5 July 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 16-0296/AF
Master Sergeant (E-7), JOSEPH R. DOCKERY, III, USAF, *Appellant.*	)	Crim. App. No. 38624

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUES PRESENTED

I.

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

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); UNITED STATES V. DALE, 42 M.J. 384 (C.A.A.F. 1995).

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally accepted.

STATEMENT OF FACTS

Prior to group voir dire, the military judge stated on the record that the parties had discussed that one of the court members, SMSgt D.C., was on the defense's witness list. (J.A. at 35-36.) After ascertaining that SMSgt D.C. had not spoken with any other members about his knowledge of the case, the military judge excused SMSgt D.C. for cause and instructed the bailiff to remove his nameplate from the courtroom. (J.A. at 38-41.) In the presence of the rest of the members, trial counsel announced that SMSgt D.C. had been excused by the military judge. (J.A. at 43.)

During individual voir dire, MSgt L.W. identified herself as black and Hispanic. (J.A. at 52.) As his last question during individual voir dire, trial defense counsel asked MSgt L.W., "knowing we're dealing with sexual assault, which is obviously a very important topic, and [Appellant's] career and future are . . . hanging on this, knowing these facts, if you were in his shoes right now, would

you want somebody like you on this jury?" (Id.)

MSgt L.W. responded:

> I would think yes, be fair, not from nothing, but for some reason an African American person already got dismissed so 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 think that I will be fair, listening to all the facts either way.

(J.A. at 53.)

Trial counsel then asked MSgt L.W. if she was concerned that the other court member "was dismissed and that he's African American." (J.A. at 54.) MSgt L.W. responded, "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." (Id.)

At the request of the trial counsel, the military judge instructed MSgt L.W. that the minimum number of members for a military court-martial was five, not twelve. The following discussion ensued:

> **M.J.:** . . . 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."
>
> **MSgt L.W.:** "Okay, sir."
>
> **M.J:** 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?
>
> **MSgt L.W.:** No, sir.
>
> **M.J.:** Okay. You think you can be fair to both sides?
>
> **MSgt L.W.:** Yes, definitely, Sir.

(J.A. at 55.)

Trial counsel eventually challenged MSgt L.W. for cause based on actual bias against the government. He explained:

> It was the comment she made about that seemed like she didn't really intend for it to slip out, but she seemed to believe that – she expressed basically the fact that she kind of felt like she needed to protect the accused, or kind of battle for him because we'd already excused one black member. It seemed to indicate that she had a bias in his favor along racial lines. Not – no malicious intent there, but it seemed to express a bias and belief that there might be some sort of conspiracy on the part of the government to get rid of minority members on the panel. So the government can't be comfortable that she is not biased in favor of the accused and against us because of that statement, despite the fact that obviously I know you clarified and gave her a lot more background about that challenge – or that excusal I guess I should say. Still the fact that that's what she expressed, and then she seemed to want to backtrack from that when she realized what she said. That's our basis for challenging her for actual

> bias

(J.A. at 57-58.)

Trial defense counsel responded:

> . . . it seemed her confusion in the statement was rising from they were dealing with 11 and she had it in her mind that, like a civilian jury, there had to be 12. Once you clarified that . . .12 wasn't the fixed number and that wasn't a problem, she seemed immediately to get it. You asked if she had any issues in terms of fairness, all of that, she said she definitely was going to be fair. Did not indicate anything firm in terms of racial bias for anything like that. I think this was simply her just being confused in terms of military justice procedures and what it meant when Senior Master Sergeant [D.C.] was excused from the panel. There was no explicit statements about protecting him on racial lines or other lines. It completely was a matter of straight confusion, which the court, when they voir dire'd her, sufficiently resolved.

(J.A. at 58-59.)

In granting the challenge for cause, the military judge stated:

> 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 [L.W.] from her utterance without any precipitating factors there, and so given that I find implied bias, the challenge against Master Sergeant [L.W.] is granted.

(J.A. at 59.)

Trial defense counsel did not lodge any further objection to the military judge's granting of the challenge for cause. (Id.)

SUMMARY OF THE ARGUMENT

The military judge's granting of the United States' challenge for cause of MSgt L.W. did not violate the Equal Protection Clause. Batson v. Kentucky, 476 U.S. 79 (1986) applies only to peremptory challenges, and there is no authority that extends its application to challenges for cause. In any event, Appellant forfeited any claim under Batson or the Equal Protection Clause by failing to object to the challenge for cause of MSgt L.W. on those specific grounds.

Furthermore, the military judge did not commit plain error under the Equal Protection Clause by granting the challenge of MSgt L.W. Challenging a member based on her opinions on race in the justice system is not the same as challenging the member based on her race itself, and has been upheld as being "race-neutral" by several federal courts. The military judge also did not err in granting the challenge against MSgt L.W. for implied bias. MSgt L.W.'s unprompted expression of concern about the excusal of another African-American panel member led to the inference that she would be biased in favor of Appellant and against the United States. The risk was too great that a member of the public might legitimately question the fairness of the proceeding if MSgt L.W. remained as part of the court-martial panel.

