IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. JOSEPH P. PINCOLICGONZALEZ Staff Sergeant (E-6) United States Marine Corps, Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 202400290 USCA Dkt. No. 26-0123/MC

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

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Issue Presented

Whether the Military Judge violated Appellant's constitutional right to present a complete defense by prohibiting cross-examination of the complaining witness regarding violent acts he previously communicated to Appellant, thereby preventing the panel from considering evidence directly relevant to Appellant's state of mind.

Introduction

"[T]he right of a defendant in a criminal trial to assert self-defense is [a] fundamental [constitutional] right[]."[1] Yet in this case, the Military Judge excluded constitutionally-required non-hearsay evidence that Appellant needed to prove self-defense.

The Military Judge refused to allow the Defense to question the complaining witness about statements he made to the Appellant concerning his past violence, which was offered as non-hearsay statements to prove the effect of these statements on the Appellant's state of mind at the time of the alleged assault with the complaining witness. While acknowledging the Defense had a good-faith basis to lay the foundation, the Military Judge refused to let the Defense voir dire the witness outside the presence of the members to establish that the complaining

[1] *Taylor v. Withrow*, 288 F.3d 846, 851-52 (6th Cir. 2002) (discussing, *inter alia*, that "Blackstone referred to self-defense as 'the primary law of nature,' and claimed that 'it is not, neither can it be in fact, taken away by the law of society.' 3 William Blackstone, *Commentaries*, *4.").

witness made these statements to the Appellant. The lower court, affirming, never addressed whether the Military Judge abused his discretion when he excluded constitutionally-required, non-hearsay evidence that Appellant needed to prove self-defense. This Court should grant review to uphold the fundamental right to a meaningful opportunity to present a complete self-defense case.[2] The Constitution protects, and no rule of evidence restricts, the Defense's ability to elicit admissible evidence of the Appellant's state of mind through the Government's witnesses on an issue of self-defense.

Statement of Statutory Jurisdiction

Appellant filed a timely Notice of Appeal with the Navy-Marine Corps Court of Criminal Appeals (NMCCA).[3] The lower court reviewed this case under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ).[4] Appellant invokes this Court's Article 67(a)(3), UCMJ, jurisdiction.

Statement of the Case

A general court-martial consisting of officer and enlisted members convicted

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[2] "The exclusion of trustworthy exculpatory evidence may violate an accused's constitutional right to present a defense." *United States v. Maebane*, __ M.J. __, 2025 CAAF LEXIS 772, at *14 (C.A.A.F. 2025) (citing *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006); *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973)).

[3] Notice of Appeal (Nov. 12, 2024); *United States v. PincolicGonzalez*, No. 202400290, slip op. (N-M. Ct. Crim. App. Dec. 11, 2025).

[4] *PincolicGonzalez*, slip op. at 1.

Appellant, contrary to his plea, of one specification of assault consummated by a battery as a lesser-included offense, in violation of Article 128, UCMJ.[5] The members acquitted Appellant of the greater, charged offense of aggravated assault with the infliction of substantial bodily harm.[6] The members sentenced Appellant to a reprimand and no other punishment.[7] In his request for clemency, Appellant asked the Convening Authority to set aside the findings.[8] The Convening Authority denied the request and approved the findings and sentence, which the Military Judge entered into judgment.[9] The lower court affirmed the findings and sentence.[10]

[5] R. at 305, 1216.
[6] R. at 1216; Entry of Judgment (July 3, 2024).
[7] R. at 1261; Entry of Judgment (July 3, 2024).
[8] Convening Authority Action (Apr. 24, 2024).
[9] Convening Authority Action (Apr. 24, 2024); Entry of Judgment (Jul. 3, 2024).
[10] *PincolicGonzalez*, slip op. at 10.

Statement of Facts

A. The complaining witness, Corporal Sierra, who was in the same platoon as Appellant, told the Appellant about his history of fighting other Marines in his platoon.

Appellant and the complaining witness, Corporal (Cpl) Sierra, were members of the same platoon in A Company, 1st Reconnaissance (Recon) Battalion.[11] They had served together in the platoon for approximately one year.[12] During that time, Appellant learned from the complaining witness that Cpl Sierra had gotten involved in physical altercations (fights) with other Marines, at least one of which he had initiated while on deployment in Greece.[13]

B. During an exercise debrief, Appellant and Cpl Sierra got into an argument, which turned into a physical altercation.

The platoon deployed with the 13th Marine Expeditionary Unit (MEU) aboard USS ANCHORAGE to the Indian Ocean, where they conducted maritime interdiction exercises with members of the Sri Lankan armed forces.[14] After completing an exercise on 23 January, their unit debriefed a group of several dozen Marines and Sri Lankans standing in the "boat valley" of the ship.[15] The boat

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[11] R. at 712-13. At the time of trial, Cpl Sierra had been promoted to Sergeant. For the purposes of clarity, this supplement refers to him as the pseudonym of Cpl Sierra (his rank during the alleged incident).
[12] R. at 711-12.
[13] R. at 759-66.
[14] R. at 713, 720.
[15] R. at 804, 838, 841, 1010-11.

valley was a "very tight space."[16] It was hot, and everyone was tired after being on the water for over four hours.[17]

During the exercise debrief, Cpl Sierra raised an issue with Appellant about the "blood roster," a record of the participants' blood types that is used in case of injury.[18] Cpl Sierra blamed Appellant for doing the blood roster incorrectly.[19] Subsequently, both Marines moved into an enclave to the side of the circle to have a "sidebar" conversation, which soon turned into an argument.[20] Witnesses described the enclave as a "tight space."[21] During the argument, Cpl Sierra was "frustrated," "mad," and took the issue with the blood roster "personally."[22]

By the end of the sidebar argument, which "set [Cpl Sierra] off specifically," Cpl Sierra told Appellant words to the effect of "okay, motherfucker."[23] Cpl Sierra testified he and Appellant were standing four or five feet apart when he said this.[24] He testified he told Appellant, "[o]kay motherfucker, a staff NCO [referring to Appellant] you can't ask the SOIDC [the independent duty corpsman] who's

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[16] R. at 929.
[17] R. at 804-05, 916-17, 1009.
[18] R. at 722, 860.
[19] R. at 722-25.
[20] R. at 724-25, 798-99, 807, 863-68, 913, 995, 1011-13.
[21] R. at 806, 929.
[22] R. at 748-750.
[23] R. at 753-55, 808, 924, 931, 1018.
[24] R. at 723.

