on the panel."[19] The military judge further noted that CSM Merriwether was a "very senior NCO, E9," and "selected as a command sergeant major," and that this gave extra weight to the fact that CSM Merriwether would "hold his ground" during deliberations. As to CPT Little, the military judge noted that "even though he's rated by LTC [DS], he very credibly stated that he would not be restrained"

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[17] J.A. 116.
[18] J.A. 097.
[19] J.A. 140-41.

during deliberations if he were to sit on the same court-martial panel as LTC DS.[20]

3. **Ongoing Reliance on the Trial Counsel for Military Justice Advice**

During group voir dire, the military judge asked the panel members, including LTC DS, whether "any member of the panel [has] had any dealings with any of the parties to the trial to include either [the Military Judge] or counsel which might affect [their] performance of duty as a court member in this trial in any way."[21] LTC DS, along with the rest of the panel members, answered in the negative.[22]

The parties and the court questioned LTC DS further about his relationship with the trial counsel during individual voir dire.[23] LTC DS had assumed battalion command approximately 90 days prior to appellant's court-martial.[24] During this time period, and in his capacity as a battalion commander, LTC DS met CPT Sandys, the trial counsel in appellant's case.[25] LTC DS and the trial counsel interacted "once every week or once every other week," with LTC DS personally consulting with the trial

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[20] J.A. 141.
[21] J.A. 045.
[22] J.A. 045.
[23] J.A. 094-096.
[24] J.A. 095.
[25] J.A. 094.

counsel on military justice matters.[26] LTC DS had a favorable view of the trial counsel's advice and reported that he "sometimes . . . agree[d] with [the trial counsel] and sometimes [did] not."[27] None of their interactions had to do with sexual assault cases.[28] Appellant raised the issue of LTC DS's relationship with the trial counsel in his challenge of LTC DS for cause.[29]

In addressing the issue of LTC DS's relationship with the trial counsel, the military judge noted that LTC DS said, "without prompting by anyone," that he "sometimes agrees with [the trial counsel's] advice and sometimes not."[30] The military judge further noted that the relationship between the two had been over a period of three months.[31]

4. **Presence of Four Other Members Who Also Received Military Justice Assistance from the Trial Counsel**

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[26] J.A. 094.
[27] J.A. 094-095.
[28] J.A. 095.
[29] J.A. 139. Appellant raised the issue by noting that his challenge of LTC DS was "nearly identical" to his challenge of LTC Duncan, with the "addition of two issues." J.A. 139. As appellant had challenged LTC Duncan in part due to LTC Duncan's relationship with the trial counsel, the military judge and government counsel recognized that appellant was raising this issue as to LTS DS as well, and addressed the objection as such. The defense ultimately used its preemptory challenge on LTC Duncan. J.A. 146.
[30] J.A. 140.
[31] J.A. 140.

Of the members who ultimately sat on appellant's panel, LTC DS, CSM Merriwether, CSM Felicioni, SGM Dawson and CPT Little reported knowing the trial counsel.[32] Of those members, LTC DS, CSM Merriwether, CSM Felicioni and CPT Little had received military justice assistance from the Trial Counsel.[33] Three reported, to varying degrees, favorable impressions of the trial counsel and/or the advice they had received from trial counsel.[34] CSM Felicioni reported that he had spoken with trial counsel regarding military justice matters without commenting on the quality of the interaction.[35] Appellant challenged each of these members for cause based, in whole or in part, on their relationship with the trial counsel.[36]

At trial, during his argument with regard to another panel member who was ultimately the subject of defense counsel's peremptory challenge, appellant raised the issue of multiple panel members receiving legal advice from the trial counsel. At trial, appellant's counsel couched the issue as an ethical one,

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[32] J.A. 055.
[33] J.A. 094, 123, 078-079, 112. LTC Duncan also received legal advice from the trial counsel. J.A. 102-04. The military judge denied the appellant's challenges for cause with regard to this membeJ.A. J.A. 138. Appellant subsequently exercised his peremptory challenge on LTC Duncan. J.A. 14). As a result, there were only four members in total on the panel, including LTC DS, who received military justice assistance from the trial counsel.
[34] J.A. 094, 124, 115.
[35] J.A. 078-079.
[36] J.A. 139-45.

