IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Specialist (E-4) **JONATHAN K. LEE** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20240025 USCA Dkt. No. 26-0183/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ERRONEOUSLY DENIED MULTIPLE DEFENSE CHALLENGES FOR CAUSE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2018).[1]

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

Statement of the Case

On January 19, 2024, an enlisted panel sitting as a general court-martial convicted Appellant *in absentia*, contrary to his pleas, of three specifications of rape of a child and three specifications of sexual abuse of a child, in violation of Article 120b, 10 U.S.C. § 920b, Uniform Code of Military Justice [UCMJ]. (Charge Sheet; R. at 984). The same day, the military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for a total of 64 years, and to be dishonorably discharged. (R. at 993–94). On April 12, 2024, the convening authority took no action on the findings and approved requested deferment of forfeitures. (Action). On March 6, 2024, the military judge entered judgment. (Judgment). Appellant's case was docketed at the Army Court on October 31, 2024. (Referral and Designation of Counsel).

On February 27, 2026, the Army Court affirmed the findings and sentence. *United States v. Lee*, ARMY 20240025, 2026 CCA LEXIS 108 (A. Ct. Crim. App., Feb. 27, 2026) (contained in App'x A). Appellant was notified of the Army Court's decision. In accordance with Rule 19 of this Court's Rules of Practice and Procedure, on April 28, 2026, the undersigned appellate defense counsel filed a Petition for Grant of Review, while seeking leave to file the Supplement to the Petition for Grant of Review separately and an enlargement of time. This Court granted appellate defense counsel's motion, granting until May 20, 2026, to file the

Supplement. The undersigned counsel hereby file the Supplement to the Petition for Grant of Review under Rule 21.

Statement of Facts

Appellant was tried *in absentia* after the military judge ruled Appellant had voluntarily absented himself prior to the start of trial. (R. at 129–32). The parties proceeded with the court-martial and group voir dire began on January 16, 2024. (R. at 163).

A. Voir Dire of First Sergeant TM.

First Sergeant (1SG) TM was a member of the military police (MP) branch, in which he had served for over two decades. (R. at 279). First Sergeant TM had experience as a military police investigator and had investigated a broad range of cases, including allegations of child sex abuse. (R. at 279–80). He also had prior experience teaching Sexual Harassment/Assault Response and Prevention (SHARP) classes. (R. at 203). Moreover, 1SG TM had a prior working relationship with one of the Government's main witnesses, Special Agent BR, who had previously investigated members of 1SG TM's unit and briefed him on case developments. (R. at 278).

First Sergeant TM expressed an opinion that he would "want to see some evidence from defense in helping [him] decide the case." (R. at 214). He also

believed that if appellant was convicted of any specification, that his punishment had to "include at least some jail time." (R. at 219).

During individual voir dire, 1SG TM stated he would not give greater weight to Special Agent BR's testimony, nor would his extensive experience as an MP affect his "view of law enforcement officials." (R. at 281). First Sergeant TM was asked about his desire to hear evidence from the defense and he stated that: "if there's something that can be refuted I would, you know, of course, like to hear that so that I'm getting both sides of it." (R. at 282). When defense followed up by asking whether 1SG TM would "hold it against" them if the defense put on no evidence, 1SG TM responded, "[n]ot against them. No, sir. It would depend on what else – what had been presented prior to that." (R. at 283). Neither the Government nor military judge asked any follow-up questions of 1SG TM.

B. The Military Judge Denied Defense's Challenge of 1SG TM.

Defense challenged 1SG TM for implied bias based on his extensive military police experience. (R. at 330-31). Defense also argued bias based on 1SG TM's relationship with Special Agent BR. (R. at 331). The military judge noted that he believed the level of interaction was merely commiserate with those expected of a company first sergeant. (R. at 331). Defense argued that the public may have concerns about the fairness of the proceedings "if a career law enforcement officer who's interacted with one of the agents" was seated on the panel. (R. at 332).

Defense also noted that 1SG TM was the only member of the panel veneer who stated they knew any witness, let alone an actual investigator connected with the case. (R. at 333). Neither the defense, the government, nor the military judge discussed 1SG TM's opinions on whether defense must present evidence.

C. Voir Dire of Command Sergeant Major RL.

After challenges, only seven panel members remained. (R. at 339-40). The next day, five new members underwent group voir dire, which included Command Sergeant Major (CSM) RL. (R. at 346, 350). During group voir dire, CSM RL expressed the opinion that he would have difficulty believing that "once a person has lied, they may feel pressure to continue telling the lie even under oath in a court-martial." (R. at 338). Command Sergeant Major RL also answered that he was "not open to the idea" that an alleged victim's uncorroborated testimony "may not be enough to find a person guilty of sexual assault." (R. at 389). He stated that if the only evidence the government admits is the alleged victim's testimony, he would *not* consider voting not guilty. (R. at 389-90) (emphasis added).

During individual voir dire, defense asked whether CSM RL would "hold it against the defense" if they asked a difficult question to a child witness during cross-examination. (R. at 411–12). Command Sergeant Major RL stated, "maybe a little bit." (R. at 412).