Finally, the Air Force Court of Criminal Appeals did not err by testing any alleged error in the excusal of MSgt L.W. for prejudice. The cases cited as

precedent by Appellant, Peters, Woods, Nash, Clay, and Dale, apply only under circumstances where the military judge erroneously failed to excuse a member for cause, and thus are distinguishable from Appellant's case. The improper excusal of a court member is not structural error in a non-capital case, and thus automatic reversal is not required. AFCCA's finding of no prejudice in this case was correct where there is no evidence that the members who actually comprised Appellant's panel were anything other than fair and impartial.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR IN GRANTING THE CHALLENGE FOR CAUSE AGAINST MSGT L.W.

Standard of Review

Implied bias challenges are reviewed pursuant 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. at 33 (quoting United States v. Moreno, 63 M.J. 129, 134 (C.A.A.F. 2006).

A military judge's rulings on a Batson challenge are reviewed for an abuse of discretion. United States v. Tulloch, 47 M.J. 283, 289, 296 (C.A.A.F. 1997) (Sullivan, J. dissenting; Crawford, J. dissenting). "[A] finding of intentional discrimination is a finding of fact entitled to appropriate deference by a reviewing

court." Batson, 476 U.S. at 98, n.21 (citing Anderson v. Bessemer City, 470 U.S. 564, 573 (1985)). Furthermore, "[a] military judge's determination that the trial counsel's peremptory challenge was race-neutral is entitled to 'great deference' and will not be overturned absent 'clear error.'" United States v. Hurn, 58 M.J. 199, 201 (C.A.A.F. 2003) (citing United States v. Williams, 44 M.J. 482, 485 (C.A.A.F. 1996)).

Although Appellant calls for a de novo review of the issue presented due to its Constitutional implications, there is no basis for applying such a standard of review. In Hernandez v. New York, 500 U.S. 352, 366-67 (1991), the Supreme Court rejected the notion that it should make an "independent" determination as to whether there has been discrimination under Batson. Instead, the Supreme Court reiterated that whether a prosecutor had a discriminatory intent was "a question of historical fact" entitled to deference, and asserted "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." Id. at 366-67. *See also* Woods, 74 M.J. at 243, n.1 (rejecting the appellant's request to apply a de novo standard of review to challenges for implied bias).

Law and Analysis

R.C.M. 912(f)(2)(N) states that a "member shall be excused for cause whenever it appears that the member [s]hould not sit as a member in the interested

of having the court-martial free from substantial doubt as to legality, fairness and impartiality." It may be a ground for challenge when a member "has a decidedly friendly or hostile attitude toward a party." R.C.M. 912(f)(2)(N) Discussion.

The standard for determining whether implied bias exists is an objective test. Peters, 74 M.J. at 34 (citing United States v. Wiesen, 56 M.J. 172, 175 (C.A.A.F. 2001)). "The core of that objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel." Id. The totality of the circumstances should be considered in determining whether there is implied bias. Id.

In Batson v. Kentucky, 476 U.S. at 89, the Supreme Court held that a criminal defendant's rights under the Equal Protection Clause[1] are violated if the prosecutor uses a peremptory challenge to strike jurors on account of their race. Our superior Court held that Batson was applicable to military courts-martial in United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988).

Military courts apply Batson in a different manner than civilian courts. In United States v. Moore, 28 M.J. 336, 368 (C.M.A. 1989), this Court adopted a *per se* rule: "Upon the Government's use of a peremptory challenge against a member of the accused's race and upon timely objection, trial counsel must give his reasons

[1] U.S. Const. amend. XIV, § 1.

for the challenge."[2] The military judge then must determine whether trial counsel has articulated a neutral explanation relative to the particular case and has given a "clear and reasonably specific explanation of legitimate reasons to challenge th[e] member." Id. at 369. The reasons need not rise to the level required for a challenge for cause. Id.

The military judge must also "review the record and weigh trial counsel's credibility before he makes a factual determination regarding the presence or absence of purposeful discrimination in the panel member's rejection." United States v. Greene, 36 M.J. 274, 281 (C.M.A. 1993). The offering of a race-neutral explanation by trial counsel, "does not end the military judge's duties under Batson. The military judge must still determine whether the asserted justification is merely a pretext for intentional race-based discrimination." Id.

"Once the convening authority has designated a servicemember as 'best qualified' to serve on a court-martial panel, trial counsel may not strike that person on the basis of a proffered reason, under Batson and Moore, that is unreasonable, implausible, or that otherwise makes no sense." Tulloch, 47 M.J. at 287.

Appellant asserts on appeal that the military judge's grant of the challenge for cause to MSgt L.W. was improper because her statements during voir dire did

[2] Batson itself requires that defense counsel must first establish a *prima facie* case of purposeful discrimination before the burden shifts to the prosecution to offer a race-neutral basis for the challenge. Due to the *per se* rule established in Moore, military defense counsel are not required to meet this threshold finding. Id.

not give rise to implied bias and her excusal violated the Equal Protection Clause as articulated by Batson. (App. Br. at 6, 11.) Appellant's claim for relief must be denied for the reasons discussed below.

a. Batson does not apply to challenges for cause.

In his brief, Appellant first correctly identifies that "the issue before the Court does not fall squarely within the Batson line of cases." (App. Br. at 10.) However, he then claims that the "principles of Batson and those espoused in Santiago-Davila provide guidance in evaluating the substance of the government's challenge." (App. Br. at 10-11.) Appellant then attempts to apply the framework of Batson to trial counsel's challenge for cause against MSgt L.W. For example, Appellant contends that "the military judge failed to articulate any race-neutral basis for granting the government's challenge," and that the military judge's granting of the challenge for cause was "a violation of Appellant's rights under the Equal Protection Clause as articulated by Batson and Santiago-Davila." (App. Br. at 11-12.)