stating, "[t]he conflict to me both--and I would go so far as to say even as an ethical matter, is so plain that it can't survive the implied bias test that the public can have confidence in the panel, particularly if they return a guilty finding, and a panel where the prosecuting attorney was literally the legal advisor to the jurors."[37] Appellant did not raise the issue, as he does now, of the cumulative effect of the members' relationship with trial counsel.[38] In response to appellant's argument, the military judge addressed each of appellant's challenges individually, in turn, and denied them.[39] The military judge noted that CSM Felicioni did not report receiving military justice advice from the trial counsel, but rather had just been "made aware of certain pending cases."[40] The military judge noted that while CSM Merriwether had spoken to the trial counsel "four or five times" in the approximately four months leading up to appellant's court-martial, some of their interactions "appeared to . . . involve[] administrative matters . . . rather than the rendering of legal advice per se."[41] Finally, the

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[37] J.A. 13.
[38] AB at 6.
[39] The military judge's ruling regarding the trial counsel's relationship with LTC DS is set forth in sub-part 3 of this section, *supra*.
[40] J.A. 143. Appellant did not raise - and the military judge did not address - the issue of CSM Felicioni playing cards with the trial counsel.
[41] J.A. 144.

military judge noted that CPT Little "did not ask for legal advice" from the trial counsel, but rather a "back-brief" on an on-going officer misconduct case.[42] For each of these members, the military judge noted that "an objective observer would not have any substantial doubt" about the fairness of appellant's panel, and that he had considered the liberal grant mandate.[43]

5. **Panel Selected Exclusively from Sergeant Castillo's Brigade**

At trial, appellant did not raise the issue, as he does now, of the panel being selected exclusively from appellant's brigade.[44] As such, the record is not developed as to this issue.

Ultimately, after discussing and considering all of appellant's bases for challenging LTC DS for cause, the military judge found that "viewed objectively through the eyes of the public, an objective observer would not have a substantial doubt" about the "fairness of [appellant's] . . . panel if LTC

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[42] J.A. 145. During individual voir dire, CPT Little indicated that his consultation with the trial counsel on military justice matters was limited to the approximately one month where he was in command of HHC, while the HHC commander was on leave. J.A. 112.

[43] J.A. 143-45.

[44] AB at 6.

DS served as a member," and further noted that he had "considered the liberal grant mandate."[45]

Additional facts necessary for the disposition of the granted issue are set forth below.

## GRANTED ISSUE AND ARGUMENT

WHETHER, UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE IMPLIED BIAS CHALLENGE AGAINST LIEUTENANT COLONEL DS IN LIGHT OF HIS PERSONAL EXPERIENCE AS A SEXUAL ASSAULT VICTIM, HIS DIRECT SUPERVISORY ROLE OVER TWO OTHER MEMBERS, HIS ONGOING RELIANCE ON THE TRIAL COUNSEL FOR MILITARY JUSTICE ADVICE, THE PRESENCE OF FOUR OTHER MEMBERS WHO ALSO RECEIVED MILITARY JUSTICE ASSISTANCE FROM THE TRIAL COUNSEL, AND THE FACT THAT THE PANEL WAS SELECTED EXCLUSIVELY FROM SERGEANT CASTILLO'S BRIGADE.

## Summary of Argument

A close examination of each of the five areas upon which appellant challenges LTC DS demonstrates that none gives rise, individually, to a claim of implied bias.[46] Moreover, even when considered collectively, there is no risk that the public would perceive that the accused did not receive a fair trial because LTC DS sat on his court-martial. As such, the military judge did not run afoul of the *United States* v. *Bagstad* standard.[47]

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[45] J.A. 141-42.
[46] Appellant essentially concedes this point. AB at 13.
[47] 68 M.J. 460, 462 (C.A.A.F. 2010).