boarded in the stateroom with you for the blood types."[25] He testified that after a "brief moment of silence," he took a step back, took a sip from an energy drink that had been sitting on the ground, and Appellant struck him in the face.[26] On cross-examination, Cpl Sierra acknowledged that he had provided conflicting accounts about the physical distance between himself and Appellant (previously stating they were eight-to-ten feet apart), and about the time lapse between the "ok, motherfucker" statement and the punch (previously stating the delay was ten, fourteen, and up to thirty seconds).[27]

While some bystanders supported Cpl Sierra's account, others disputed it.[28] One described the two Marines as arguing about a foot apart, when he saw Cpl Sierra "gesture" at Appellant.[29] Another testified Cpl Sierra stepped towards Appellant, so close that their boots were almost touching and within a foot of each other, and was telling him, "do your job, motherfucker," when Appellant punched

[25] R. at 725-26.
[26] R. at 725-26.
[27] R. at 747, 787.
[28] R. at 799 (Cpl Sierra did not raise a fist or rush at Appellant), 869 (describing hearing an impact and seeing Cpl Sierra point at Appellant, who had a raised elbow), 880 (describing hearing words exchanged and then a can hitting the ground and seeing Cpl Sierra reeling with Appellant in a bladed stance), 914 (describing the punch as a "sucker punch" when Cpl Sierra was not looking), 995-96 (same), 925 (stating Cpl Sierra did not raise a fist and was holding an energy drink).
[29] R. at 1058.

him.[30] Others testified the two were face-to-face or within a foot of each other, and that the punch came immediately after Cpl Sierra said something to the effect of "[a]ll right, motherfucker."[31]

C. The Military Judge permitted the Government to admit testimony about Cpl Sierra's character for peacefulness and lack of prior fighting history, but did not permit the Defense to elicit evidence that Cpl Sierra told Appellant about his prior fighting history within the unit.

During trial, the Military Judge allowed the Government to admit testimony about Cpl Sierra's character for peacefulness.[32] On cross-examination, the Defense attempted to impeach the witness's testimony by asking if he knew Cpl Sierra had been in fights with other members of the platoon, to include a specific fight Cpl Sierra had with a certain Sergeant [Golf] in Greece.[33] The witness denied any knowledge of such incidents.[34]

During its cross-examination of Cpl Sierra, the Defense asked whether he had "been in other altercations in 1st Recon Battalion before."[35] The Government objected to the question as calling for improper character evidence under Military Rule of Evidence (MRE) 405(a), arguing "the government has not asked the

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[30] R. at 798-99, 807-08.
[31] R. at 914, 924, 931, 1013, 1021, 1024.
[32] R. at 904-09.
[33] R. at 917-18.
[34] R. at 917-18.
[35] R. at 757-62.

witness any questions about his reputation, opinion, or character on direct examination" and that it was "outside of the scope and not relevant."[36] The Defense responded that the testimony was not offered as character evidence under MRE 405(a), but relevant to Appellant's state of mind at the time of the assault, since "part of [Appellant's] belief is based on [Cpl Sierra's] previous physical altercations—these previous physical altercations were known in . . . their platoon. There was an altercation specifically between Sergeant [Golf] and . . . [then-Corporal Sierra], where [Cpl Sierra] initiated violence against [Sgt Golf], so that goes to the objective reasonable . . . ."[37]

Interrupting, the Military Judge stated, "Sure."[38] He then asked the Defense, "So why is it not . . . appropriate evidence to be admitted either through the accused or through another witness opinion as to [Cpl Sierra's] character for violence or aggression? You seem to be attempting to introduce specific instances of conduct to impeach the witness or to suggest that they acted in conformity [there]with."[39]

The Defense explained that its theory of admission for Cpl Sierra's prior acts of violence was "[n]ot that [Cpl Sierra] acted in conformity [there]with, but that it

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[36] R. at 759.
[37] R. at 759-60.
[38] R. at 760.
[39] R. at 760.

goes to [*Appellant's] knowledge* that another altercation occurred," which was relevant to his claim of self-defense.[40] Trial Counsel continued to object under MRE 405(a).[41] Proffering that Appellant was aware of this previous altercation, the Defense responded to the Military Judge, "*this is not going to his [Cpl Sierra's] character*. We're not offering it for his [Cpl Sierra's] character for aggression. It's related to whether or not *[Appellant] knows of a prior act* . . . which goes to his [Appellant's] objective reasonable belief that harm is going to be done to him."[42]

The Military Judge sustained the government objection, based on his view that the proffered testimony went "to either reputation or opinion testimony."[43] The Military Judge explained that he was "not foreclosing the introduction of the Defense admitting character evidence as to [Cpl Sierra's] character for aggression or violence from other witnesses."[44] He stated the evidence also failed under a MRE 403 analysis (albeit without conducting any analysis).[45]

After a recess, the Defense requested to ask Cpl Sierra, "Did you have a conversation with [Appellant] about your prior instances—in regards to a prior

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[40] R. at 760 (emphasis added).
[41] R. at 760-61.
[42] R. at 761 (emphasis added).
[43] R. at 761-62.
[44] R. at 762.
[45] R. at 762.

physical altercation you were in?"[46] The Defense also requested to *voir dire* Cpl Sierra outside the presence of the members to demonstrate it could lay the appropriate foundation for this questioning with the Court.[47] The Government objected under MRE 611, describing the question as "back-door testimony that the defense counsel is using, with the knowledge that the accused and the victim did not know each other well," and also under MRE 403, arguing it was "highly unlikely that they had a conversation about this prior specific instance."[48]

The Military Judge stated he "[did not] doubt [the Defense had] a good faith basis to ask this question."[49] However, he then raised a *sua sponte* hearsay objection (which the Government later joined), to which the Defense responded that the testimony was admissible not for its truth, but for its "effect on [the] listener," as it was being offered to prove "[Appellant's] objective reasonable belief" about Cpl Sierra's history of violent acts for purposes of proving self-defense.[50]

The Military Judge sustained his hearsay objection and prohibited the Defense from questioning Cpl Sierra about these prior acts.[51] He ruled that "the

[46] R. at 763.
[47] R. at 763.
[48] R. at 764.
[49] R. at 764.
[50] R. at 764-65.
[51] R. at 765.

effect on the listener argument is to the time, distance—it's too attenuated."[52] And despite having just found the Defense had "a good faith basis to ask this question," he ruled the testimony could not come in under a hearsay exception "absent some showing that [Appellant] was under a subjective belief and knowledge of that statement."[53] He refused to let the Defense *voir dire* Cpl Sierra to make any foundational showing that Appellant had subjective knowledge of the prior fight (by Cpl Sierra telling him about it).[54]

Later, on redirect, the Government asked Cpl Sierra if he had "ever been in a physical altercation with [Appellant] before," to which he replied "Never."[55] When the Defense argued the question "open[ed] the door to [the Defense] probing into whether he's been in previous physical altercations"[56] the Military Judge "underst[ood] that position" and described it as "close," but ruled that "absent evidence that [Appellant] was aware of any other physical altercations, that it's [not] relevant evidence."[57]

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[52] R. at 765-66.
[53] R. at 766.
[54] R. at 766.
[55] R. at 786.
[56] R. at 792-93.
[57] R. at 793.

