IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Specialist (E-4) **RODRIGO L. URIETA** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20220432 USCA Dkt. No. 24-0172/AR

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

Granted Issue

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST A MEMBER WHO BELIEVED A SOLDIER WHO HIRED A CIVILIAN DEFENSE COUNSEL DID NOT BELIEVE IN HIS DEFENSE.

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 [UCMJ], 10 U.S.C. § 866. This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3).

Statement of the Case

On August 25, 2022, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault without consent and one specification of false official statement, in violation of Article 120 and 107, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920, 907. (JA006). On August 25, 2022, the military judge sentenced appellant to eight months confinement, reduction to E-1, and a dishonorable discharge. (JA005). On October 13, 2022, the convening authority approved the adjudged sentence. (JA116). On October 14, 2022, the military judge entered Judgment. (JA117).

The Army Court summarily affirmed the findings and sentence. *United States v. Urieta*, ARMY 20220432, 2024 CCA LEXIS 192 (Army Ct. Crim. App. Apr., 25, 2024) (JA002). This Court granted Appellant's petition for grant of review on August 29, 2024 and ordered briefing under Rule 25. (JA001).

Summary of Argument

"Me." "My experience." (JA076-77). What the military judge predicated as an "outside perception" was in fact SFC Byers' stated belief. SFC Byers stated appellant's hiring of a civilian defense counsel was "unusual;" it meant appellant did not believe in his defense; and in his experience, "people hire civilian counsel after . . . [t]hey didn't get the outcome they were looking for, so they went to retrial with a civilian lawyer." (JA076-79). The military judge erred in denying

the defense challenge for cause of SFC Byers on the grounds of actual and implied bias.

For actual bias, the military judge abused his discretion. The military judge failed to consider SFC Byers' unambiguously expressed beliefs and his acceptance of SFC Byers' disclaimer of bias is not supported by the record. For implied bias, the military judge's ruling should be entitled no deference because his ruling focused exclusively on actual bias. When viewed objectively through the eyes of the public, SFC Byers' beliefs raise substantial doubt as to the legality, fairness, and impartiality of the court-martial.

The military judge compounded his errant rulings by failing to apply the liberal grant mandate. At a minimum, SFC Byers' statements made this a "close case," and required the military judge to grant defense's causal challenges.

Statement of Facts

Appellant was represented by civilian counsel. (JA031). During group voir dire, appellant's military defense counsel asked if "anyone here ever heard it said that if a soldier hires civilian defense counsel, it must mean the soldier is guilty?" (JA069). Sergeant First Class [SFC] Byers answered in the affirmative. (JA069). The next question was "[w]ould anyone here hold it against Specialist Urieta, our soldier, for having hired a civilian defense counsel?" (JA069). All members, including SFC Byers, answered in the negative. (JA069).

During individual voir dire, SFC Byers explained why he held his belief about civilian counsel. "*[T]o me*, hiring an outside civilian lawyer means that you don't trust your defense very much." (JA076) (emphasis added). SFC Byers said he "wouldn't hold it against [military defense counsel], no – [i]t's just of perception." (JA076). Military defense counsel asked SFC Byers if he thinks "it's unusual when somebody hires a civilian defense counsel to represent them?" (JA077).

> In *my* experience, I have only ever seen people hire civilian counsel after they have already been through the trial and their lawyers had let them down -- I wouldn't say let them down. They didn't get the outcome they were looking for, so they went to retrial with a civilian lawyer, instead of a military [defense counsel].

(JA077) (emphasis added).

Before the government voir dired SFC Byers, the military judge "want[ed] to clarify something [SFC Byers] said." (JA078-79).

> MJ. You said that you believe that hiring a civilian counsel means that you don't trust your defense very much.
>
> SFC Byers. I did.
>
> MJ. When you say, "your defense," do you mean your defense counsel, as in the attorneys? Or do you mean the defense as in the case that you're going to present?
>
> SFC Byers. *All of it.*
>
> MJ: I just wanted to clarify what you meant by that word. Thank you. [Trial Counsel]?

(JA079) (emphasis added).