Appellant's entreaty to extend Batson is unpersuasive, as he has not identified any case law which supports his contention that the Batson framework applies to challenges for cause. In fact, many federal circuits have recognized that Batson does *not* apply to challenges for cause. United States v. Elliott, 89 F.3d 1360, 1365 (8th Cir. 1996) ("We know of no case that has extrapolated the Batson

framework to for-cause strikes"); United States v. Blackman, 66 F.3d 1572, 1575 n.3 (11th Cir. 1995)("[N]o authority suggests Batson extends to the area of challenges for cause"); United States v. Bergodere, 40 F.3d 512, 515-16 (1st Cir. 1994)("defendants must show that the challenge was peremptory rather than for cause" to invoke Batson.) *See also* United States v. Abbey, 1998 U.S. App. LEXIS 11772 (10th Cir. 1998) (unpub. op.); Anderson v. Woods, 2008 U.S. Dist. LEXIS 47594 at *5 (S.D.N.Y 12 June 2008)(unpub. op);

In Elliott, the Eighth Circuit Court of Appeals explained that challenges for cause and peremptory challenges are inherently different because the former require a reason to be stated, but the latter do not (absent a Batson challenge). 89 F.3d at 1365. Thus, a trial judge already has the duty to make a ruling on any challenge for cause. Since challenging a member on the basis of race is not a valid reason for a challenge for cause, presumably no trial judge would grant such a challenge. It therefore follows that if a valid challenge for cause on non-racial grounds exists and is granted by the military judge, there is *per se* no racial discrimination against the excused member. A Batson –type inquiry that would require the military judge to "articulate a race-neutral basis for granting the government's challenge" for cause is wholly unnecessary where a military judge has already reviewed the basis for a challenge for cause and found it to be legitimate.

Since there is no authority in federal courts or in the military that extends Batson to challenges for cause, this honorable Court should decline to find that the military judge should have conducted any additional Equal Protection analysis of the challenge for cause. This Court should further decline to find a violation of the Equal Protection Clause in this case, where MSgt L.W. was excused based on a challenge for cause rather than a peremptory challenge.

b. Appellant forfeited any claim under the Equal Protection Clause or Batson by not raising the issue at trial.

Even assuming that the principles of Batson apply to challenges for cause, Appellant forfeited such claims absent plain error by not objecting to the challenge for cause on the basis of Batson or the Equal Protection Clause during his court-martial. Appellant's attempt to reframe trial defense counsel's objection to the challenge for cause as an Equal Protection challenge is unconvincing. (App. Br. at 14-15.) Trial defense counsel asserted that *MSgt L.W.* had not demonstrated racial bias, but made no reference whatsoever to trial counsel or the government being racially biased. Merely voicing disagreement with a prosecutor's reasons for challenging a court member is not sufficient to preserve a Batson claim for appellate review, and it should not be sufficient to preserve an Equal Protection claim in Appellant's case. *See* United States v. Chandler, 12 F.3d 1427, 1430-32 (7th Cir. 1994). This Court has repeatedly held that objections must be specific in

order to preserve the underlying issue for appellate review, as it is exceedingly difficult for appellate courts to review issues that were not developed at all on the record. *See* United States v. Brandell, 35 M.J. 369, 372 (C.M.A. 1992); United States v. McCarty, 45 M.J. 334, 335 (C.A.A.F. 1996).

Nothing about trial defense counsel's objection can be reasonably interpreted as alleging "inappropriate racial overtones" on the part of trial counsel, as Appellant claims. (App. Br. at 16.) There was no reference to Batson, the Equal Protection Clause, purposeful racial discrimination, and no request for a "race-neutral" justification for the challenge for cause. In short, trial defense counsel's objection to the challenge for cause to MSgt L.W. did not encompass an Equal Protection challenge, and therefore the issue was not properly preserved for appeal.[3]

Federal courts have uniformly applied waiver or forfeiture[4] to untimely Batson challenges and Batson challenges where a party does not challenge the

[3] Appellant's argument that "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," is not supported by any law. (App. Br. at 15.) Batson and Moore only require a response from a trial counsel *after* an objection to a specific challenge is made. In the interests of judicial economy, prosecutors cannot be expected to answer every possible objection a defense counsel might make before it is articulated. This is why the onus is strictly on defense counsel to lodge specific objections.

[4] Although some of the opinions listed use the term "waiver," they then apply a plain error analysis. Therefore, the term "forfeiture" is more appropriate. *See* United States v. Gladue, 67 M.J. 311 (C.A.A.F. 2009) (describing the difference

race-neutral reason given for the peremptory strike as pretextual. United States v. Pulgarin, 955 F.2d 1, 1-2 (1st Cir. 1992); United States v. Rudas, 905 F.2d 38, 41 (2d Cir. 1990); Government of the Virgin Islands v. Forte, 806 F.2d 73, 75-76 (3rd Cir. 1986); Davis v. Baltimore Gas & Elec. Co., 160 F.3d 1023, 1027 (4th Cir. 1998); Jones v. Butler, 864 F.2d 348, 369-70 (5th Cir. 1988); United States v. Reid, 764 F.3d 528, 533 (6th 2014); Chandler, 12 F.3d at 1430-32; Hopson v. Fredericksen, 961 F.2d 1374, 1377-78 (8th Cir. 1992); United States v. Contreras-Contreras, 83 F.3d 1103, 1104-05 (9th Cir. 1996); Sledd v. McKune, 71 F.3d 797, 799 (10th Cir. 1995); United States v. Cashwell, 950 F.2d 699, 704 (11th Cir. 1992).