Reason to Grant Review

The Military Judge violated Appellant's Sixth Amendment right to present a complete defense by prohibiting cross-examination of the complaining witness about prior violent acts he communicated to Appellant—critical, non-hearsay evidence directly relevant to his state of mind for a self-defense claim.

The lower court opinion misses the mark: in affirming a military judge's *hearsay* ruling about evidence Appellant argued on appeal was (1) non-hearsay, and (2) violated the Sixth Amendment, the opinion omitted any reference to hearsay or the Sixth Amendment. It compounded this error by incorrectly requiring Appellant to testify, call another witness (that did not exist), or lay a "different" foundation (when the Military Judge already prohibited laying the foundation through Cpl Sierra—leaving Appellant's testimony as the only other way to lay foundation for an out of court conversation).[58]

This holding creates an unconstitutional hurdle for the accused and directly conflicts with this Court's decision in *United States v. Maebane*, which held that an evidentiary ruling violates the right to present a defense when it "thwarted the defense's theory" and stripped primary evidence of its probative value.[59] The NMCCA's decision does precisely that, and therefore warrants this Court's review.

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[58] *PincolicGonzalez*, slip op. at 9; R. at 766.
[59] *Maebane*, 2025 CAAF LEXIS 772, at *21-22.

Ultimately, the lower court sidestepped the hearsay issue entirely and affirmed the exclusion of constitutionally-required evidence on foundational and MRE 403 grounds.[60] But despite Appellant desperately trying to lay foundation at trial—and the Military Judge's acknowledgement of counsel's good faith proffer—he refused to permit brief voir dire of the witness to lay foundation.[61] He did not conduct a MRE 403 analysis, and the lower court conducted one in direct conflict with this Court's recent holding in *United States v. Maebane*—without citing to, or acknowledging, that recent decision.[62]

The lower court's ruling, essentially, creates a new rule that this Court has

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[60] *PincolicGonzalez*, slip op. at 8-10 (holding under section 2.a. that the Military Judge did not err in requiring TDC to lay a proper evidentiary foundation, and in section 2.b. that, regardless, the evidence would violate MRE 403).

[61] R. at 763 (Defense Counsel: "And we would offer for the Court to have [Cpl Sierra] come in without the members to just have a proffer of what that physical altercation was, to lay the foundation outside the members."); R. at 764 (Military Judge: "Defense, I don't doubt you have a good faith basis to ask this question possibly based on consultation with your client, but how do you get around hearsay?").

[62] *PincolicGonzalez*, slip op. at 9-10 ("this line of questioning would have amounted to a confusing waste of time"); R. at 764 (Military Judge's MRE 403 ruling containing no analysis); *Compare Maebane*, 2025 CAAF LEXIS 772, at *26 (overruling the lower court's MRE 403 analysis, particularly where "the evidence did not pose a risk of 'sidetrack[ing] the jury into consideration of factual disputes only tangentially related' to the case") *with United States v. Maebane*, No. 202200228, 2024 CCA LEXIS 171, at *23 (N-M. Ct. Crim. App. May 3, 2024) ("We agree that admitting the record . . . would be a needless waste of time."). The Court should grant review of this conflict with *Maebane*. C.A.A.F. Rule 21(b)(5)(B)(ii).

not, but should, settle.[63] It holds that an accused must testify, call a third-party witness (even if one does not exist), or lay a different foundation (even if not possible) to introduce evidence that a complaining witness told the accused information that formed the basis of a self-defense claim.[64] And it holds the Military Judge was correct to preclude the accused from admitting this evidence through a competent witness already on the stand. This contradicts fifty years of case law from this Court that there "is no requirement that an accused himself testify in order to raise the issue of self-defense."[65] Worse, it propounds a new and novel rule that severely undercuts the right against self-incrimination and the right to a meaningful opportunity to present a complete defense.

A. The constitutional right to a meaningful opportunity to present a complete defense does not yield to technical and mechanical applications of rules of evidence.

"[T]he Constitution guarantees criminal defendants 'a meaningful

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[63] C.A.A.F. Rule 21(b)(5)(A).

[64] *PincolicGonzalez*, slip op. at 8-9 ("Appellant's argument here fails . . . [as] both *Dobson* and *James* turned on the fact that the appellants in those cases had testified at trial. Therefore, the foundation in those cases . . . had been properly laid . . . Here, Appellant *chose not to testify*." (emphasis added)).

[65] *United States v. Curtis*, No. 30,992, 1976 CMA LEXIS 5781, at *2 n.1 (C.M.A. Feb. 27, 1976) (citing *United States v. Gordon*, 34 C.M.R. 94 (C.M.A. 1963)).

opportunity to present a complete defense.'"[66] The Supreme Court has explained:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.[67]

The Military Judge here denied Appellant's question to Cpl Sierra on four grounds: (1) character evidence; (2) hearsay; (3) lack of foundation; and (4) MRE 403.[68] As explained below, the lower court appears to agree with Appellant that reasons (1) and (2) were erroneous.[69] Citing *Chambers v. Mississippi*, *Holmes v. South Carolina*, *United States v. Dobson*, and this Court's recent decision in *United States v. Maebane*, Appellant argued at the lower court that the Military Judge's refusal to let him ask Cpl Sierra this one question violated his right to a meaningful opportunity to present a complete defense.[70]

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[66] U.S. Const. amend. VI*; Holmes*, 547 U.S. at 324 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *California v. Trombetta*, 467 U.S. 479, 485 (1984)); *see also United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016) ("A defendant's Sixth Amendment right to confront the witnesses against him is violated where it is found that a trial judge has limited cross-examination in a manner that precludes an entire line of relevant inquiry.") (quoting *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005)).

[67] *Chambers*, 410 U.S. at 294.

[68] R. at 759-66.

[69] *PincolicGonzalez*, slip op. at 8-10 (affirming the ruling on foundation and MRE 403 grounds).