The government asked SFC Byers if he thought it was more likely appellant was guilty because he hired a civilian defense counsel: "it is unusual to *me*," but "I don't think it's an admission of guilt, or a thought of guilt, by hiring a civilian attorney." (JA 079-80) (emphasis added). Sergeant First Class Byers explained the "outside perception of [when] you hire a civilian attorney, that basically, you don't trust the system from the military standpoint -- that you have to go outside the military to bring somebody in." (JA080). The government went on to ask SFC Byers "if you're selected and you're weighing the facts, and weighing the evidence, considering everything, are you going to hold it against [appellant] because he's hired a Civilian Defense Counsel . . . Will you consider that at all in reaching a finding during your deliberations?" "Not at all . . . just the facts." (JA080).

The defense challenged SFC Byers for actual and implied bias. (JA090). The defense argued SFC Byers "not only would hold [the hiring of civilian defense counsel] against the defense team, he would hold it against the accused having to think that, hey, I don't have a good case, so I'm going to go here and hire this defense counsel and try to change things up." (JA090). The defense added, "I don't think any member of the public looking at this hearing, someone say they basically don't think somebody should hire a Civilian Defense Counsel, that

they're going to think that Sergeant First Class Byers is open to the evidence that's been presented to him." (JA090).

The government objected, stating "that it is more of a perception that [SFC Byers] believes" and SFC Byers had said he would consider the instructions and the facts. (JA090-91). The government continued: "[SFC Byers] also never said that that was his own belief. He indicated that that's a perception that [is] widely held." (JA091). Even so, the government expressed a reservation: "but [SFC Byers] did say that *he* held the belief – [that] if an accused hired Civilian Defense Counsel, there might be something going on there." (JA091) (emphasis added). The military judge denied the challenge.

> The challenge is denied. My notes are also that, when pressed on it, he said – considered what the government said – it was an outside perception that he believes that the public or others have, not that he personally holds that perception. And when specifically asked if he would hold it in any way against the accused, he said, not at all, he would just look at the facts of the case.

(JA091).

The military judge never specifically referenced the liberal grant mandate for the defense's challenge of SFC Byers or conduct the appropriate analysis. To the contrary, after hearing all of the defense's challenges, the military judge, generally referred to the liberal grant mandate: "I did consider the liberal grant

mandate in *all of those* when I considered both the actual and implied bias of each of the challenges." (JA092) (emphasis added).

Sergeant First Class Byers was impaneled as part of an eight-member panel. (JA094).

Granted Issue

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST A MEMBER WHO BELIEVED A SOLDIER WHO HIRED A CIVILIAN DEFENSE COUNSEL DID NOT BELIEVE IN HIS DEFENSE.

Standard of Review

A. Actual Bias

This Court reviews a military judge's actual bias determinations for an abuse of discretion. *United States v. Keago*, 84 M.J. 367, 372 (C.A.A.F. 2024) (citation omitted). An actual bias challenge is evaluated based on the totality of the circumstances. *Id.* (citations omitted). "Because a challenge based on actual bias involves judgments regarding credibility, and because the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire, a military judge's ruling on actual bias is afforded great deference." *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012) (citing *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (additional citation omitted) (internal quotation marks omitted). "Great deference" is not a separate standard

but is this Court's recognition that actual bias rests heavily on the sincerity of an individual's statement that he or she can remain impartial, an issue approximating a factual question on which the military judge is given greater latitude. *Id.* at 88-89. A military judge abuses his discretion when: (1) he predicates his ruling on findings of fact that are not supported by the evidence of record; (2) he uses incorrect legal principles; (3) he applies correct legal principles to the facts in a clearly unreasonable way, or (4) fails to consider important facts. *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citations omitted).

A. Implied Bias

When reviewing a military judge's determination on implied bias, this Court applies a standard of review "that is less deferential than abuse of discretion, but more deferential than de novo review." *Keago*, 84 M.J. at 372 (citing *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015)). In *Keago*, this Court explained:

> We interpret our case law as dictating a sliding standard of appellate review for implied bias challenges that falls somewhere on a spectrum between de novo and abuse of discretion based on the specific facts of the case. 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 military judges provide, the more deference they will receive.

84 M.J. at 373 (citing *United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016)).

This Court has noted that although "we do not expect record dissertations" from the military judge's decision on implied bias, this Court requires "a clear signal" that the military judge applied the law correctly. *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017) (quoting *Clay*, 64 M.J. at 277) (alteration omitted). "'[A] mere incantation of the legal test for implied bias without analysis is rarely sufficient in a close case.'" *Id*. (quoting *Peters*, 74 M.J. at 34).