The military Courts of Criminal Appeals who have addressed the issue have also applied forfeiture to tardy and incomplete Batson claims: United States v. Irvin, ACM 35167 (A.F. Ct. Crim. App. 24 March 2005) (unpub. op.); United States v. Walker, 50 M.J. 749, 750 (N-M. Ct. Crim. App. 1999); United States v. Galarza, No. 9800075 (A. Ct. Crim. App. 31 May 2000)(unpub. op.)

Appellant's assertion that Equal Protection issues cannot be waived appears to be based on a misreading of Santiago-Davila, 26 M.J. at 390. In Santiago-Davila this Court declined to find waiver where the appellant had not made a Batson challenge, but instead made a similar challenge to an allegedly racially

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between waiver and forfeiture and explaining how courts often conflate the two terms.)

discriminatory peremptory challenge under a California Supreme Court case with a similar holding. However, nothing about this Court's opinion suggested that "the rights articulated in Batson and Santiago-Davila" can never be waived, as Appellant now claims. (App. Br. at 14.) Importantly, in Santiago-Davila the defense counsel "asserted a closely-related constitutional claim." 26 M.J. at 390. Here, trial defense counsel advanced no theory even resembling an Equal Protection argument.

In United States v. Hurn, 55 M.J. 446, 449 (C.A.A.F. 2001), this Court also declined to find waiver of a Batson issue. The military judge twice interrupted trial defense counsel mid-sentence and did not give him the opportunity to disagree with the race-neutral reason offered by trial counsel. Id. But again, the circumstances in Hurn were not present in this case. Trial defense counsel was given a full opportunity to object to the challenge for cause against MSgt L.W. and raised no Equal Protection concerns.

The justifications for applying forfeiture to Batson issues are manifold. In McCrory v. Henderson, 82 F.3d 1243, 1248 (2d Cir. 1996), the Second Circuit Court of Appeals discussed "problems caused by tardy Batson challenges" and why they mandate forfeiture of the issue if not raised during jury selection. If an Equal Protection concern is raised at trial, the judge can remedy the error by disallowing the challenge; however, after the trial has concluded, the only remedy

for an Equal Protection violation is vacating the conviction. Id. at 1247. "The 'timely objection' rule is designed to prevent defendants from 'sandbagging' the prosecution by waiting until trial has concluded before insisting on an explanation for jury strikes that by then the prosecutor may largely have forgotten." Id. (citing United States v. Forbes, 816 F.2d 1006, 1011 (5th Cir. 1987)). Also, a prosecutor's reasons for a challenge may rest in part on subtle factors that are difficult to remember long after the fact. Id. at 1247-48.

Further, a Batson challenge requires a judge to rule on whether the proffered reasons for a challenge are a pretext for purposeful discrimination. Such a determination depends on the judge's observations of the jurors and attorneys and on an assessment of their credibility. Id. at 1248. "It is nearly impossible for the judge to rule on such observations intelligently unless the challenged juror either is still before the court or was recently observed." Id. *See also* Snyder v. Louisiana, 552 U.S. 472, 477 (2008) ("best evidence of discriminatory intent will often be the demeanor of the attorney who raises the challenge, making the trial court's first-hand observations of even greater importance.)

In this case, Appellant's failure to raise an Equal Protection challenge at trial deprived the United States of the ability to present additional evidence or argument in full response to any claim that it was purposefully excluding MSgt L.W. on the basis of her race or that its reason for the challenge for cause was pretextual. It

also precluded the military judge from instituting remedies that might have addressed any Equal Protection concerns at the time of trial.

Most importantly, the lack of objection at trial prevented the military judge from making findings of fact as to the existence of purposeful discrimination or pretext that would be reviewable by this Court, which itself does not have fact-finding authority under Article 67(c), UCMJ. This Court's lack of fact-finding authority calls into question whether this Court can even do what Appellant asks it to do: namely, make the factual finding that the government engaged in purposeful racial discrimination, and thereby reverse this case on Equal Protection grounds. For these reasons, Appellant's Equal Protection claims on appeal must be considered forfeited and can only be reviewed for plain error.

c. The military judge's excusal of MSgt L.W. was not plain error and did not violate the Equal Protection Clause since trial counsel's reason for the challenge was race-neutral.

Even assuming that the framework of Batson can and should be applied to challenges for cause, Appellant cannot establish that it was error, plain or otherwise, under the Equal Protection clause for the military judge to grant the challenge for cause of MSgt L.W.

Given the lack of authority extending Batson to challenges for cause, it is not surprising that there is little case law addressing claims similar to Appellant's.

However, case law interpreting Batson is useful in analyzing whether a challenge for cause might violate the Equal Protection Clause.

A judge does not commit plain error in allowing a strike against a juror if the reason given for the strike is not inherently discriminatory and if there is no evidence on the record to suggest the prosecutor's reason was a pretext for racial discrimination. Chandler, 12 F.3d at 1432; Contreras-Contreras, 83 F.3d at 1105 (both citing Hernandez, 500 U.S at 360: "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.")