[70] Appellant's Br. at 24-39 (citing *Holmes*, 547 U.S. 319; *Chambers*, 410 U.S. 284; *United States v. Dobson*, 63 M.J. 1 (C.A.A.F. 2006)); Appellant's Reply at 9-15 (citing *Maebane*, 2025 CAAF LEXIS 772).

Where "constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."[71] As this Court's Chief Judge recently noted, it is "an iron-clad fact [that] [t]he Military Rules of Evidence cannot supplant or supersede the Constitution of the United States."[72] That is particularly true when the evidentiary rules are *mis*applied to the detriment of constitutional rights, as the Military Judge did here.

B. The Military Judge refused to allow the Defense to lay foundation after acknowledging they had a good faith basis to do so—and the lower court's opinion necessarily holds that Appellant's only way to admit evidence of his state of mind was to testify.

The Military Judge prevented Appellant from introducing admissible, relevant testimony to self-defense from a competent witness based on a lack of foundation. A witness is competent to testify about matters on which he has personal knowledge.[73] A party preserves an objection to the exclusion of evidence where it "informs the military judge of [the evidence's] substance by an offer of

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[71] *Chambers*, 410 U.S. at 294.
[72] *B.M. v. United States*, 84 M.J. 314, 324 (C.A.A.F. 2024) (Ohlson, C.J., concurring) (citing *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787-88 (N-M. Ct. Crim. App. 2017).
[73] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 601, 602 (2024) [hereinafter MCM].

proof."[74] "[A]dmissibility determinations that hinge on preliminary factual questions" like foundation, are subject to the "preponderance of proof" standard.[75]

The Defense's question was: "Did you have a conversation with [Appellant] about your prior instances—in regards to a prior physical altercation you were in?"[76] The Military Judge acknowledged the Defense had "a good faith basis to ask this question."[77] But he refused to allow the Defense to satisfy his foundation concerns through voir dire outside the presence of the members.[78] The Military Judge, instead, ruled that the evidence could not come in "absent some showing that [Appellant] was under a subjective belief and knowledge of that statement."[79]

The excluded question to Cpl Sierra was critical for providing evidence of subjective belief, since the only other method of establishing it would have been through the Appellant's testimony. That is why the Defense tried to lay the foundation that the conversation happened, and the Military Judge refused. The Military Judge erred by requiring Appellant to provide testimony that a competent witness on the stand, Cpl Sierra, was also capable of providing. While Appellant's testimony might have carried more weight in deciding the ultimate issue of self-

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[74] MCM, MIL. R. EVID. 103(a)(2).
[75] *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).
[76] R. at 763.
[77] R. at 764.
[78] R. at 763-66.
[79] R. at 766.

defense, it was not necessary to meet the low foundational threshold for the evidence to be deemed relevant and admissible.[80]

To admit a nonhearsay statement, a proponent "can prove the statement to show its effect on the state of mind of the hearer or reader."[81] "When the proponent is going to argue a nonhearsay theory for admitting a statement," the foundation includes six simple elements.[82]

The Defense could have easily laid this foundation in six or fewer brief questions to Cpl Sierra. And if Cpl Sierra denied the conversation ever happened—then, yes—foundation would be lacking. But the Defense had to be allowed to *try*. Cpl Sierra was a competent witness to testify about his conversation with Appellant, and the only witness *other* than Appellant who could do so. The Military Judge acknowledged the Defense's good faith basis to ask the question. But his ruling, and the lower court's affirmation of it, have no basis under the evidentiary rules to *prevent* Appellant from attempting to lay the

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[80] *Roberson*, 65 M.J. at 46 (describing the "relatively lower standard for relevance . . . to support a defense of duress. . .").
[81] 1 Military Evidentiary Foundations § 10-5, para. 2 (2025) ("[1]. Where the statement was made. [2]. When the statement was made. [3]. Who was present. [4]. The content of the statement. [5]. In an offer of proof, the proponent indicates an intent to use the statement for a nonhearsay purpose. [6]. In the same offer of proof, the proponent shows that under a nonhearsay theory, the statement is logically relevant.").
[82] *Id*.

foundation. Both authorize the exclusion of constitutionally-required (and admissible) testimony about Appellant's affirmative defense.

Notably, the lower court never once mentions that the TDC requested to voir dire Cpl Sierra, or that the Military Judge refused. This omission was a critical oversight. The lower court ruled that Appellant's admissible, constitutionally-required evidence could be: (1) excluded on foundational grounds; while (2) declining to acknowledge that he tried to lay foundation outside the presence of the members through a competent witness—and that the Military Judge denied this request while acknowledging the TDCs had a good faith basis.[83]

"[It is a] fundamental . . . principle that an accused may not be compelled to testify against himself in a criminal prosecution. While he may voluntarily elect to take the witness stand and testify, an accused is perfectly free to refrain from doing so."[84] Accordingly, "[t]here is no requirement that an accused himself testify in order to raise the issue of self-defense."[85]

It would be factually, logically, and legally impossible for Appellant to have laid foundation for a private conversation between himself and Cpl Sierra through anyone other than himself or Cpl Sierra. The "other" choices offered to admit this

[83] R. at 766.
[84] *Gordon*, 34 C.M.R. at 98 (citing *inter alia*, U.S. Const. amend. V).
[85] *Curtis*, 1976 CMA LEXIS 5781, at *2 n.1 (citing *Gordon,* 34 C.M.R. at 98)).

evidence are, therefore, false choices—leaving only Appellant's testimony—after the Military Judge foreclosed laying foundation for the conversation through Cpl Sierra.

Review by this Court of this dangerous new precedent is warranted.[86] The Court should cure the lower court's opinion with crisp, clear guidance: when needed for a meaningful opportunity to present a complete defense, the accused is permitted to lay foundation for relevant evidence through witnesses other than himself, even if he could also lay it.[87]

C. The lower court appears to agree with Appellant that the Military Judge's rulings on character and hearsay grounds were erroneous.

The Military Judge first excluded the cross-examination of Cpl Sierra on character evidence grounds, even though TDC explained multiple times that knowledge of Cpl Sierra's prior fights was not a "character" or "opinion" issue, but rather went to Appellant's belief of self-defense.[88] Appellant briefed the issue in detail at the lower court, citing to *United States v. Dobson* and *United States v.*

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[86] *See* C.A.A.F. Rule 21(b)(5)(A), (B), (C), (F).
[87] *See Chambers*, 410 U.S. at 294 (that evidentiary rules "may not be applied mechanistically to defeat the ends of justice"); *Curtis*, 1976 CMA LEXIS 5781 at *2 n.1 ("there is no requirement that an accused himself testify in order to raise the issue of self-defense").
[88] R. at 760-62.