Law

As a matter of due process, an accused has both a constitutional and regulatory right to a fair and impartial panel. *Keago*, 84 M.J. at 371 (citing *Commisso*, 76 M.J. at 321) (internal citation and quotation omitted).

Rule for Courts-Martial [R.C.M.] 912(f)(1), authorizes specific grounds for excusing panel members for cause.[1] Two of those sections are directly applicable here.

For R.C.M. 912(f)(1)(M), which encompasses actual bias, a member must be excused when he or she has formed or expressed an opinion as to the guilt or innocence of the accused as to any offense. *Nash*, 71 M.J. at 88.

Regarding R.C.M. 912(f)(1)(N), which covers actual and implied bias, a member should not sit in the interest of having the court-martial free from

[1] References to the R.C.M. are from *Manual for Courts-Martial, United States* (2019 ed.).

substantial doubt as to legality, fairness, and impartiality." *Keago,* 84 M.J. at 371 (citing *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003)). This language applies to actual and implied bias. *Id.* (citing *Miles*, 58 M.J. at 194).

A. Actual Bias

Actual bias is defined as "bias in fact." *Keago,* 84 M.J. at 371 (internal quotation marks omitted) (citation omitted). It is the existence of a state of mind "that leads to an inference that the [member] will not act with entire impartiality." *Id.* at 371-72 (quoting *Fields v. Brown*, 503 F. 3d 755, 767 (9th Cir. 2007)) (additional citation omitted). "Actual bias is personal bias that will not yield to the military judge's instructions and the evidence presented at trial." *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015) (citing *Nash*, 71 M.J. at 88). "[M]ere declarations of impartiality, no matter how sincere, may not be sufficient . . . to resolve the question of [actual] bias." *Nash*, 71 M.J. at 89 (alteration added).

B. Implied Bias

Implied bias is not viewed through the eyes of the judge or the members, but through the eyes of the public. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). It is bias "regardless of actual partiality." *Keago,* 84 M.J. at 372 (citations omitted). It is an objective test based on the totality of circumstances, focused on the public's perception of fairness in the military justice system, and assumes the public is familiar with the unique structure of the military justice

system. *See id*.; *see also Dockery*, 76 M.J. at 96 ("[t]he 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") (quoting *Peters*, 74 M.J. at 34).

C. Liberal Grant Mandate

When there is a close call for bias, the military judge is "enjoined" to liberally grant the challenge. *Keago*, 84 M.J. at 373 (citing *Clay* 64 M.J. at 277); *Peters*, 74 M.J. at 34 ("mandated to err on the side of granting a challenge" if it is "a close question."). The mandate places the responsibility on the trial judge to prevent both the reality and appearance of bias of any potential member. *Clay*, 64 M.J. at 277.

This Court has repeatedly reaffirmed the applicability of the liberal grant mandate over the decades since it was recognized, including in the last year. *Keago*, 84. M.J. at 373; *Clay*, 64 M.J. at 277; *Peters*, 74 M.J. at 34. This is because of certain unique elements in the military justice system including limited peremptory rights and the manner of appointment of court-martial members that presents perils not encountered in other systems of justice. *Keago*, 84 M.J. at 372 (citing *Peters*, 74 M.J. at 34).

For example, in *Keago*, this Court found the military judge's rulings to be a close call. And while the military judge in *Keago* recited the correct law for actual bias, implied bias, and the liberal grant mandate and provided a "thorough

explanation" for his actual bias decision, he "provided no 'analysis as to why, given the specific factors in this case, the balance tipped in favor of denying the challenge.'" *Id*. at 373 (citing *Peters*, 74 M.J at 35).

D. Prejudice

Because impartiality of members is "the *sine qua non* for a fair court-martial," the presence of a biased member on the panel undermines the fundamental reliability of a trial's outcome. *Commisso*, 76 M.J. at 321 (citations omitted) (internal quotation marks omitted).

This Court has traditionally not tested for prejudice when it finds member bias. *See, e.g.*, *Clay*, 64 M.J at 278 (setting aside findings and sentence when the military judge abused his discretion by "not applying the liberal grant mandate" to the challenge, with no requirement of a showing of prejudice); *Woods*, 74 M.J. at 245 (setting aside findings and sentence when "particularly in view of the liberal grant mandate, the military judge erred in denying the defense challenge for cause on grounds of implied bias, and that error prejudiced [Wood]'s substantial rights. Article 59(a), UCMJ").