Trial counsel's reasons for challenging MSgt L.W. were not inherently discriminatory. He articulated that MSgt L.W. had made a sua sponte expression of concern about the excusal of an African-American panel member which demonstrated that she might believe the government was purposefully excluded members of the same race as Appellant. The Supreme Court has elaborated that Batson "does not require that the justification [for a peremptory strike] be unrelated to race. Batson only requires that the prosecutor's reason for striking a juror not be the juror's race." Hernandez, 500 U.S. at 375. Furthermore, several federal circuits have found that exercising a *peremptory* challenge against a juror because of the juror's expressed views on race in the criminal justice system is not equivalent to challenging the juror because the juror's race.

In United States v. Perkins, 105 F.3d 976, 978 n.1 (5th Cir. 1997), the defendant's defense counsel asked the jurors during voir dire if they had looked around the courtroom and been able to figure out who were the defendants, who were the lawyers, and who were the prosecutors. In exercising a peremptory challenge against an African-American juror, the prosecutor noted that in response to the defense counsel's question, that juror "started shaking his head and kind of had a disgusted look on his face. And from that, I got the impression that he might be somebody who would have some ill feelings about the fact that there could have been . . .something against the defendants because of their race." Id. at 978.

The Fifth Circuit found no violation of Batson, noting, "the prosecutor pointed to the juror's personal conduct which the prosecutor interpreted to mean that the juror was skeptical of the judicial system." Id. at 979. The Fifth Circuit asserted that "[a] juror's trust in the fairness of the system is not inherently based upon race," and "the juror's action removes the specter of a generic reason or group based presumption." Id. The Court then emphasized, "[t]he prosecutor articulated *specific conduct* which conveyed such an attitude."[5] Id. (emphasis

[5] The Fifth Circuit distinguished Perkins from United States v. Bishop, 959 F.2d 820 (9th Cir. 1992). In Bishop, the Ninth Circuit found a Batson violation where the prosecutor struck a juror because she was poor and lived in a poor violent area of Los Angeles where the residents "probably believe police 'pick on' African-Americans." Perkins, 105 F.3d at 979. Such a challenge violates Batson because it is based on a generalization rather than being drawn from what the juror actually said. Id.

added). *See also* United States v. Douglas, 82 F.3d 1315, 1319 (5th Cir. 1996) (Peremptory challenge against an African-American juror who said he would have concern if an all white jury was selected in the case did not violate Batson.)

In Tolbert v. Gomez, 190 F.3d 985 (9th Cir. 1999), a prospective African-American juror asked if he could speak with the trial judge. This juror asked the judge why the jurors had not been questioned about race and whether they had "predetermined views as to whether or not the defendant is guilty based on their race." Id. at 987. The juror also stated, "I glanced at the jurors to see what the composition of the jury was and it seemed to be between American, Indian, Hispanic, female, male so I think along those lines it should be adequate." Id. The juror repeatedly affirmed that he himself could be fair and impartial. Id. The prosecutor ultimately exercised a peremptory challenge against this member. Id. at 978-79.

The Ninth Circuit Court of Appeals ruled that there was no Batson violation, since the defense had not raised an inference that the prosecutor's peremptory challenge of this juror was based on race. Id. at 989. The Ninth Circuit rejected that notion that the striking this juror "on the basis of his *opinions* on race was equivalent to striking him on the basis of his race." Id. (emphasis added). The Court further highlighted that a juror's concerns about the racial attitudes of the other jury members is not "a characteristic that is peculiar to any race." Id.

quoting Purkett v. Elem, 514 U.S. 765, 769 (1995). Indeed, the Court pointed out that the juror's "views about racial attitudes are shared by many not of his race or belonging to any racial minority." Id. *See also* Akins v. Easterling, 648 F.3d 380, 388 (6th Cir. 2011)(Finding the Fifth and Ninth Circuit's reasoning in Perkins and Tolbert persuasive for the purposes of habeas review); United States v. Samuels, 543 F.3d 1013, 1018 (8th Cir. 2008) (Peremptory challenge against juror who stated he believed the justice system did not treat African Americans fairly did not constitute purposeful discrimination on the part of the government); United States v. Blanding, 250 F.3d 858, 861 (4th Cir. 2001) (concern that a juror would be racially biased against the defendant based on the juror's display of the confederate flag was a "race-neutral" basis for a peremptory challenge against that juror); People v. Stanley, 39 Cal. 4th 913, 939-940 (Cal. 2006) ("A match in the skin color between a defendant and a prospective juror does not preclude a peremptory excusal on grounds that the juror exhibited sympathy or bias either for or against the defendant who is of the same race.")

The reasoning of the courts described above is highly persuasive in evaluating facts of this case. Trial counsel did not generalize that all African-American jurors distrust the judicial system. He did not merely assume that MSgt L.W. would be biased in favor of Appellant because they were of the same race. *See* Batson, 476 U.S. at 97. Instead, like the prosecutor in Perkins, he pointed to

specific statements made during voir dire that led him to believe MSgt L.W. distrusted the court-martial proceedings based on SMSgt. D.C's excusal and therefore might be biased in favor of Appellant and against the government. Moreover, as the Air Force Court found, MSgt L.W. "injected the issue of race sua sponte." (J.A. at 7.)

