IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Master Sergeant (E-7)
JOSEPH R. DOCKERY III
USAF,
Appellant.

USCA Dkt. No. 16-0296/AF

Crim. App. No. 38624

BRIEF IN SUPPORT OF PETITION GRANTED

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FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	APPELLANT'S BRIEF
v.	)	USCA Dkt. No. 16-0296/AF
Master Sergeant (E-7) **JOSEPH R. DOCKERY III,** USAF, *Appellant.*	)	Crim. App. No. 38624

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

Granted Issues

I.

WHETHER THE MILITARY JUDGE ERRED BY GRANTING, OVER DEFENSE OBJECTION, THE GOVERNMENT'S CHALLENGE FOR CAUSE AGAINST MSGT LW.

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FINDING THAT THE MILITARY JUDGE DID NOT ERR, AND BY CONCLUDING THAT EVEN IF THE MILITARY JUDGE DID ERR THERE WAS NO PREJUDICE, CONTRARY TO THIS COURT'S PRECEDENT IN *UNITED STATES v. PETERS*, 74 M.J. 31 (C.A.A.F. 2015), *UNITED STATES v. WOODS*, 74 M.J. 238 (C.A.A.F. 2015), *UNITED STATES V. NASH*, 71 M.J. 83 (C.A.A.F. 2012), *UNITED STATES v. CLAY*, 64 M.J. 274 (C.A.A.F. 2007), AND *UNITED STATES v. DALE*, 42 M.J. 384 (C.A.A.F. 1995).

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866. This Court has jurisdiction to review this case pursuant to Article 67, UCMJ, 10 U.S.C. § 867.

Statement of the Case

On December 11, 2013, and February 25 – March 1, 2014, Appellant was tried at a general court-martial by officer and enlisted members at Osan Air Base, Republic of Korea. Contrary to his pleas, Appellant was found guilty of adultery in violation of Article 134, Uniform Code of Military Justice (UCMJ), and sexual assault in violation of Article 120, UCMJ. 10 U.S.C. § 920 (2012). He was sentenced to a reduction to E-4 and confinement for one year. JA 66. On 16 June 2014, the convening authority approved the findings and sentence as adjudged.

On 2 December 2015, the Air Force Court of Criminal Appeals (AFCCA) affirmed. JA 1. The government constructively served Appellant a copy of AFCCA's decision on 3 December 2015. On 25 January 2016, Appellant filed a Petition with this Court and a Motion to File the Supplement Separately. On 29 January 2016, this Court granted Appellant's motion extending the time to file this supplement until 16 February 2016.

Statement of Facts

Appellant is an African-American man who was accused of raping a white female one evening after she had been drinking heavily. During individual *voir dire*, trial defense counsel (TDC) asked Master Sergeant (MSgt) LW whether, if she were in Appellant's shoes, she would want someone like her on the jury. JA 52. MSgt LW responded as follows:

> I would think yes, be fair, not from nothing, but for some reason an African American person already got dismissed, so really I would think - not that it wouldn't be - oh god – I would say yes. You would want - you would want somebody like me to be fair for both parties, to judge. I will think that I will be fair, listening to all the facts, either way.

JA 53.[1] As a follow up to that statement, the government's senior trial counsel (STC) asked a few questions, and the following exchange occurred:

> Q. Sergeant LW, I just wanted to clarify one thing that you just said. You made a comment, I believe - maybe I heard it incorrectly - you made a comment when he asked you about whether or not you could be fair, you made a comment about one person had already gotten dismissed, or one African American already got dismissed. Is that what you stated?
>
> A. Yes, sir.
>
> Q. What were you - what was your point, or what - are you concerned that he was dismissed and that he's African American?

[1] The member previously noted her race as "black and Hispanic." JA 52.

A. No, sir, no. Just if - well, I don't know - I'm assuming there's supposed to be 12 individuals, and I was just wondering if - you know - if he was going to be replaced.

Q. Ah, okay.

A. But not - not about –

STC: Sir, would you mind instructing her on that?

MJ: Sure, I can do that. So, for military courts, there's no requirement to have 12 folks. The minimum requirement is five. Okay? So it's different than what you see on TV, and what you see in the movies on Netflix or Hulu. So for any number of reasons, me, as the military judge can excuse court members for a number of reasons. And there was an issue that was brought up to me, I made a judgment call as the military judge, sort of like an official on a football - called an official time out and I said, "You know what? This person is not going to sit on the panel as a juror."