## Standard of Review

This Court's standard of review on a challenge for cause premised on implied bias is "less deferential than abuse of discretion, but more deferential than de novo review."[48] "A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not."[49]

## Law and Analysis

Rule for Courts-Martial (R.C.M.) 912(f)(1)(N) mandates that a member be excused whenever he should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." "This rule encompasses challenges based upon both actual and implied bias."[50] "Implied bias exists when, 'regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced....'"[51]

The test for determining an R.C.M. 912(f)(1)(N) challenge for implied bias is objective, "'viewed through the eyes of the

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[48] *Id.*
[49] *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007) (citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).
[50] *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008) (citing *Clay*, 64 M.J. at 276).
[51] *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007) (quoting *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)).

public, focusing on the appearance of fairness.'"[52] The hypothetical "public" is assumed to be familiar with the military justice system.[53] In carrying out this objective test, this Court determines "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high."[54] Challenges for actual or implied bias are evaluated based on the totality of the factual circumstances.[55] "[I]n the absence of actual bias, 'implied bias should be invoked rarely.'"[56]

1. **Experience as a Sexual Assault Victim**

Appellant's claim regarding LTC DS's report that he was a victim of a sexual assault as a child is without merit as a basis for disqualification due to implied bias. The facts of appellant's case, which involve an allegation of sexual assault by a husband against his wife, were sufficiently dissimilar from LTC DS's reported situation to warrant no relief. While this court has reversed trial judges for "denying challenges where court members have been victims of similar or traumatic crimes,"

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[52] *Clay*, 64 M.J. at 276 (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)).
[53] *See Downing*, 56 at 423.
[54] *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008).
[55] *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F.2008) (citing *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F.2004)).
[56] *Clay*, 64 M.J. at 277 (internal citations omitted).

such is not the case here.[57] As the military judge noted, LTC DS, without prompting, said that the two situations were "not the same issue at all."[58] An objective member of the public would not consider that LTC DS's childhood experiences, nearly 30 years prior, gave rise to a reason to doubt the fairness of appellant's court-martial.[59]

2. **Direct Supervisory Role over Two Other Members**

As a preliminary matter, a command relationship between members, even where one member is responsible for rating another, is not *per se* disqualifying.[60] LTC DS's command relationships with CSM Merriwether and CPT Little would not cause an objective observer to doubt the fairness of appellant's

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[57] *Cf. United States v. Lavender*, 46 M.J. 485, 488 (C.A.A.F. 1997) (finding no implied bias where panel members were victims of larcenies during trial which were significantly factually different than the charged larcenies); *United States v. Daulton*, 45 M.J. 212, 218 (C.A.A.F. 1996) (finding implied bias where the member's mother and sister had been sexually abused as children in a case alleging indecent acts with children); *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985) (finding implied bias where the member had been subjected to substantially similar crimes as those alleged against the accused).

[58] J.A. 094, 141.

[59] *See generally United States v. Brown*, 34 M.J. 105, 111 (C.M.A. 1992) (upholding denial of challenge for cause where member's son had been the victim of homosexual assault in sodomy case, where the member and the military judge noted the "different circumstances" in the cases).

[60] *United States v. Murphy*, 26 M.J. 454, 455 (C.M.A. 1988). *Cf. United States v. Deain*, 17 C.M.J.A. 44, 53 (C.M.A. 1954) (finding error where the senior member was responsible for rating the junior members based on their performance as court members).

court-martial.[61] Importantly, the military judge was able to observe the demeanor of LTC DS, CSM Merriwether, and CPT Little when he questioned them closely about whether their command relationship would inhibit their ability to serve as court-members.[62] All three "credibly disclaimed" that this command relationship would in any way affect their service on appellant's court-martial. This type of in-court assessment of demeanor should not be second-guessed on appeal.[63]