While the challenge for cause was related to race, trial counsel did not challenge MSgt L.W. based on her race itself. As the Supreme Court stated in Hernandez, this type of challenge is permitted by Batson and the Equal Protection Clause. Indeed, there are people of all races who might express similar concerns about the racial make-up of a court-martial panel in the trial of an African-American servicemember. If a Caucasian court member had expressed unprompted concerns that an African-American member had been excused from the panel, one would imagine that trial counsel would have also challenged that court member for cause as well.

Ultimately, in assessing Appellant's Equal Protection claim it is essential to return to the original purpose behind Batson. The Supreme Court recognized that the Equal Protection Clause is violated where there is evidence of *purposeful racial discrimination* in court proceedings. *See* Batson (generally addressing purposeful racial discrimination in peremptory challenge to court members and in jury venire selection.) The facts of this case do not demonstrate that the United

States *purposefully* discriminated on the basis of race in challenging MSgt L.W. for cause. Instead, the facts show that trial counsel challenged MSgt L.W. for cause for a race-neutral reason: namely, because he believed she might distrust the justice process and therefore would be biased in favor of the accused and against the government.

Moreover, there was no evidence in the record to suggest that trial counsel's concern for racial bias on the part of MSgt L.W. was a pretext for racial discrimination against her because she was black and Hispanic. Indeed, trial defense counsel's failure to object at trial to the challenge for cause as being a pretext for racial discrimination indicates that the parties at trial accepted trial counsel's justification for the challenge as being sincere. Trial counsel's reasons for the challenge were not unreasonable, implausible, or nonsensical which might tend to suggest a pretext for racial discrimination. Rather, the challenge was similar to other challenges that have been upheld by other federal courts as being non-discriminatory.

Under all of the above circumstances, there is simply no evidence of purposeful racial discrimination on the part of the government in the challenge of MSgt L.W. Trial counsel's stated reason for the challenges was not inherently discriminatory. The military judge had no duty to address sua sponte whether purposeful racial discrimination occurred, especially where trial defense counsel

made no such objection and where there is no case law extending Batson to challenges for cause. It did not offend the Equal Protection Clause for the military to grant the challenge for cause, especially under a plain error standard.

d. The military judge did not err in granting the challenge to MSgt L.W. under the implied bias standard.

Given that there was no violation of the Equal Protection Clause in granting the challenge for cause of MSgt L.W., this Court must still determine whether the military judge erred in granting the challenge for cause based on implied bias. While Appellant implores this Court to give the military judge no deference because "he did not offer any analysis or demonstrate he applied the correct law," this position is not supported by the law or the facts of this case. (App. Br. at 10.) This Court has said that where a military judge's analysis of implied bias or the liberal grant mandate is not discussed on the record, or is not comprehensive, the military judge is entitled to *less* deference. Peters, 74 M.J. at 34; United States v. Bagstad, 68 M.J. 460, 462 (C.A.A.F. 2010); United States v. Richardson, 61 M.J. 113, 120 (C.A.A.F. 2005). "However, this does not suggest that the military judge is entitled to no deference." United States v. Hollings, 65 M.J. 116, 119 (C.A.A.F. 2007).

Here, the military judge articulated that he found no actual bias, and mentioned his observation that MSgt L.W. had made her "utterance" about the excusal of SMSgt D.C. "without any precipitating factors." He demonstrated that

he understood the law to the extent that he did not apply the liberal grant mandate to a challenge by the government. *See* United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005). He also demonstrated that he understood the appropriate standard for implied bias, because he mentioned public perceptions of fairness in his reasoning for denying other challenges for cause under the implied bias standard. (R. at 260, 274.) While this Court may choose to afford the military judge in this case less deference than if his ruling had been more extensive, it certainly should afford him some deference in reviewing his decision.

The record demonstrates ample support for the military judge's excusal of MSgt L.W. for cause based on implied bias.[6] The Supreme Court has emphasized that the goal of the Sixth Amendment is "jury impartiality with respect to both contestants" and "neither the State nor the defendant should be favored." Holland v. Illinois, 493 U.S. 474, 483 (1990). Following the Supreme Court's reasoning, the prosecution should be able to successfully challenge a potential court member for cause when that member expresses a bias in favor of the accused. Indeed, this notion is echoed in the discussion to R.C.M. 912(f)(1)(N), which indicates it may be a ground for challenge when a member "has a decidedly friendly or hostile

[6] Although this Court has previously stated that "implied bias should be invoked rarely," more recently this Court has clarified that this statement "reflects that 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." Clay, 64 M.J. at 277.

attitude toward *a party*." (emphasis added.) Notably, the R.C.M. discussion does not limit the ground for challenge only to when a member demonstrates a hostile attitude toward the accused.

Without prompting, MSgt L.W. noted the fact that another African American court member had been excused from the court-martial as the reason why she would want someone like herself on the panel. As trial counsel mentioned, this raised the inference that MSgt L.W. felt the need to advocate on behalf of Appellant because they were of similar racial background and another African-American member had already been excused from the panel. (J.A. at 57-58.) It also raised the inference that MSgt L.W. was questioning why SMSgt D.C. had been excused, and that she therefore would be distrustful of the court-martial process. (J.A. at 58.) This concern was compounded when MSgt L.W. asked if SMSgt D.C. was going to be replaced.