MBR [MSGT LW]: Okay, sir.

MJ: You are not to speculate as to why I excused that person from the panel. Don't try to infer any particular reason why that person was excused from the panel. It's just because my job is to make sure this trial is conducted in a fair, orderly, and impartial manner, and so that's what I did. So, with that information coming from me as the military judge, does that affect any comments or thoughts you have about your ability to sit on this panel as a court member?

MBR [MSGT LW]: No, sir.

MJ: Okay. You think you can be fair to both sides?

MBR [MSGT LW]: Yes, definitely, sir.

JA 54-55. This was the only context in which the discussion of race arose. SMSgt DC had previously been removed from the court for actual bias, he knew the

Appellant, had knowledge of the case, and was a potential witness. JA 38-39. He was the only other African-American of the 12 members appointed by the convening authority other than MSgt LW. JA 53. No further questions were asked of this member regarding her feelings about Appellant, her racial beliefs, her feelings towards the government, her feelings regarding the removal of the other member, or any biases she may or may not hold with regard to race.

When it came time for challenges, STC challenged MSgt LW and asserted that she harbored actual bias against the government. JA 57. STC elaborated, speculating that "[MSgt LW] felt like she needed to protect the accused or kind of battle for him because we'd already excused one black member." *Id*. STC further inferred that "[MSgt LW] indicate[d] that she had a bias in [Appellant's] favor along racial lines." *Id.* The STC then asserted that the government was concerned that, through her short answers during *voir dire*, MSgt LW had somehow expressed "a belief that there might be some sort of conspiracy on the part of the government to get rid of minority members on the panel." JA 58.

The military judge then denied the government's challenge for actual bias, but granted the challenge on grounds of implied bias. JA 59. Specifically, the military judge stated:

> All right, I've considered her responses. While I don't find an actual bias, on the part – I think that was cleared up by my instructions to her, I do find that there is implied bias on the part of Master Sergeant

> [LW] from her utterance without any precipitating factors there, and so given that I find implied bias, the challenge against Master Sergeant [LW] is granted. So she will be excused.

JA 59. TDC opposed the challenge to MSgt LW. JA 57.

Summary of Argument

The military judge erred in granting the government's challenge for cause against MSgt LW where that challenge was based upon the government's mischaracterization of MSgt LW's statements and their objection to her having voiced an opinion favoring the seating of racial minorities on the panel, where the military judge failed to give any basis for his use of the implied bias standard, failed to do a proper analysis under the implied bias standard, and where the military judge failed to articulate any race-neutral basis for granting the government's challenge. The Air Force Court erred in testing this error for prejudice, contrary to this Court's precedent.

Argument

I.

THE MILITARY JUDGE ERRED BY GRANTING, OVER DEFENSE OBJECTION, THE GOVERNMENT'S CHALLENGE FOR CAUSE AGAINST MSGT LW.

Standard of Review

Challenges granted or denied under an implied bias standard are reviewed to a standard that is less deferential than abuse of discretion, but more deferential

than *de novo* review. *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015). This Court "does not expect record dissertations from the military judge's decision on implied bias, [but] it does require a clear signal that the military judge applied the right law." *Id.* at 34 (internal citations omitted). This Court affords "less deference if an analysis of the implied bias challenge on the record is not provided." *Id*.

Law and Analysis

"Unlike the test for actual bias, this Court looks to an objective standard in determining whether implied bias exists." *Peters*, 74 M.J. at 34, citing *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001). "In reaching a determination of whether there is implied bias, namely, a 'perception or appearance of fairness of the military justice system,' the totality of the circumstances should be considered." *Id.*, citing, *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995).

Although generally viewed in light of public perception, the views of the accused, and other members of armed forces, and their perceptions of the trial's fairness, are also questions which must be considered. *Id.* Additionally, there is no basis for application of the liberal grant mandate to government challenges given the convening authority's broad power to appoint members of his or her choosing. *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005).