Argument

A. The court-martial was tainted by SFC Byers' actual bias.

The military judge abused his discretion when he denied defense's challenge for cause of SFC Byers on the grounds of actual bias because he failed to consider important facts, predicated his ruling on findings of fact that were not supported by the record, and failed to apply the law.

1. The military judge failed to consider important facts—SFC Byers unambiguously and repeatedly aligned outside perceptions with his personal beliefs.

The military judge determined SFC Byers was speaking about "an outside perception that he believes that the public or others have, not that [SFC Byers] personally holds that perception." (JA091). This finding is inapposite to SFC Byers' repeated statements on the record.

Responding with *his* opinion of civilian defense counsel, SFC Byers stated: "*to me*, hiring an outside civilian lawyer means that you don't trust your defense very much." (JA076) (emphasis added). Sergeant First Class Byers expounded on the question of whether it is unusual when somebody hires a civilian defense counsel: "In *my experience*, I have only ever seen people [hiring] civilian counsel after they have already been through the trial . . . . [and] didn't get the outcome they were looking for, so they went to retrial with a civilian lawyer, instead of a military [defense counsel]." (JA077) (emphasis added).

The trial counsel confirmed these were SFC Byers' personal beliefs: "[SFC Byers] did say that *he* held the belief . . . if an accused hired Civilian Defense Counsel, there might be something going on there." (JA091) (emphasis added). Even the military judge signaled "that [SFC Byers] believes that hiring a civilian counsel means that you don't trust your defense very much." (JA079).

Like *Commisso,* here, the military judge "neglected to consider facts that should have been weighed heavily in resolving the question whether the defense established actual or implied bias." *See Commisso*, 76 M.J. at 323 (holding the military judge abused his discretion by, *inter alia,* failing to consider important facts that were relevant to the question on whether appellant had a valid basis for challenging members for cause).

The record does not support the benign gloss the military judge gave to SFC Byers' statements. While this Court may afford the military judge deference, the deference is limited to the plain words SFC Byers used. By straining to conclude that SFC Byers meant something other than what he actually said, the military judge failed to consider important facts. This was an abuse of his discretion.

2. The military judge predicated his ruling on SFC Byers' disclaimer of bias but the record and the law do not support acceptance of the disclaimer.

Denying the challenge for cause of SFC Byers, the military judge stated: "when specifically asked if [SFC Byers] would hold it in any way against the accused, he said, not at all, he would just look at the facts of the case." (JA091).

In *Napolitano*, this Court was presented with a claim that a member was actually biased against an appellant because that appellant chose to be represented by civilian counsel. *See United States v. Napolitano*, 53 M.J. 162, 163 (C.A.A.F. 2000). In *Napolitano*, this Court held that the military judge did not abuse his discretion by rejecting an actual bias challenge for cause against a member who called lawyers 'Freelance guns for hire (aka Johnies [sic] Cochran)' because (1) the military judge subsequently asked the member several questions as a result of this comment; (2) explained to the member the various legal aspects of a civilian defense attorney's role; and (3) the ensuing dialogue between the military judge and the member "reflect[ed] an evolution of [his] thinking on this question." *See Napolitano*, 53 M.J. at 167 (alterations added).

The differences in approach between the military judge in *Napolitano* and the military judge in this case are broad. Here, unlike in *Napolitano*, the military judge did not explain the role of civilian defense counsel to SFC Byers. The military judge did not explain appellant's right to a presumption of innocence and counsel of his choosing. *See United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 2016) (citing *In re Winship*, 397 U.S. 358 (1970) ("A foundational tenet of the Due Process Clause, U.S. Const. amend. V., is that an accused is presumed innocent until proven guilty"); *United States v. Watkins*, 80 M.J. 253, 258 (C.A.A.F. 2020) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006)) ("The Sixth

Amendment guarantees the right to counsel, and within that, the right to choice of counsel for those who hire their own counsel"). The military judge did not instruct or correct SFC Byers' belief that the appellant was free to hire a civilian attorney with no ramifications and that an accused has a constitutional, statutory, and regulatory right to a counsel of his choosing if reasonably available. *See Rogers*, 75 M.J. 270.