James.[89] These two cases support the TDC's proposition that the issue was not about Cpl Sierra's character, but about Appellant's belief of imminent harm (and relevant to self-defense).[90] Even though it declined to say so, the lower court's opinion necessarily agrees with Appellant. It applied *Dobson* and *James* and distinguished them on only foundational grounds.[91]

If the lower court had instead agreed with the Military Judge, it would have said these cases were inapplicable and that the evidence was inadmissible on character grounds, as the Military Judge ruled at trial.[92] But the lower court did *not* affirm the Military Judge's ruling on character evidence grounds, and its opinion cannot be read in any way other than that it agreed with Appellant.[93] In fact, it differentiated Appellant's case from *Dobson* and *James* by applying its new and novel rule that is at issue in this case.[94] Thus, Appellant and the lower court agree that *Dobson* and *James* are the applicable case law—this evidence was relevant to Appellant's belief of imminent harm and his affirmative defense.

The Military Judge next excluded the evidence on a *sua sponte* hearsay

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[89] Appellant's Br. at 24-34 (citing *Dobson*, 63 M.J. at 19; *United States v. James*, 169 F.3d 1210 (9th Cir. 1999) (en banc)).
[90] *Id*.
[91] *PincolicGonzalez*, slip op. at 8-9.
[92] R. at 761-62.
[93] *See PincolicGonzalez*, slip op. at 8-9.
[94] *Id*.

objection, even though TDC explained why it was admissible as non-hearsay under effect-on-listener.[95] Appellant briefed the issue in detail at the lower court, citing to *United States v. Rubin*, which explains why this testimony was non-hearsay because it was being used for its effect on the listener to establish the accused's "state of mind."[96] The lower court, again, apparently agreed with Appellant, because it completely ignored the hearsay issue and never once ruled that it agreed with, or affirmed, the Military Judge's ruling on hearsay grounds. This silence is particularly notable where the Military Judge's final, ultimate ruling was squarely on hearsay grounds—and the lower court never once mentions the word "hearsay" in its opinion.[97] The lower court's opinion can only be read in that it acknowledged Appellant was correct—this evidence was not hearsay.

The lower court, therefore, affirmed *solely* on: (1) lack of foundation; and (2) MRE 403.[98] These are the two point-headers of its analysis section, and the

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[95] R. at 764-66.

[96] Appellant's Br. at 31-32 (citing *United States v. Rubin*, 591 F.2d 278, 283 (5th Cir. 1979)); *see also United States v. Roberson*, 65 M.J. 43, 46 (C.A.A.F. 2007) (holding that a military judge erred in excluding a hearsay statement because it "could reasonably be construed" as going to the accused's intent because it "reflect[ed] the declarant's state of mind. . . ."). The Court in *Roberson* further explained the "relatively low standard for relevance in M.R.E. 401" supported admissibility because "the statement tend[ed] to support a defense of duress as raised through other testimony." *Id*.

[97] *See generally PincolicGonzalez*, slip op. 1-10 (hearsay is not mentioned once in the opinion).

[98] *PincolicGonzalez*, slip op. at 8-10.

only areas of the law it ruled on.[99] The Military Judge's rulings on lack of foundation and MRE 403 must be viewed with the understanding that this same judge was basing those rulings on two already-erroneous evidentiary determinations.[100]

D. The lower court's MRE 403 reasoning ignored, and directly conflicted with, this Court's recent opinion in *Maebane*.

While the lower court afforded the Military Judge's MRE 403 ruling no deference, it conducted its review in a manner that conflicts with *Maebane*.[101] In *Maebane*, this Court reversed this same lower court's verbatim MRE 403 conclusion that the offered evidence would have been a waste of time.[102] Not only that, there, like in this case, "the military judge's ruling violated Appellant's constitutional right to present a complete defense[.]"[103] Here, the offered evidence

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[99] *Id*.
[100] *See United States v. Walters*, No. 2016-12, 2017 CCA LEXIS 27, at *5-8 (A.F. Ct. Crim. App. Jan. 12, 2017) (explaining that "each of" the military judge's "conclusions [were] guided and influenced" by her "erroneous view of the law," and that this erroneous view "influenced her subsequent analysis and decisions" under other evidentiary rulings, like MRE 403).
[101] *PincolicGonzalez*, slip op. at 9-10 ("this line of questioning would have amounted to a confusing waste of time").
[102] *Compare Maebane*, 2025 CAAF LEXIS 772, at *26 (overruling the lower court's MRE 403 analysis, particularly where "the evidence did not pose a risk of 'sidetrack[ing] the jury into consideration of factual disputes only tangentially related' to the case") *with Maebane*, 2024 CCA LEXIS 171, at *23 ("We agree that admitting the record . . . would be a needless waste of time.").
[103] *See Maebane*, 2025 CAAF LEXIS 772, at *28.

was *a single* question, about a conversation between the complaining witness and the accused. It is hard to see how this one question, the answer to which Appellant would have been stuck with, would have been a "confusing waste of time."[104] Like *Maebane*, this one question—if Cpl Sierra told the accused about Cpl Sierra's prior fighting history—"was not excessively 'complex or time-consuming.'"[105] It was directly relevant to the only disputed issue the members had to decide: whether Appellant reasonably believed he had to defend himself.[106] Just like *Maebane*, the Military Judge's hearsay and MRE "403 determinations were arbitrary because they excluded reliable and highly probative evidence."[107]

In assault cases, the defense of self-defense is available whenever the accused "(A) [a]pprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and (B) [b]elieved that the force [he]

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[104] *PincolicGonzalez*, slip op. at 9-10.
[105] *See Maebane*, 2025 CAAF LEXIS 772, at *27 (quoting *United States v. Jordan*, 485 F.3d 1214, 1221 (10th Cir. 2007)).
[106] The scope of Cpl Sierra's injury was also disputed and the members acquitted Appellant of causing substantial bodily harm. For the purposes of his appeal, the only disputed issue at trial was self-defense.
[107] *See Maebane*, 2025 CAAF LEXIS 772, at *28.

used was necessary for protection against bodily harm. . . ."[108] Both of those elements, which the government must disprove beyond a reasonable doubt, go to the accused's state of mind at the time of the alleged assault.[109] Indeed, the second element is wholly subjective, involving the personal belief of the accused, even if not objectively reasonable.[110] As such, evidence "of a victim's specific prior acts of violence *known to the defendant* may be admitted to show [an accused's] state of mind at the time of the [alleged assault]."[111] Thus, the well-established law of self-defense makes the very evidence the Military Judge shut down some of the most probative evidence about the only issue in dispute in this case.[112]

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[108] MCM, R.C.M. 916(e)(3) (2024). While for homicide and assault cases involving deadly force, the belief must be necessary for protection against "death or grievous bodily harm," for other assaults (like the one at issue here) it must be for protection against just "bodily harm," where the "force used by the accused was less than force reasonably likely to produce death or grievous bodily harm." R.C.M. 916(e)(1)(B), (e)(3)(B).