Under Rule for Courts-Martial (R.C.M.) 912(f)(4)(N) implied bias only exists where there is a substantial doubt as to the member's ability to sit with regard to "legality, fairness and impartiality." The implied bias standard originated for use by the defense. *See, United States v. Castillo,* 74 M.J. 39 (C.A.A.F. 2015); *Peters,* 74 M.J. 31; *Clay,* 64 M.J. 274. There are concerns about the potential or reality of command influence in appointing members to court-martial panels and thus, the implied bias standard exists to allow defense counsel to ensure a fair panel. *Id.* That is not to say the government is never able to exercise a challenge for implied bias, rather it is notable because the implied bias standard should only be used rarely. *Clay,* 64 M.J. at 277. In other words, "where actual bias is found, a finding of implied bias would not be unusual, but where there is no finding of actual bias, implied bias must be independently established." *Id.*

Because implied bias should only be used rarely and the liberal grant mandate does not apply to the government; it is a rare case where the government can establish sufficient cause for an implied bias challenge. In a review of the case law Counsel found only two circumstances where a member was removed from a panel based on a government challenge for implied bias. Both of those cases involved the death penalty, and the members indicated they would not vote for the death penalty. *See, United States v. Curtis,* 33 M.J. 101, 107 (C.A.A.F.

1991), and *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). In those cases the government had grounds to excuse those members, grounds that were neither racially motivated nor improper; the members had an inelastic predisposition to not sentencing someone to the death penalty. The statements made by MSgt LW do not rise to the level of an inelastic predisposition, rather they state her desire to have someone like her, someone "fair for both parties," remain on the panel if she were sitting in the Appellant's chair. JA 53.

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors ... on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); see U.S. CONST. AMEND. XIV, §1; see also, *Foster v. Chatman, Warden*, 578 U.S. __ (2016). Further, when the concerns of *Batson* are implicated, a prosecutor cannot proffer a reason for making a challenge that is "unreasonable, implausible, or that otherwise makes no sense." *See, United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997). In *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988), this Court held that the holding in *Batson* applies to courts-martial. Appellant therefore had a right to be tried by a panel from which "no 'cognizable racial group' has been excluded." *Santiago-Davila*, 26 M.J. at 389-90 (*quoting Batson*, 476 U.S. at 96). "This right to equal protection is part of due process under the Fifth Amendment...and so it applies to courts-

martial, just as it does to civilian juries." *Id.* (citations omitted). Accordingly, the Constitutional right to due process is implicated when the government improperly challenges a court-martial member.

Given that Constitutional implication, this Court should use a *de novo* standard of review for this issue, notwithstanding the hybrid standard articulated in *Peters*, 74 M.J. at 33. However, given the facts of this case, even if the Court uses the *Peters* standard the military judge's decision should be afforded no deference given he did not offer any analysis or demonstrate he applied the correct law.

However, this Court does not even need to reach *Batson*, to decide this case in Appellant's favor. This Court summed up Appellant's argument succinctly in stating:

> Furthermore, even if we were not bound by *Batson*, the principle it espouses should be followed in the administration of military justice. In our American society, the Armed Services have been a leader in eradicating racial discrimination. With this history in mind, we are sure that Congress never intended to condone the use of a government preemptory challenge for the purpose of excluding a "cognizable racial group."

Santiago-Davila, 26 M.J. at 390 (C.M.A. 1988). Because this record presents this issue as a challenge for cause rather than a preemptory challenge, the issue before the Court does not fall squarely within the *Batson* line of cases. However, the

principles of *Batson* and those espoused in *Santiago-Davila* provide guidance in evaluating the substance of the government's challenge.

Here, the government purported to offer a basis for challenge, which stated that the member favored the defense because of her race, fails under both actual and implied bias and would not even have been acceptable under a preemptory challenge because they were unable to articulate a race neutral reason to strike the member. Appellant acknowledges that both the government and the defense have the right to challenge and excuse a member who demonstrates a racial bias. In fact the federal courts have upheld situations where African-American defendants challenge members for the appearance of a racial bias. *United States v. Blanding*, 250 F.3d 858, 861 (4th Cir. 2001)(the Fourth Circuit sustained a defense counsel's challenge of a white male who displayed a Confederate flag bumper sticker in the trial of an African-American defendant).