And no ensuing dialogue between the military judge and SFC Byers "reflec[ted] an evolution of [thinking on this question]." *Napolitano*, 53 M.J. at 167 (alterations added). Indeed, during the only point of clarification from the military judge, SFC Byers clarified *his* belief that hiring a civilian defense counsel not only indicated appellant distrusted his military defense attorney; hiring a civilian defense counsel also meant appellant did not believe he had a defense to the charges he faced. And after his clarification with the military judge, SFC Byers equivocated with trial counsel; SFC Byers did not "think [hiring civilian counsel] is an admission of guilt," but "it is *unusual to me*." (JA079-80) (emphasis added).

Here, as in *Nash*, the voir dire responses raised more questions than they resolved. In response to the military judge's clarifying question, despite having just been instructed by the military judge that "the accused is presumed to be innocent of the offenses," and "it is of vital importance that you keep an open mind

until all the evidence has been presented," (JA034-35), SFC Byers still said that hiring a civilian defense counsel not only means an accused does not trust his military attorney, it means an accused does not trust his case—because in SFC Byers' experience, "*I have only ever seen* people hire civilian counsel after . . . *[t]hey didn't get the outcome* they were looking for, so they *went to retrial* with a civilian lawyer." (JA077, JA079) (emphasis added). Thus, if anything, the voir dire in this case magnified concerns about SFC Byers' views and his ability to follow the military judge's instructions – it even insinuated that appellant had already lost his case, starting him off in a worse position.

Furthermore, the trial counsel's attempt to rehabilitate SFC Byers relied entirely on leading questions. (JA079-80). A series of leading questions which result in predictable answers does not alleviate the taint of the earlier answers. *Nash*, 71 M.J. at 89. And unlike *Nash*, it was trial counsel attempting to rehabilitate SFC Byers, not the military judge. Indeed, in this case, the attempt to rehabilitate SFC Byers with leading questions was more ineffectual than it was in *Nash*.

Even though the law presumes the military judge is better positioned than this Court to decide the sincerity behind SFC Byers' disclaimers, "mere declarations of impartiality, no matter how sincere, may not be sufficient . . . . to resolve the question of [actual] bias." *Nash*, 71 M.J. at 89 (alteration added). The

absence of any meaningful curative instruction on the part of the military judge rendered SFC Byers' assertion in this regard worthless. *See Rogers*, 75 M.J. at 275 (Stucky, J., concurring) ("This expression evinced a personal bias which [did] not yield to the military judge's instructions and the evidence presented at trial because no pertinent instructions were given, a clear case of *actual* bias") (quoting *Nash*, 71 M.J. at 88) (emphasis in original) (internal quotation marks omitted). SFC Byers' later declarations of impartiality, no matter how sincere, were not sufficient to ameliorate concern about his bias. The military judge erred by ruling to the contrary.

3. The military judge did not apply the liberal grant mandate — appellant's challenge presented at the very least, a close case of actual bias.

The military judge in this case did not apply the liberal grant mandate specifically to the challenge to SFC Byers. *Cf. Keago*, 84 M.J. at 372 ("*With respect to each challenged member*, the military judge . . . recognized the liberal grant mandate") (emphasis added). The only time the military judge mentioned the liberal grant mandate was after the military judge had already denied the defense challenges for cause. (JA092). "I did consider the liberal grant mandate in all of those [panel members] when I considered both the actual and implied bias of each of the challenges." (JA092). Rather than go back and do an individual analysis of the liberal grant mandate for the denied challenge of SFC Byers, the military judge offered only a talismanic, one-size-fits-all, cleansing statement. *See Peters*, 74

M.J. at 35 ("Although the military judge here said he was considering the mandate, the record does not provide further analysis as to why, given the specific factors in this case, the balance tipped in favor of denying the challenge.")

SFC Byers' statements, which repeatedly "suggested critical misunderstandings about appellant's fundamental constitutional rights," *Cf. Keago*, 84 M.J. at 375, did not yield to pertinent instructions. This establishes that it was at least a close case whether SFC Byers was actually biased against appellant. The liberal grant mandate prohibited the military judge from denying the challenge. *See id.* at 373.

B. Even if this Court does not find actual bias, the court-martial was tainted by SFC Byers' implied bias.

Even if this Court defers to the military judge's ruling on actual bias, the convictions should still be overturned because of implied bias. The test for implied bias is focused on the appearance of fairness when viewed through the eyes of a public assumed to be familiar with the military justice system. *See Keago*, 84 M.J. at 372.