Furthermore, at the end of voir dire, seven of the original ten members remained, of which LTC DS maintained a rating relationship with only two other members. This was far less than the two-thirds required to convict.[64] Even if it were, this is not *per se* disqualifying.[65] And, similar to other bases for reversal cited in appellant's brief, it was not argued at the trial level. [66] As such, appellant forfeited this aspect of his

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[61] *Murphy*, 26 M.J. at 456 (finding panel members within same rating chain not *per se* disqualifying).
[62] J.A. 140.
[63] *See, e.g. Daulton*, 45 M.J. at 217 (C.A.A.F. 1996) (citations omitted) (military judge given "great deference" in assessing demeanor in implied bias context).
[64] *Cf. United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001) (finding an "intolerable strain on public perception" where a panel member and his six subordinate members comprised the two-thirds majority sufficient to convict).
[65] *Bagstad*, 68 M.J. at 462.
[66] While challenging LTC Duncan for cause, the civilian defense counsel noted that, including LTC Duncan, 40% of the panel was comprised by members of LTC Duncan's command. J.A. 136. However, although civilian defense counsel referenced his

argument by not raising it at trial and allowing the military judge to address it.[67] While appellant obviously did not forfeit his challenge as to LTC DS overall, and, as such, is entitled to the *Bagstad* standard of review (again, overall), the fact that he did not raise at trial two of the five bases he now raises on appeal significantly diminishes his argument.

3. **Ongoing Reliance on the Trial Counsel for Military Justice Advice**

LTC DS was not unfairly aligned with the trial counsel. LTC DS had known the trial counsel for only approximately 90 days, and during this time had, at times, disagreed with the trial counsel's advice.[68] Further, LTC DS substantially outranked the trial counsel.[69] The military judge expressly noted the short duration of their relationship and the fact that LTC DS had disagreed with the trial counsel in the past when

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argument with regard to LTC Duncan when challenging LTC DS, he did not cite a subsequent percentage of the panel, with regard to either members of the same command, or, more importantly, the percentage of the panel that maintained a rating relationship. J.A. 139.

[67] *See, e.g., United States v. Marshall*, 67 M.J. 418, 419-20 (C.A.A.F. 2008) (purpose of forfeiture rule is to ensure that the trial judge has the opportunity to rule on issues arising at trial, and to prevent the raising of such issues for the first time on appeal, after any chance to correct them has vanished) (citing *United States v. Frady*, 456 U.S. 152, 163 (1982)).

[68] J.A. 094-095.

[69] J.A. 094.

appellant's challenge of LTC DS.[70] The fact that LTC DS expressed a generally favorable view of the trial counsel does not change this analysis, or somehow indicate that LTC DS was unfairly aligned with the trial counsel.[71]

4. **Presence of Four Other Members Who Also Received Military Justice Assistance from the Trial Counsel**

As with appellant's other bases for challenge, there is no *per se* rule against members of the panel knowing and or receiving legal advice from the trial counsel. Even so, the facts of this case do not reveal a situation where this court should reverse the military judge's rulings. First, prior to the start of this court-martial, the trial counsel's relationship with these panel members had been for a period of only about three months. Second, the trial counsel had only provided limited guidance to LTC DS and CSM Merriweather since both assumed their positions within the brigade. Third, CSM Felicioni's responses during individual voir dire suggested that he had not in fact received advice from the trial counsel. Rather, the record establishes only that he had spoken with the trial counsel or individuals from the brigade legal office for

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[70] J.A. 140.

[71] *See generally United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994) (no implied bias due to professional relationship with trial counsel).

information on the status of cases.[72] Finally, CPT Little had never received military justice advice from the trial counsel. Rather, his consultation with the trial counsel had been specific to the status of one case while he was the temporary HHC commander.[73] As the S-2, it is unlikely he would be in a position to continue receiving military justice advice from the trial counsel. This was not something the defense counsel explored during individual voir dire.[74]