However, in the case *sub judice* MSgt LW expressed no racial bias, actual or implied, and therefore the government inappropriately challenged her and the military judge improperly granted that challenge. The STC's assertion that MSgt LW had indicated some sort of racial bias in her answers during *voir dire* was not supported by anything MSgt LW actually said; the challenge was therefore speculative and improper. The military judge's granting of that challenge – whether under actual or implied bias – was equally improper and a violation of

Appellant's rights under the Equal Protection Clause as articulated by *Batson* and *Santiago-Davila*. There was nothing about what MSgt LW said during *voir dire* that could be read to evidence any bias in favor of Appellant; in fact, her responses were a correct statement of the law and indicated that she could be fair to both parties.

Contrary to the assertions of the STC, MSgt LW's statements demonstrated no racial bias. MSgt LW's initial statement was an appropriate response to the TDC's question of whether, if she were on trial "would you want somebody *like you* on this jury?" JA 53 (emphasis added). MSgt LW is an African-American, and it was not inappropriate for her to be conscious of that fact when she acknowledged to the parties that the only other African-American was dismissed and it was, in her view, a positive thing to have a racially diverse panel. She stated she would be "fair, listening to all the facts either way." JA 53. A member's stated general preference for a racially diverse panel when asked if someone "like you" should sit is in no way an expression of racial bias sufficient to sustain a challenge for cause. Likewise, it is unassailable for an African-American female senior non-commissioned officer to be conscious of her racial identity and cite it as a positive aspect of her contribution to the appearance of the fair administration of justice. She affirmatively asserted a desire to be fair to both sides. She did not

express anything about a bias against the government or a belief that there was a conspiracy to remove minority members.

The STC argued that MSgt LW could not be impartial because she viewed the presence of an African-American on the panel as being advantageous to the appearance of justice, for both the Appellant and for the public. Given what MSgt LW actually said, the STC's argument opposing her presence on the court amounted to governmental bias against African-Americans who believe their presence on court-martial panels contribute to both the appearance and the actuality of fairness. The government's challenge was the opposite of race-neutral. The prosecutor's explanation for the government's opposition was therefore "unreasonable, implausible, [and] makes no sense." *Tulloch*, 47 M.J. at 287. The military judge's response to that challenge deepened the *Batson* concerns implicated.

The military judge offered no persuasive explanation for granting the government's challenge – though he purported to do so on implied bias grounds, which would normally call for careful exposition. Instead of giving any rationale, the military judge simply stated he found implied bias based on "her utterance without any precipitating factors." JA 59. This rationale itself made no sense considering the fact that questioning by counsel for both sides was the clear "precipitating factor" which led MSgt LW to voice her opinion that the appearance

of fairness would enhanced if the panel included an African-American. JA 53-54. In making his determination, the military judge did not discuss the objective standard to be used when employing the implied bias standard; he failed to address public perception, the perception of other members of the armed forces, or the perception of the Appellant. *See Castillo*, 74 M.J. at 42 (quoting *Peters*, 74 M.J. at 34). He did not spend time discussing the totality of the circumstances. JA 59. In other words, the military judge failed to articulate any reasons for his decision and that decision should be afforded no deference, notwithstanding the hybrid standard of review for this issue articulated in *Peters*, 74 M.J. at 33.

The rights articulated in *Batson* and *Santiago-Davila* cannot be waived. The TDC unequivocally objected to the government's challenge. In *Santiago-Davila* the CMA declined to find that an appellant waived his constitutional rights under *Batson*—made applicable to the military through the due process clause of the Fifth Amendment—where the trial defense counsel raised an objection, but cited different case law. *Id.* at 390; U.S. CONST. AMEND. V. The Court refused to find waiver in light of the fundamental nature of the constitutional right at stake, where appellant raised a related claim. *Id.*

Even if the right enshrined in *Batson* could be waived—contrary to this Court's predecessor's holding in *Santiago-Davila*—TDC's express objection to the basis of the government's challenge for cause preserved the propriety of the

granted challenged for appeal. Granted, TDC did not say the specific words "equal protection" or "*Batson*," but his objection to the substance of the challenge is inextricably intertwined with the issue of racial bias. TDC specifically addressed the racial portions of the STC's challenge stating MSgt LW "[d]id not indicate anything firm in terms of *racial bias* or anything like that." JA 58 (emphasis added). Relatedly, TDC contended in opposition to the government's challenge that "[t]here was no explicit statements about protecting [Appellant] on racial lines or other lines." JA 59.