1. The military judge's mere invocation of the implied bias doctrine should not be entitled to deference.

"[T]he well-settled law that requires military judges to consider on the record whether to grant causal challenges exists not merely to have the words of the test preserved on the record, but to show that the grounds for the challenge

were given serious and careful consideration in the first instance." *Peters*, 74 M.J. at 35.

Here, the military judge failed to sufficiently analyze the "effect the panel member's presence will have on the public's perception of whether the appellant's trial was fair." *Peters*, 74 M.J. at 35. To the extent there was any analysis, it focused entirely on SFC Byers' actual bias and whether he personally held a false perception about civilian attorneys. (JA091). "As the military judge did not perform an implied bias analysis on the record, our review of [his] analysis will move more toward a de novo standard of review." *Rogers*, 75 M.J. at 273.

2. When viewed objectively through the eyes of the public, SFC Byers' beliefs raise substantial doubt as to the legality, fairness, and impartiality of the court-martial.

Here, the risk is too high that the public will perceive that appellant was tried by "something less than a court of fair, impartial members." *See Keago*, 84 M.J. at 372.

Would an objective member of the public reasonably believe SFC Byers was able to keep an open mind to the presumption of innocence when, in SFC Byers' view, hiring a civilian defense counsel meant appellant did not believe in his own defense? Would an objective member of the public reasonably believe SFC Byers understood appellant had a constitutional right to counsel of his own choosing when civilian defense counsel's presence at appellant's counsel table was

"unusual" to SFC Byers? Would an objective member of the public ask about SFC Byers' experience with "people hi[ring] civilian counsel after . . . [t]hey didn't get the outcome they were looking for, so they went to retrial with a civilian lawyer"? Would an objective member of the public reasonably believe that this experience affected SFC Byers' ability to keep an open mind until all the evidence was presented?

Indeed, the credibility of the military justice system is at stake. Here, the convening authority handpicked a member to serve on a court-martial panel who believes hiring a civilian defense counsel was "unusual," means an accused does not believe in his defense, and relied on his experience, to state "people hire civilian counsel after . . . [t]hey didn't get the outcome they were looking for, so they went to retrial with a civilian lawyer." (JA077-JA080). The government used leading questions in an attempt to obtain a different answer than the problematic ones the enlisted Soldier provided – questions that suggested the correct answer and that no reasonable member of the public would think an Enlisted member would quibble with an Officer over in a court-martial.

Considering the totality of the circumstances, SFC Byer's presence on a panel that convicted and sentenced appellant raises substantial doubts about the legality, impartiality, and fairness of the court-martial.

3. The military judge did not apply the liberal grant mandate — appellant's challenge presented at the very least, a close case of implied bias

As discussed *supra*, the military judge in this case did not apply the liberal grant mandate specifically to the challenge to SFC Byers. SFC Byers' statements which repeatedly "suggested critical misunderstandings about appellant's fundamental constitutional rights," establish that it was at least a close case whether a reasonable member of the public would have significant questions about the fairness of appellant's panel. *See Keago*, 84 M.J. at 375 (citing *Rogers*, 75 M.J. at 271) (holding that a member's "uncorrected misunderstanding of a relevant legal issue would cause an objective observer to have substantial doubt about the fairness of [the accused's] court-martial panel"). Without the benefit of the military judge's reasoning, this Court should conclude appellant's challenge presented a close case of implied bias and required the military judge to grant defense's implied bias challenge. *See id*.

Conclusion

WHEREFORE, appellant respectfully requests that this Honorable Court set aside the findings and the sentence.

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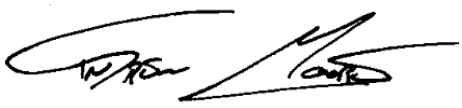

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 4,996 words.

2. This Brief on Behalf of Appellee 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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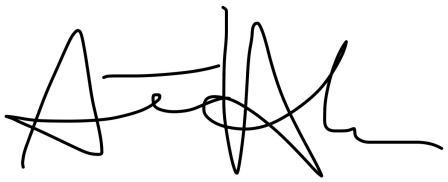
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Urieta, USCA Dkt. 24-0172/AR was electronically with the Court and Government Appellate Division on September 30, 2024.



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