Appellant calls trial counsel's reason for his challenge a "mischaracterization of MSgt L.W.'s statements.[7]" (App. Br. at 6.) But it is appropriate for counsel to reference evidence elicited during voir dire "from which an inference can be drawn that the member will not be impartial." *See* Woods, 74

[7] Appellant criticizes trial counsel because his basis for challenge "was not supported by anything MSgt. L.W. actually said." (App. Br. at 11.) However, it should be noted that MSgt L.W. also never explicitly stated, "it was, in her view, a positive thing to have a racially diverse panel," or "the appearance of fairness would be enhanced if the panel included an African-American," as Appellant now chooses to characterize her statements. (App. Br. at 12-14.)

M.J. at 245 (Stucky, J. concurring). That is exactly what trial counsel did here, and trial counsel's inferences were reasonable and legitimate interpretations of MSgt L.W.'s statements. [8]

When trial counsel asked MSgt L.W. if the excusal of the other African-American member concerned her, her answer – contrary to Appellant's claims – was indeed equivocal. She replied, "No, sir, no. Just if – well, I don't know . . ." and then asked if the member would be replaced. (J.A. at 54.) She never gave a firm response that SMSgt D.C.'s excusal did not concern her. Based on MSgt L.W.'s ambivalent response, questions remained as to whether she harbored misgivings about the fairness of the court-martial system that would cause her to favor Appellant. The record indicates that her answers included hesitations and instances where she would make a statement and then quickly backpedal from it. The military judge was in the best position to interpret MSgt L.W.'s equivocal answers in court, and he found evidence of implied bias. *See* Woods, 74 M.J. at 243 n.1 ("resolving claims of implied bias involves questions of fact and demeanor"); Clay, 64 M.J. at 277 ("what might appear to be a close call on a cold

[8] Interestingly, the rest of MSgt L.W.'s voir dire indicated that she was a former volunteer at a Rape Crisis Center, who occasionally had escorted victims of sexual assault to the hospital for sexual assault examinations. (J.A. at 44-46.) Such information would ordinarily have prompted a challenge for cause from trial defense counsel. Trial defense counsel's objection to the challenge of MSgt L.W. suggests that, based on her comments at issue, they must have recognized that she was certainly a favorable member for Appellant.

appellate record, might not appear so close when presented from the vantage point of a military judge observing the members in person . . .").

Although Appellant relies heavily on MSgt L.W.'s statements that she would be fair to both sides, such proclamations do not preclude a finding of implied bias. United States v. Strand, 59 M.J. 455, 460 (C.A.A.F. 2004)("disclaimers of bias, or the absence of actual bias, are not dispositive with regard to implied bias, which is viewed through the eyes of the public."); United States v. Smart, 21 M.J. 15, 19 (C.M.A. 1985) ("We do not accept as conclusive a challenged member's perfunctory disclaimer of personal interest or his assertion of impartiality.") Again, the military judge was best situated to evaluate MSgt L.W.'s statements, and he found implied bias.

Taking all the circumstances of MSgt L.W.'s answers as a whole – her unprompted reference to race as why she would want a court member like herself, her hesitations and backtracking, her reference to the excusal of another African-American court member, and her lack of an explicit response that the excusal did not concern her – there was legitimate concern that MSgt L.W. had a "decidedly friendly" attitude toward Appellant and a distrustful attitude toward the government or the court-martial process. Based on MSgt L.W.'s answers during voir dire, the risk was too high that a member of the public would legitimately question the fairness of the proceeding if she remained as part of the court-martial

panel. *See* Woods, 74 M.J. at 243. Just as public confidence is undermined in a trial where the government obtains a conviction based on bias against an accused, so too is public confidence undermined where an accused, assisted by bias, obtains an acquittal. *See* Georgia v. McCollum, 505 U.S. 42, 50 (1992). Under the totality of the circumstances and giving appropriate deference to the military judge, he did not err in granting the challenge for cause against MSgt L.W. on the grounds of implied bias. [9]

Since the military judge did not err in granting the challenge for cause against MSgt L.W., the granted issue should be answered in the negative.

[9] There is also a persuasive argument that MSgt L.W.'s answers demonstrated actual bias. "Actual bias is a personal bias that will not yield to the military judge's instructions and the evidence presented at trial." Woods, 74 M.J. at 243. *See also,* Id. at 245 (Stucky, J., concurring) ("If there is evidence from which an inference can be drawn that a member will not be impartial . . . or may be unlawfully influenced, that is actual bias.") In this case, MSgt L.W.'s statements supported the inference that she would not be impartial toward the government, and thus, her presence on the panel would have created substantial doubt as to the impartiality of the court-martial.

II.

THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT ERR IN FINDING THAT APPELLANT WAS NOT PREJUDICED BY ANY ALLEGED ERROR IN EXCUSING MSGT L.W FOR CAUSE.

Standard of Review

Whether a Court of Criminal Appeals used the appropriate standard to test for prejudice is a question of law reviewed de novo. United States v. Evans, ___ M.J. ____ No. 16-0019/AR, slip. op. at 5 (C.A.A.F. 6 June 2016).

Law and Analysis

Appellant asserts that the Air Force Court of Criminal Appeals (AFCCA) erred by testing any error in the excusal of MSgt L.W. for prejudice. In support of this contention, he cites to this Court's prior decisions in Peters, Woods, Nash, Clay, and Dale. However, these cases are all distinguishable from Appellant's case, in that they address the failure to remove a court member, rather than the alleged improper excusal of a court member which is at issue here. Therefore, they are not binding precedent that AFCCA or this Court must apply to Appellant's case.