D. The Military Judge Denied Defense's Challenge of CSM RL.

The defense challenged CSM RL for cause based on actual and implied bias. (R. at 445-46). The defense cited CSM RL's statement that the government need only "address," not necessarily disprove, alternate theories in order to prove guilt. (R. at 446). The military judge asserted that CSM RL's beliefs regarding a victim's potential to lie was not evidence of bias, just evidence of him not accepting the defense's theory of the case. (R. at 447). The defense argued that CSM RL's "baseline" was that defense's alternative theories were "automatically less likely." (R. at 448).

The military judge denied the challenge and reasoned that "to the extent there was bias, it would yield to the evidence presented and the judge's instructions, and an objective observer would not have substantial doubt about the fairness of the accused's court-martial panel." (R. at 449). The military judge stated that he believed some of the defense's questions regarding reasonable doubt were confusing and that when presented with "the law as it is accurately written, he was unequivocal in his acknowledgment that the government bears the burden of proof." (R. at 449). The military judge found that any difference between "address" versus "disprove" were "semantic." (R. at 449). The military judge stated that even in view of the liberal grant mandate, this "wasn't a close call." (R. at 450). The military judge denied defense's challenge. (R. at 449).

After challenges, the defense used their peremptory challenge to excuse CSM RL. (R. at 453). 1SG TM was empaneled. (R. at 453).

Reasons to Grant Review

Pursuant to this Court's Rule 21(b)(5)(F), the Army Court's affirmance of the military judge's erroneous denial of Appellant's challenges for cause departed from the accepted course of military justice proceedings.

Appellant's case is in front of this Court under a unique posture. Fairness of trying an absent accused is already placed in a premium position because he is unable to personally participate in the voir dire process. Empanelment of the least biased members thus becomes of the utmost import. Appellant lost out on this fairness when the military judge denied the defense challenges against two members who evinced bias. The defense was forced to use its sole peremptory on one of the offending members and as such, Appellant was prejudiced.

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ERRONEOUSLY DENIED MULTIPLE DEFENSE CHALLENGES FOR CAUSE.

Standard of Review

This Court reviews a "military judge's actual bias determinations for an abuse of discretion." *United States v. Keago*, 84 M.J. 367, 371 (C.A.A.F. 2024) (citing *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020)).

This Court reviews "implied bias challenges pursuant to a standard that is 'less deferential than abuse of discretion, but more deferential than de novo review.'" *Keago*, 84 M.J. at 371 (citing *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015)). While a "military judge's ruling on a challenge for cause is given great deference," that deference may be afforded to a greater or lesser degree based on the reasoning the military judge puts on the record. *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017).

Law

"The Due Process Clause of the Constitution…protects a defendant from conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *United States v. Neal,* 68 M.J. 289, 298 (C.A.A.F. 2010) (citing *In re Winship*, 397 U.S. 358, 364 (1970)); *see* R.C.M. 920(e)(5). "[P]roof beyond reasonable doubt requires that the evidence

must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt." *United States v. Gay*, 16 M.J. 475, 477 (C.M.A. 1983) (internal quotations omitted); Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3A–44B–2 (29 February 2020) [Benchbook].

"The Constitution precludes shifting the burden of proof from the government to the defense 'with respect to a fact which the State deems so important that it must be either proved or presumed' in order to constitute a crime." *Neal*, 68 M.J. at 298 (citing *Patterson v. New York*, 432 U.S. 197, 215 (1977)); Benchbook, para. 2-5-1 ("the accused's guilt rests solely upon the prosecution and the burden never shifts to the defense to establish the accused's innocence").

As a matter of due process, an accused "has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017). "A member shall be excused for cause whenever it appears that the member…[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). "[T]his language encompasses the two types of bias: actual and implied." *Keago*, 84 M.J. at 371.

Actual bias is "'the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.'" *Id.* (citing *Hennis*, 79 M.J. at

384). The test for actual bias is whether a member's personal bias "will . . . yield to the military judge's instructions and the evidence presented at trial." *Id*. (citing *United States v. Nash,* 71 M.J. 83, 88 (C.A.A.F. 2012)).

The test for implied bias is "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high." *Keago*, 84 M.J. at 371 (citing *United States v. Woods*, 74 M.J. 238, 243-44 (C.A.A.F. 2015)). Implied bias is "bias conclusively presumed as [a] matter of law." *Hennis*, 79 M.J. at 385. It is "bias attributable in law to the prospective juror regardless of actual partiality." *Keago*, 84 M.J. at 371. Implied bias can be shown where a panel member holds an erroneous view of the law and the military judge fails to correct it. *United States v. Rogers*, 75 M.J. 270, 271 (C.A.A.F. 2015) (holding that the panel member's "uncorrected misunderstanding of a relevant legal issue would cause an objective observer to have substantial doubt about the fairness of [appellant's] court-martial panel).