[109] For the first element, the test is "whether, under the same facts and circumstances in this case, any reasonably prudent person faced with the same situation, would have believed that he would immediately be physically harmed . . . Secondly, the accused must have actually believed that the amount of force he used was required to protect himself." U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 5-2-2 (July 23, 2024) (Other Instructions on Self-Defense).

[110] *Dobson*, 63 M.J. at 11.

[111] *Id.* at 19 (citing *James*, 169 F.3d at 1210; *United States v. Saenz*, 179 F.3d 686, 686 (9th Cir. 1999)).

[112] The Military Judge agreed the Government's case-in-chief itself raised self-defense, and agreed to instruct the members on it before the Defense presented its case. R. at 1045.

That is why the same lower court that erred in *Maebane* misapplied the MRE 403 standard here: this one question would not have been a "confusing waste of time."[113] On the contrary, it was of central importance to Appellant's defense theory, as was the excluded evidence in *Maebane*.[114] Accordingly, Appellant cited to *Maebane* in his Reply, but the lower court declined to cite to, acknowledge, or apply *Maebane* in any way.[115] As it did in *Maebane*, the lower court misapplied MRE 403 in conflict with this Court's precedent.

Moreover, if the Military Judge truly thought this one question was such a sideshow, then he applied a dangerously unfair standard to this trial—giving the Government great latitude in marginally relevant issues but stonewalling the Defense on this critical evidence. For example, for one witness, he reopened witness examination after he determined a witness's un-objected to testimony was "unclear" and "prejudic[ial]" to the Government—and then examined the witness himself.[116] And after denying the Defense's question to Cpl Sierra, he allowed the Government to ask Cpl Sierra the flip-side to the same question about his prior

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[113] *Compare PincolicGonzalez*, slip op. at 9 ("this line of questioning would have amounted to a confusing waste of time") *with Maebane*, 2024 CCA LEXIS 171, at *23 ("We agree that admitting the record . . . would be a needless waste of time.").
[114] *See Maebane*, 2025 CAAF LEXIS 772, at *28-29.
[115] Appellant's Reply Br. at 12-15 (applying *Maebane* to the MRE 403 and prejudice analysis).
[116] R. at 891-99.

violent history: whether he had ever fought with Appellant.[117] The Military Judge even acknowledged his decision to allow this Government question made his prior ruling "close," but still denied the Defense's attempt to produce evidence it needed for its self-defense case.[118] In doing so, "the military judge eliminated 'the probative force of the whole chain' of evidence underlying Appellant's defense."[119] Review by this Court of this conflict with this Court's precedent and this departure from the accepted and usual course of judicial proceedings is warranted.[120]

[117] R. at 786.
[118] R. at 793.
[119] *See Maebane*, 2025 CAAF LEXIS 772, at *29 (quoting *Lunbery v. Hornbeak*, 605 F.3d 754, 761 (9th Cir. 2010)). Appellant's self-defense "chain" included Cpl Sierra getting within a foot and face-to-face with Appellant, calling him a "motherfucker" and gesturing at him, after a verbal dispute. R. at 726-26, 798-99, 807-08, 1058.
[120] *See* C.A.A.F. Rule 21(b)(5)(B), (F).

Conclusion

Accordingly, Appellant requests that this Court grant review to protect Appellant's constitutional right to present a defense, and to reject the lower court's dangerous proposition that conflicts with this Court's holding in *Maebane* and other precedents: that an accused must testify to lay foundation for otherwise admissible evidence that can be introduced through the government's witnesses.

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Appendix

A. *United States v. PincolicGonzalez*, No. 202400290, slip op. (N-M. Ct. Crim. App. Dec. 11, 2025).

Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 21(b) because it contains 6,312 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

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Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and opposing counsel on March 2, 2026.

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United States Navy–Marine Corps Court of Criminal Appeals

Before
KISOR, GANNON, and FLINTOFT
Appellate Military Judges

UNITED STATES
Appellee

v.

Joseph P. PINCOLICGONZALEZ
Staff Sergeant (E-6), U.S. Marine Corps
Appellant

No. 202400290

Decided: 11 December 2025

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Aran T. Walsh

Sentence adjudged 28 March 2024, by a general court-martial convened at Marine Corps Base Camp Pendleton, California, consisting of officer and enlisted members. Sentence in the Entry of Judgment: a reprimand.

For Appellant:
Lieutenant Benjamin M. Cook, JAGC, USN

For Appellee:
Major Mary Claire Finnen, USMC
Lieutenant Matthew Parker, JAGC, USN

Senior Judge KISOR delivered the opinion of the Court, in which Judge GANNON and Judge FLINTOFT joined.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

KISOR, Senior Judge:

Appellant was convicted, contrary to his pleas, of one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ),[1] for unlawfully using his hand to strike Corporal (Cpl) J.A.S. in the face. The case is before us on direct appeal pursuant to Article 66(b)(1)(A), UCMJ.

Appellant does not challenge the legal or factual sufficiency of his conviction, but asserts two assignments of error (AOEs): (1) whether the military judge erred in denying the Defense challenge for cause against Major Bravo for implied bias; and (2) whether the military judge erred in prohibiting the Defense from cross-examining the victim about prior violent acts he told Appellant he engaged in before the alleged assault.

I. BACKGROUND

Appellant and Cpl J.A.S. were on an exercise onboard USS *Anchorage* in the Indian Ocean. The exercise involved units from the Sri Lankan Navy, and, after the exercise, there was a debrief led by a platoon commander. During the debrief, Cpl J.A.S. raised the point that the roster was incomplete as it did not list everyone's blood type. Corporal J.A.S. reasoned that the requirement to provide everyone's blood type was to ensure that information would be readily available to medical staff in the event of an injury. Corporal J.A.S. evidently believed Appellant was the person responsible for the incomplete roster, although Appellant stated that he did not believe the roster was his responsibility.

Appellant and Cpl J.A.S. moved a short distance away from the debrief and had a vituperative exchange of views on this issue, during which Cpl J.A.S. called Appellant a "motherf[***]er." In response, Appellant then punched Cpl

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[1] 10 U.S.C. § 928.