Contrary to Appellant's claim, it does not logically follow that "when a member is *not* removed improperly should be treated the same as when a member *is* removed improperly with regard to prejudice." (App. Br. at 20.) Quite simply,

the failure to remove a biased member from the panel has different ramifications than the improper excusal of a member. In the former instance, the panel is undoubtedly tainted by a biased member; there is no opportunity for the accused to be tried by an impartial panel. In the latter instance, an accused still has the opportunity to be tried by an impartial panel assuming the remaining panel members are impartial.

In Gray v. Mississippi, 481 U.S. 648, 668 (1987), the Supreme Court recognized that the infringement of a right to an impartial jury can never be treated as harmless error. Thus, if a member who should have been excused for bias sits on a panel, it constitutes structural error.[10] Structural error requires automatic reversal without testing for prejudice. *See* Rivera v. Illinois, 129 S.Ct. 1146, 1455 (2009). However, most other errors, even those of a constitutional nature, can be harmless. Neder v. United States, 527 U.S. 1, 8 (1999). Appellant concedes that the alleged error in this case is not structural, yet asks for a structural error remedy – automatic reversal without testing for prejudice. (App. Br. at 21.)

Despite Appellant's contentions otherwise, there is much support in the law for testing the improper removal of a court member for prejudice. In James, 61

[10] This Court has explained that in situations where the defense uses a peremptory challenge against a member who should have been excused for cause, "it creates a significant burden on the statutory right of the defense to exercise a peremptory challenge to remove a member objectionable to the defense." United States v. Quintanilla, 63 M.J. 29, 37 (C.A.A.F. 2005). An appropriate remedy is reversal of the findings and sentence. Id.

M.J. at 133, this Court stated that it would evaluate a military judge's decision to grant a government challenge for cause for "prejudicial error," although it did not reach the question of prejudice as it found no error in granting the challenge. Several federal circuits have similarly asserted that where a government challenge for cause is improperly granted, the appellant is entitled to relief only if he can show actual prejudice. United States v. Mills, 987 F.2d 1311, 1314 (8th Cir. 1993); United States v. Griley, 814 F.2d 967, 974 (4th Cir. 1987).

In Quintanilla, a capital case, this Court refused to overturn the findings even though the military judge had erroneously granted a government challenge for cause. 63 M.J. at 37. This Court highlighted that "[t]here had been no allegation that any of the members who sat on the panel held a bias against Appellant or otherwise should have been disqualified." Id. The Fifth Circuit Court of Appeals has likewise held that "improper removal of a member of the venire is not grounds for reversal in a non-capital case unless the jurors who actually sat were not impartial within the meaning of the *sixth amendment*." United States v. Gonzalez-Balderas, 11 F.3d 1218, 1222 (5th Cir. 1994)(citing United States v. Prati, 861 F.2d 82 (5th Cir. 1988)). This reasoning is supported by the Supreme Court, which has said, "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have

occurred are subject to harmless-error analysis." Rose v. Clark, 478 U.S. 570, 579 (1986).

As such, AFCCA was correct to consider the concept of structural error, and to recognize that in the absence of structural error in this case, it was appropriate to test for prejudice. AFCCA was also correct to conclude that even if the military judge erred in excusing MSgt L.W. for implied bias, Appellant suffered no prejudice. As discussed at length above, Appellant's Equal Protection rights were not violated.[11] The United States also would have been able to use its peremptory challenge against MSgt L.W. anyway, since it had a race-neutral reason to do so.[12] Appellant was also not denied the right to exercise his own peremptory challenge in a manner he saw fit.

After MSgt L.W. was removed from the panel, Appellant was tried by a panel that was impartial and fair, as required by the Sixth Amendment. At no time has Appellant ever challenged the impartiality or fairness of the members who

[11] Indeed, if an Equal Rights Violation had been found, reversal, rather than a prejudicial error analysis would be required. Batson, 476 U.S. at 90. It is well recognized in federal courts that a Batson violation is structural error from which prejudice is conclusively presumed. *See e.g.* Sanchez v. Roden, 753 F.3d 279, 307 (1st Cir. 2014); United States v. McAllister, 693 F.3d 572, 582 n.5 (6th Cir. 2012).

[12] The United States did not use its peremptory challenge. (J.A. at 61.) Trial defense counsel did exercise their peremptory challenge, leaving the court at a quorum of five members. (Id.) Assuming MSgt L.W. had been retained on the panel, trial counsel could have exercised his peremptory challenge without falling below a quorum and requiring the detailing of new court members. *But see* Gray, 481 U.S. at 664 (rejecting the argument that unexercised peremptory challenges can prove harmless error in a capital case).

actually comprised his court-martial panel. As AFCCA highlighted, "there was no evidence a different panel would have somehow produced a better result for Appellant." (J.A. at 8-9.) (citing United States v. Newsom, 29 M.J. 17, 21 (C.M.A. 1989)). Since, Appellant suffered no prejudice from any alleged error in the excusal of MSgt L.W. he is not entitled to reversal of his conviction or any other form of relief. This granted issue should also be answered in the negative.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 5 July 2016.

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/s/_____

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