Under RCM 912(f)(3), "[t]he burden of establishing that grounds for a challenge exist is upon the party making the challenge." Accordingly, the government—as the challenging party—had the burden of presenting every potential theory supporting a challenge for cause at trial. The record contains everything the government offered to support its challenge prior to it being granted by the military judge. No doubt, the experienced STC knew the government bore the burden of justifying its challenge and provided as detailed an argument he could to support it. The government should have considered that the defense might contest—as it did—the racial nature of the challenge at trial and on appeal before it made such a challenge on these facts. The fact that the government's argument falls short on appeal is no cause for this Honorable Court

to speculate as to other potential theories of challenge the government may have articulated under a different record.

The government's basis for challenge was it felt MSgt LW stated that because she was black she would fight harder for the Appellant. The defense objected to that basis, citing the inappropriate racial overtones and the lack of support for the challenge based on MSgt LW's actual words. The government, thus, had every opportunity to defend itself, but instead it rested on the substance of the challenge it brought. The government must now defend that record on appeal, not some hypothetical record that would have occurred had the prosecution attempted to develop other proper bases for challenge before its improper challenge was erroneously granted.

Our national history and literature are replete with examples where a racially diverse panel would have contributed to the appearance and reality of fairness. *See, e.g.*, *Powell v. Alabama*, 287 U.S. 45, 50 (1932) (reversing the conviction of the "Scottsboro Boys," nine young black men convicted of raping two white women, but not reaching one of the assigned errors that "they were tried before juries from which qualified members of their own race were systematically excluded"); Harper Lee, *To Kill a Mockingbird* 253 (35th ed. 1995) (Atticus Finch commenting ruefully on the miscarriage of justice in the rape trial of a black man with a white female accuser: "The one place where man ought to get a square deal

is in a courtroom, be he any color of the rainbow"). Poignantly, Appellant's case is one of a black man accused of raping a white woman. MSgt LW was right to point out that having a diverse panel enhanced the appearance and reality of fairness.

MSgt LW dismissed—emphatically—any notion that she would unfair to either side. JA 53, 55. Her answers were unequivocal and did not display that she was distrustful of the court system, as argued by the government. Any confusion MSgt LW had was related to how many individuals should sit on the panel, as she initially believed at least twelve were required. JA 54. This is not an unreasonable view for a layperson to have in light of the historical preference for twelve-member juries. *See United States v. Wilkinson*, No. S32218, 2015 CCA LEXIS 213, at *4 fn2 (A.F. Ct. Crim. App. May 11, 2015) (noting the need for factual sufficiency review in part because "servicemembers accused at court-martial are denied some rights provided to other citizens" including the right to trial by jury). To the extent that there was any ambiguity, MSgt LW's answers to the military judge when instructed at the STC's behest resolved any arguable concerns. JA 53, 55.

The case of *People v. Stanley*, 39 Cal. 4th 913, 939-940 (Cal. 2006) underscores the impropriety of MSgt LW's excusal. As the Supreme Court of California properly observed, the Constitution prohibits "the assumption that a

member of a particular group will, because of their membership, harbor particular attitudes or biases." *Id.* Here, the crux of the government's argument at trial was that MSgt LW would harbor a particular support for the Appellant despite her own disclaimer based on her general observation that she was the only African-American remaining on the panel and her support of a diverse panel. This is the precise "group bias" decried by *Stanley*. Because MSgt LW explicitly stated she would be fair to both sides and merely expressed support of a diverse panel in general, this case is unlike *Blanding*, where the Fourth Circuit sustained a defense counsel's challenge of a white male under an implied racial bias standard in the trial of an African-American defendant.

WHEREFORE, Appellant respectfully requests that this Honorable Court reverse the Air Force Court and find the military judge's grant of the challenge for cause was constitutionally improper and set aside the findings and sentence in this case and authorize a rehearing.

II.

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FINDING THAT THE MILITARY JUDGE DID NOT ERR, AND BY CONCLUDING THAT EVEN IF THE MILITARY JUDGE DID ERR THERE WAS NO PREJUDICE, CONTRARY TO THIS COURT'S PRECEDENT IN *UNITED STATES v. PETERS*, 74 M.J. 31 (C.A.A.F. 2015), *UNITED STATES v. WOODS*, 74 M.J. 238 (C.A.A.F. 2015), *UNITED STATES V. NASH*, 71 M.J. 83 (C.A.A.F. 2012), *UNITED STATES v. CLAY*, 64

M.J. 274 (C.A.A.F. 2007), AND *UNITED STATES v. DALE*, 42 M.J. 384 (C.A.A.F. 1995).