J.A.S. in the face, which caused enough bleeding to require ten stitches to close the wound. The Government charged Appellant with aggravated assault.

The case went to a contested trial. During voir dire of a panel member, Major B, both trial and defense counsel explored Maj B's personal views on self-defense. Major B said he had been in three or four fights back in middle school, but none since he joined the Marine Corps.[2] In response to trial counsel's question, "was there ever a situation where you thought you were acting in self-defense," Major B responded that "I generally try not to get into a fight unless I have to defend myself."[3] The defense counsel explored this further, and the following exchange occurred:

> **DC**: And then talk about the fistfights just a little bit, you said you don't really start – or try not to get in a fight if you started a fight. Is that fair to say?
>
> **Maj. B:** I don't fight unless I feel I am being threatened.
>
> **DC:** Okay. And would you agree that if the other party is using threatening words and threatening actions, that you could act in self-defense?[4]
>
> **Maj. B:** I generally don't consider words threatening unless they are conveying a very specific threat and there's a means of backing them up.[5]

Major B went on to explain that an example of "a means of backing them up" meant that if someone was threatening to stab him but that person did not have a knife, he would not consider the words threatening.[6] He also stated that generally a better course of action is to de-escalate.[7]

The Defense challenged Major B for cause for actual and implied bias.[8] Defense counsel stated, essentially, that Major B's general statements that it

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[2] R. at 470.

[3] R. at 470.

[4] There was no objection to this question, which strayed into hypotheticals and sought a commitment from the member.

[5] R. at 473.

[6] R. at 474.

[7] R. at 474.

[8] R. at 477.

would be better to de-escalate a situation created "an appearance of impartiality."[9] The military judge denied the challenge.[10]

At trial, Cpl J.A.S. testified about the incident. On cross-examination, defense counsel asked, "[y]ou've been in other altercations in 1st Recon Battalion before?"[11] Trial counsel objected, and the military judge sustained the objection.[12]

The military judge included the standard self-defense instruction in his findings instructions to the members.[13] Defense counsel argued in closing argument that Appellant punched Cpl J.A.S. in self-defense.[14] The members convicted Appellant of assault consummated by a battery, but acquitted him of the greater offense of aggravated assault.[15] They sentenced him to a reprimand.[16]

II. DISCUSSION

A. The Military Judge Did Not Err in Denying the Defense Challenge For Cause Against Major B For Implied Bias.

Appellant asserts that the military judge erred in denying the Defense challenge for cause for implied bias.[17] Appellant further asserts that because the military judge did not "recite or apply" the standard for implied bias, we should give the military judge "a less deferential standard [of review] that is closer to de novo."[18]

1. Standard of Review

Rule for Courts-Martial (R.C.M.) 912(f)(1)(N) provides: "[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

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[9] R. at 478. If the transcript is correct, we assume he meant partiality (bias).

[10] R. at 479.

[11] R. at 757.

[12] R. at 757; R. at 767.

[13] R. at 1141-42.

[14] R. at 1165.

[15] R. at 1216.

[16] R. at 1261.

[17] Appellant's Brief at 15. Appellant does not renew the challenge for actual bias.

[18] Appellant's Brief at 17.

doubt as to legality, fairness, and impartiality."[19] R.C.M. 912(f)(1)(N) encompasses "both actual bias and implied bias."[20] R.C.M. 912(f)(3) provides: "[t]he burden of establishing that grounds for a challenge exist is upon the party making the challenge."[21] Military judges should be "liberal in granting challenges for cause."[22]

Implied bias is bias attributable in law to the prospective juror regardless of actual partiality.[23] 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."[24] In asking that question, this Court will consider the totality of the circumstances and assume the public is familiar with the unique structure of the military justice system.[25]

We review a military judge's implied bias analysis under a standard of review that is less deferential than abuse of discretion, but more deferential than de novo review.[26] The Court of Appeals for the Armed Forces has explained this sliding standard of appellate review for implied bias challenges falls somewhere between de novo and abuse of discretion based on the specific facts of the case.[27]

A military judge who cites the correct law and explains his implied bias reasoning on the record will receive greater deference (closer to the abuse of discretion standard), while a military judge who fails to do so will receive less deference (closer to the de novo standard). Accordingly, the more reasoning a military judge provides, the more deference he or she will receive. Put differently, although appellate courts do not expect record dissertations from military judges when they rule on implied bias challenges, a mere incantation of the legal test for implied bias without analysis is rarely sufficient to afford the

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[19] R.C.M. 912(f)(1)(N).

[20] *See United States v. Rome,* 47 M.J. 467, 469 (C.A.A.F. 1998) (citing *United States v. Harris*, 13 M.J. 288, 292 (CMA 1982)).

[21] R.C.M. 912(f)(3).

[22] *Rome*, 47 M.J. at 469 (citing *United States v. Smart*, 21 M.J. 15, 21 (CMA 1985)).

[23] *United States v. Hennis*, 79 M.J. 370, 385 (C.A.A.F. 2020) (quoting *United States v. Wood*, 299 U.S. 123, 133 (1936)) (quotation marks omitted).

[24] *United States v. Woods*, 74 M.J. 238, 243-44 (C.A.A.F. 2015).

[25] *See id.* at 244.

[26] *United States v. Peters*, 74 M.J. 31, 33-34 (C.A.A.F. 2015) (quoting United States v. Moreno, 63 M.J. 129, 134 (C.A.A.F. 2006)) (internal quotations omitted).

[27] *United States v. Keago*, 84 M.J. 367, 373 (C.A.A.F. 2024).

military judge abuse of discretion review in close cases.[28] Of course, it bears repeating that military judges must err on the side of granting defense challenges for cause.[29]

2. Analysis

a. The standard we will apply in this case is de novo.

Appellant contends, and the Government apparently does not dispute, that because the military judge did not articulate a standard for implied bias, the military judge should be reviewed under a less deferential standard that is close to de novo.[30] We agree and review this issue de novo.

b. The military judge did not err in denying the challenge.

Major B's responses to the questions were replete with common sense, and in no way indicated any type of bias, actual or implied. In response to general questions, he indicated that he had been in fistfights in middle school; that he generally tries not to fight unless he is defending himself from an actual immediate threat and, that de-escalation is usually preferable. He also agreed he would follow the military judge's instructions as to what the legal definition of self-defense is.[31] This is not a close call. We see no risk that a member of the public would perceive that Appellant received something less than a court of fair, impartial members based on the voir dire of Major B. Reviewing the military judge's denial of the challenge for cause de novo, we find he did not err.