"Military judges must err on the side of granting defense challenges for cause." *Keago*, 84 M.J. at 371. "This 'liberal grant mandate' recognizes that 'the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings,' and is intended to address 'certain unique elements in the military justice system including limited peremptory rights and the manner of appointment of court-martial members that presents perils that are not

encountered elsewhere.'" *Id*. "[I]f after weighing the arguments for the implied bias challenge the military judge finds it a close question, the challenge should be granted." *Id*. The military judge "may, in the interest of justice, excuse a member against whom a challenge for cause would lie." R.C.M. 912(f)(4).

Argument

The fairness and impartiality of members is paramount. Based on the military judge's erroneous denial of the challenges against 1SG TM and CSM RL, the defense was forced to use its sole peremptory challenge on the lesser of two evils. Fairness and impartiality were placed to the side. Appellant did not receive a trial composed of impartial members and this Court should set aside the findings and sentence based on 1SG TM's bias.

Defense was forced to utilize its peremptory challenge on CSM RL who had clearly evinced a bias toward defense. He plainly stated that should defense counsel do their primary duty—to zealously represent their client by asking the hard questions—he would hold that harshness "against" defense. (R. at 411–12). Regardless of whether he held the it against the defense "a little" or a lot, this is bias and the military judge should have granted defense's challenge. (R. at 412) *See generally Keago*, 84 M.J. 367; *Commisso*, 76 M.J. 315. But the military judge's refusal to grant the challenge for cause placed Appellant in an untenable situation.

Defense counsel had to decide what was more palatable: a member who would hold their zealous representation against them (and therefore against Appellant) or a member who had extensive law enforcement experience and was familiar with one of the main witnesses in the case. A poor choice, if indeed a choice at all.

The military judge's erroneous denial of the challenges against both members meant that 1SG TM sat Appellant's court-martial. The defense correctly pointed out the inappropriate and unfair perception this created. First Sergeant TM was a decades-long military police officer. He was intimately familiar with investigative tactics and procedures purely by his position within the profession for over two decades. Not only that, 1SG TM knew Special Agent BR, a primary witness against Appellant.

These two reasons combined necessitated an immediate excusal for cause. The Army is small; it is not, however, so small that it can be considered fair for a member who knows a witness to sit in judgment of an accused. Excusing 1SG TM would have created no significant delay or issue for the government. It would have been simple and resolved the presence of both actual and implied bias. However, the military judge erroneously denied the defense's challenge and 1SG TM ultimately sat as a member of Appellant's court-martial.

The two denials of defense's challenges were an abuse of discretion. The military judge allowed for bias to be present during Appellant's court-martial and this Court cannot be convinced of the fairness of the trial, especially given Appellant was tried *in absentia*.

Conclusion

This Court should grant Appellant's petition for grant of review and reverse the Army Court's decision that sanctioned the military judge's erroneous denials of challenges against two biased members.

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Appendix A: Army Court Decision

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLOR, POND, and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist JOHNATHAN K. LEE
United States Army, Appellant

ARMY 20240025

Headquarters, I Corps
Robert E. Murdough Military Judge
Lieutenant Colonel Cara-Ann M. Hamaguchi, Acting Staff Judge Advocate

For Appellant: Colonel Philip M. Staten. JA; Captain Eli M. Creighton, JA; Major Robert W. Duffie, JA (on brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Stephen L. Harmel (on brief).

27 February 2026

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

James W. Herring, Jr.

JAMES W. HERRING, JR.
Clerk of Court

CORRECTED COPY

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLOR, POND, and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist JONATHAN* K. LEE
United States Army, Appellant

ARMY 20240025

Headquarters, I Corps
Robert E. Murdough Military Judge
Lieutenant Colonel Cara-Ann M. Hamaguchi, Acting Staff Judge Advocate

For Appellant: Colonel Philip M. Staten. JA; Captain Eli M. Creighton, JA; Major Robert W. Duffie, JA (on brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Stephen L. Harmel (on brief).

27 February 2026

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

James W. Herring, Jr.
JAMES W. HERRING, JR.
Clerk of Court

*Corrected

Appendix B: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following matters:

I. WHETHER THE MILITARY JUDGE ERRED WHEN HE RULED THAT APPELLANT HAD VOLUNTARY ABSENTED HIMSELF FROM THE COURT-MARTIAL AND ALLOWED TRIAL TO CONTINUE *IN ABSENTIA*.

II. WHETHER THE MILITARY JUDGE ERRED WHEN HE ADMITTED THE FORENSIC INTERVIEWS OF MISS AE AND MISS IE.

III. WHETHER THE CHARGE AND SPECIFICATIONS WERE LEGALLY SUFFICIENT.

Certificate of Compliance with Rules 24(c) and 37

1. This Supplement to the Petition complies with the type-volume limitation of Rule 24(c) because it contains 2,664 words.

2. This Supplement to the Petition complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Lee, Crim. App. Dkt. No. 20240025, USCA Dkt. No. 26-0183/AR was electronically filed with the Court and Government Appellate Division on May 20, 2026.

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