Standard of Review

Whether the Air Force Court properly applied this Court's precedent is a question of law reviewed *de novo*. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010).

Law and Analysis

This Court does not test for prejudice if a military judge abuses their discretion in either excusing or failing to excuse a member. *Peters*, 74 M.J. 31, *United States v. Woods*, 74 M.J. 238 (C.A.A.F. 2015), *United States v. Nash*, 71 M.J. 83 (C.A.A.F. 2012), *v. Clay*, 64 M.J. 274 and *United States v. Dale*, 42 M.J. 384 (C.A.A.F. 1995). In each of these cases this Court determined that a military judge's failure to grant a defense challenge for cause under the liberal grant mandate with regard to implied bias was error, set aside the findings and sentence and remanded. Although in *Woods*, this Court indicated that the military judge's "error prejudiced Appellant's substantial rights" there was no further analysis regarding prejudice.

What is interesting about this case is this is a government challenge for cause that was granted under the implied bias standard. Therefore we must first remove the liberal grant mandate from the analysis, and focus solely on the

implied bias standard. As this Court recently stated, "[t]he core of the implied bias test 'is consideration of the public's perception of fairness in having a particular member as part of the court-martial panel.'" *United States v. Rogers*, __ M.J. __, No. 16-0006/CG (C.A.A.F. 2016). Again, in *Rogers,* after this Court determined the military judge erred, there was no additional test for prejudice. It logically follows that when a member is *not* removed improperly should be treated the same as when a member *is* removed improperly with regard to prejudice. There is not only no test found in the law, but there is simply no way to test for prejudice. Any test would result in a win for the government every time.

In its opinion the Air Force Court decided this issue in two distinct ways. First they determined that, as a matter of law, the military judge did not abuse his discretion. This was error. Additionally, the Air Force Court determined "[e]ven if the military judge erred, we believe any error was harmless beyond a reasonable doubt." *United States v. Dockery*, 2015 CCA LEXIS 540 (A.F. Ct. Crim. App. 2015) *8; JA 8. The CCA went on to test for prejudice, *Id*. at *9, despite there being no basis in this Court's case law to support such a test.

The Air Force Court evaluated Appellant's assertion that a member was improperly excluded as being an allegation of structural error. Appellant has never asserted that the removal of MSgt LW was structural error. The Air Force Court's findings in regards to error are of limited value to this Court because the

structural error analysis lends nothing to the determination of the ultimate issue before the Court. Moreover structural error is not implicated based on these facts; this Court has never addressed a member issue as a structural error and there is no precedence to treat it as such.

Beyond that, however, the Air Force Court erred in testing for prejudice. The AFCCA notes that there is not a test for prejudice for a structural error, but that the government bears the burden of showing the error was harmless beyond a reasonable doubt. *Id.* at *9; JA 9. However the AFCCA then goes on to conclude this is not a structural error and they can test for prejudice. *Id.* Ultimately they conclude that because there is no evidence before them that a different panel would have concluded differently there is no prejudice. *Id.* at *10; JA 10.

This Court has never required an Appellant to show prejudice when a military judge improperly grants or fails to grant a challenge for cause under the implied bias standard. Indeed, given the nature of implied bias, requiring an Appellant to demonstrate actual prejudice would be impossible. When you have implied bias there is no actual bias – i.e., that there is an appearance of impropriety but no actual impact upon the proceedings. Implied bias is prohibited not because something has transpired which has actually impaired the fairness of proceedings, but instead because something has transpired which gives rise to the appearance that such may be occurring. Requiring the Appellant to prove prejudice is

equivalent to requiring the Appellant to prove actual bias. Applying a prejudice test would therefore eviscerate the concept of implied bias itself. The Air Force Court erred when it tried to fit the implied bias peg into the actual bias hole.

WHEREFORE, Appellant respectfully requests that this Honorable Court reverse the Air Force Court and set aside the findings and sentence in this case.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 2 June 2016.

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