B. The Military Judge Did Not Err in Prohibiting Defense Counsel From Cross-Examining the Victim Prior Altercation Because Defense Counsel Had Not Laid a Proper Evidentiary Foundation.

Appellant contends that the military judge should have allowed Cpl J.A.S. to testify on cross-examination as to whether he had been in other altercations with other people.[32] Appellant's contention is that evidence that Cpl J.A.S. had been in other fights was central to his theory of self-defense, as "the Defense

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[28] *See United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017).

[29] *See Keago*, 84 M.J. at 372 (citing *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007)). The liberal grant mandate recognizes that the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings. It 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.

[30] Appellant's brief at 17; Appellee's Answer at 16.

[31] R. at 473-74.

[32] Appellant's Brief at 24.

sought to admit this evidence to demonstrate that Appellant knew of [Cpl J.A.S.]'s prior violent acts, which was relevant to his reasonable belief of imminent harm."[33]

1. Standard of Review

This Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion.[34] This Court also reviews a military judge's decision to limit cross-examination for an abuse of discretion.[35] An abuse of discretion occurs when a military judge's findings of fact are clearly erroneous, or if the military judge's decision is influenced by an erroneous view of the law.[36] The abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.[37]

Military Rule of Evidence (Mil. R. Evid.) 403 provides that the military judge may exclude logically relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.

The military judge is required to conduct a balancing test to determine if evidence is admissible under Mil. R. Evid. 403. And where the military judge places his [or her] reasoning on the record, we review the military judge's decision to admit or exclude evidence for abuse of discretion.[38] However, where the military judge fails to make an adequate record of his Mil. R. Evid. 403 analysis, we give less deference.[39] Finally, where a military judge conducts no analysis, or misarticulates the standard, we give no deference to his ruling and must instead examine the issue de novo and conduct our own balancing test.[40]

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[33] Appellant's Brief at 24.

[34] *United States v. Grubb*, 83 M.J. 546, 552 (N-M. Ct. Crim. App. 2023) (quoting *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)) (internal quotations omitted).

[35] *United States v. Shaffer*, 46 M.J. 94, 98 (C.A.A.F. 1997) (*United States v. Buenaventura*, 45 M.J. 72, 79 (1996)).

[36] *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).

[37] *See United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004).

[38] *See United States v. McElhaney*, 54 M.J. 120, 129-30 (C.A.A.F. 2000).

[39] *See United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

[40] *See id.*

2. Analysis

a. The military judge did not err in requiring trial defense counsel to lay a proper evidentiary foundation.

The military judge sustained the objection to Cpl J.A.S.'s answer to whether or not he had been in another altercation before. In sustaining the objection, the military judge ruled that the Defense had not laid the proper foundation for this testimony.[41] He stated,

> I'm not foreclosing the introduction of the defense admitting character evidence as to the alleged victim's character for aggression or violence from other witnesses. And then, I'm also not foreclosing this information once the defense establishes some foundation that the accused actually was aware of this knowledge. However, absent a foundational showing that the accused was aware of this knowledge, I find it fails under a 403 analysis and that it's unduly prejudicial and has minimal probative value.[42]

We find that the military judge properly analyzed the issue of lack of foundation for relevance. Asking Cpl J.A.S. if he had been in other fights would shed no light on whether Appellant was acting in self-defense when he threw the first punch in the incident at bar, absent some foundational evidence that Appellant knew of Cpl J.A.S. either had a violent character or was afraid of him.

Appellant points to *United States v. Dobson*[43] and *United States v. James*[44] as cases supporting his contention that "prior violent acts by alleged victims in assault cases are admissible to show the defendant's state of mind for the requisite elements of self-defense."[45] Appellant further argues that, "the Defense could not have been clearer that this was the basis for the testimony it sought to elicit."[46]

Appellant's argument here fails for two related reasons. First, both *Dobson* and *James* turned on the fact that the appellants in those cases had testified

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[41] R. at 761.

[42] R. at 762.

[43] 63 M.J. 1 (C.A.A.F. 2006).

[44] 169 F.3d 1210 (9th Cir. 1999) (*en banc*).

[45] Appellant's Brief at 30.

[46] Appellant's Brief at 30.

at trial. Therefore, the foundation in those cases for what they believed had been properly laid and had become relevant. Here, Appellant chose not to testify.[47] Second, when the military judge asked "what evidence is there [Appellant] was aware of this [altercation between Cpl J.A.S. and someone else]?"[48] Trial defense counsel stated "we can proffer to the court, but also other witnesses will testify that they know of the physical altercation between the two as well."[49] But counsel's proffer is neither evidence, nor foundation for evidence, and no witness testified about Appellant's state of mind during the incident. Appellant describes the military judge's reasoning as "circular and paradoxical."[50] Appellant's belief is that "[t]here were only two ways to elicit evidence that [Cpl J.A.S.] told Appellant about his prior fight: through Cpl J.A.S. or through Appellant."[51] Appellant thus concludes that "the error *did* preclude Appellant from presenting *any* evidence on the state of mind defense."[52] This is simply not true. He was in no way precluded from either testifying as to his own state of mind, or calling another witness, or laying the foundation a different way. The military judge did not err in sustaining the Government's objection that this question lacked foundation. Moreover, the military judge specifically did not preclude the trial defense team from laying the proper foundation, if it could, for this question to Cpl J.A.S. Furthermore, at the conclusion of his testimony, Cpl J.A.S. was subject to being recalled.

b. Regardless, even if somehow relevant, the evidence about some unrelated altercation would violate Military Rule of Evidence 403.

Rule of Evidence 403 presumes that the evidence in question is relevant. In this instance, the military judge did not explain his Mil. R. Evid. 403 balancing test with any precision, and so we will afford no deference to his ruling in that respect. In conducting our own Mil. R. Evid. 403 balancing test of the evidence de novo, and assuming that defense counsel's proffer was accurate, we find it properly excludable (even if foundational relevance had been established). Even if Appellant had been aware of a prior fight between Cpl J.A.S. and someone else, this line of questioning would have amounted to a confusing waste of time.

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[47] R. at 1103.

[48] R. at 761.

[49] R. at 761.

[50] Appellant's Brief at 33.

[51] Appellant's Brief at 36.

[52] Appellant's Brief at 35.

Therefore, in reviewing this de novo, we find that even if the evidentiary foundation had been laid, the objection was properly sustained under Mil. R. Evid. 403 as well. A testimonial journey down this rabbit hole would have been both confusing and a needless waste of time for the members.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[53]

The findings and sentence are **AFFIRMED**.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[53] Articles 59 & 66, UCMJ.