In his brief, appellant cites *United States v. Polichemi* and urges this court to adopt a presumption of implied bias where members of the trial counsel's current command are serving as panel members.[75] As this court has long recognized, there are substantial differences between the military system of justice and the civilian system. One of those is the pool of prospective jurors. Unlike in the civilian system, there is a strong likelihood that members of the panel may know and/or have current or prior dealings with counsel from either side.[76] This

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[72] J.A. 078-079.
[73] J.A. 112-114.
[74] *Lavender*, 46 M.J. at 488 (stating that "defense counsel may not decline to inquire into potentially prejudicial information and then claim on appeal that the information was prejudicial"). *Cf. United States v. Richardson*, 61 M.J. 113, 119 (C.A.A.F. 2005) (finding error where the military judge denied defense counsel's request to conduct further inquiry into the nature of trial counsel's relationship with certain panel members).
[75] 201 F.3d 858 (7th CiJ.A. 2000)
[76] *Richardson*, 61 M.J. at 119.

is not, and should not be, *per se* disqualifying, nor should it be considered to give rise, on its own, to an implied bias. To find otherwise would result in a potentially unworkable situation, given the practical realities of military justice in some parts of the world. Furthermore, such a presumption is not necessary. Any chance of prejudice to an accused, or potential for a public perception of unfairness, is remedied by the extensive voir dire process and wide latitude granted to defense counsel to question prospective panel members.[77] As appellant notes in his brief, one of the standard voir dire questions from the military judge covers any prior dealings with counsel from either side.[78] Here, the system functioned just as it should. While preliminary questioning revealed current and/or recent dealings between the trial counsel and four members of the panel, further questioning revealed the limited nature of these dealings. It also established that in the military's command driven system, commanders can and do disagree with their trial counsel. In this case in particular, where two of the remaining members were senior enlisted and another was a lieutenant colonel, the risk of the public perceiving some unfair sway from the trial counsel, a captain, is far diminished.

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[77] *Richardson*, 61 M.J. at 118.
[78] A.B. at 10 (citing Dep't of the Army, Pam. 27-9, Legal Services, Military Judges' Benchbook ch. 2 § V, para. 2-5-1 (1 Jan. 2010).

5. **Panel Selected Exclusively from Sergeant Castillo's Brigade**

As an initial matter, appellant did not raise panel selection/composition as an argument at trial. As such, appellant forfeited this aspect of his argument by not raising it at trial and allowing the military judge to address it.[79] This court-martial was held in Korea. It may have been that panel members were selected from a limited pool due to operational necessity or national security exigency.[80] However, because appellant did not raise the issue, the record is lacking in this regard.

For each basis of challenge appellant raised at the trial level, the military judge carefully considered the argument and made his ruling on the record, with supporting facts while explicitly taking into account this court's liberal grant mandate. As such, the military judge's rulings should be afforded the most deferential review applicable to this area of the law.[81]

While it is appropriate to consider the totality of the circumstances when considering a challenge for cause against a panel member, the mere piling of multiple non-meritorious claims on top of each other does not transpose them into one singular

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[79] *See, footnote 68, supra.*
[80] *Wiesen*, 56 M.J. at 176.
[81] *Clay*, 64 M.J. at 277 (quoting *Downing*, 56 M.J. at 422).

meritorious claim.[82] This is especially true where appellant did not raise two of the issues individually or all of them collectively at the trial level.[83] Because of the individual weakness of each of its parts, taken as a whole, appellant's claim fails.

**Conclusion**

Wherefore, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and uphold the findings and sentence.


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[82] *Cf. Rome*, 47 M.J. at 469-70 (finding error where even without the collective bases alleged, at least one basis for implied bias was clearly sufficient to sustain defense counsel's challenge).

[83] *Cf. United States v. Harris*, 13 M.J. 288, 290-91 (C.M.A. 1982) (finding error where the defense counsel alleged three bases individually and collectively as grounds for an implied bias challenge).

**CERTIFICATE OF COMPLIANCE WITH RULE 24(d)**

1. This brief complies with the type-volume limitation of Rule 24(c) because:

This brief contains 5,595 words.

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

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on the 28 day of July, 2014 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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