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	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20220432 USCA Dkt. No. 24-0172/AR

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.

Argument

At its core, if Sergeant First Class (SFC) Byers sat on two courts-martial with one having a civilian defense counsel and the other only having uniformed trial defense counsel, SFC Byers subjectively would place the two accused in two different positions.

The military judge, did not correct SFC Byers' belief, instruct on the constitutional dimensions of SFC Byers' choice to counsel, and/or explain away that appellant was not on a retrial and had not previously been found guilty.

If a panel member indicated that he would start two witnesses, for example a uniformed member and a civilian, off at different levels of trustworthiness from the start of a proceeding based on his own personal biases and assumptions, this would show a bias as to witness credibility before the witness testified.[1] If the judge did not correct that belief and affirmatively rehabilitate the witness, there would be concerns of both actual bias and implied bias.

That problem is heightened when the panel member's belief goes to the accused's own confidence in the viability of his own defense case or counsel. Simply put, SFC Byer's uncured personal beliefs are that appellant had doubts about his own defense and if the appellant did not believe in his own defense, why should SFC Byers? That doubt came solely from the civilian defense counsel's status.

[1] The unexceptional notion that jurors should start witnesses, evidence, and counsel off in an equal position (or else, they have a "bias") is present throughout state and federal jurisdiction precedent. Failure by a judge to inquire and develop the record on that bias is potential reversible error. *See, e.g., Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964); *Mitchell v. State*, 488 Md 1 (2024).

A. The totality of the circumstances demonstrate actual and implied bias.

SFC Byers arrived at his opinion that appellant's hiring of a civilian defense counsel was "unusual" and meant appellant did not trust "all of it," after "see[ing] people hire civilian counsel after they . . . didn't get the outcome they were looking for, so they went to retrial." (JA077, JA079-80).

The military judge, upon hearing these statements, did not inquire further or correct the apparent misconceptions about the military justice process. The military judge, in the only point of clarification with SFC Byers, heard the member move in an even worse position with his pronounced understanding that hiring a civilian defense counsel means an accused does not trust "all of it." (JA079).

But now on appeal, the government labors to do the military judge's work that was left incomplete. The government adopts a so-called "plain reading" of SFC Byers' words and then excises more than half of them: they are "most reasonably understood as [the member's] belief about the level of trust that an accused has in defense counsel and in the case that counsel crafted for presentation." (Appellee's Br. 27). This "plain reading" was never adopted by anyone at trial, to include trial counsel.[2]

[2] At trial, the government only argued SFC Byers "never said that that was his own belief. He indicated that that's a perception that [is] widely held." (JA091). The defense argued against this construed plain reading: "he would hold it against the accused having to think that, hey, I don't have a good case, so I'm going to [] hire this [civilian] defense counsel and try to change things up." (JA090).

The government claims that the "plain reading" of SFC Byers' statements "reflect a common-sense understanding of the importance of trust between client and attorney," (Appellee's Br. 26), which is "the most reasonable interpretation" and "read in context." (Appellee's Br. 25-26). However, to reach a "plain reading" interpretation of SFC Byers' ambiguous statements, the government analyzes the "context" by ignoring contrary information.

By committing to their argument there is no bias in this case, the government favors certain parts of the record to support their existing attitude and construes just one 'reading' of SFC Byers' ambiguous statements. The government does not analyze their plain reading interpretation in the context of SFC Byers' earlier remark alluding to his experience that he has "only ever seen people hire civilian counsel after they . . . didn't get the outcome they were looking for, so they went to retrial."[3] (JA077). This statement, when incorporated with SFC Byers' other statements, suggests SFC Byers predetermined the issue of guilt prior to hearing any evidence because the basis of his later opinions — appellant's hiring of a civilian defense counsel was "unusual" and meant he did not trust "all

[3] The government only devoted one sentence in their brief to this statement by SFC Byers, countering that SFC Byers "merely recounted what he himself observed and experienced . . . that he saw people hire civilian defense counsel only in certain limited contexts." (Appellee's Br. 25).

of it*"* — relies on past *trial outcomes* where accused servicemembers "didn't get [what] they were looking for."

At the very least there was a perception of predisposition or a belief that appellant had *already* been found guilty at an earlier proceeding. The military judge had a duty to inquire further to "demonstrate to an objective observer that notwithstanding [SFC Byers' stated opinions], the accused received a fair trial." *See United States v. Richardson*, 61 M.J. 113, 119-120 (C.A.A.F. 2005) (finding the military judge erred by failing to inquire into a potential bias "for the purpose of determining whether and how [it] might have implicated the doctrine of implied bias"); *see also United States v. Keago*, 84 M.J. 367, 375 (C.A.A.F. 2024) ("the military judge never asked any clarifying questions or offered any corrections about these issues that might have filled the gaps left by trial and defense counsel."). The military judge also could have educated the member or put to rest that appellant had ever been tried before. When presented with both options, education or further inquiry, the judge did neither.

The military judge not only failed to inquire into the bias, he also did not instruct the member to disregard his opinion during trial and deliberations. *See United States v. Rogers*, 75 M.J. 270, 271 (C.A.A.F. 2016) (holding the military judge's failure to curatively instruct 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).

The government places far too much emphasis on SFC Byers' disclaimers of bias and the military judge's instructions, considering the lack of pertinent curative instructions from the military judge. While SFC Byers may believe himself to be unbiased after suggestive questions from the trial counsel in a military courtroom, his statements fail to "convincingly demonstrate[] a departure" from suggested misunderstandings about appellant's fundamental constitutional rights. The risk is too high that the public will perceive appellant was tried by "something less than a court of fair, impartial members." *Keago*, 84 M.J. at 372, 375.

The government's argument that SFC Byers "never said anything nearly as biased as [the challenged member in *Napolitano*] did . . ." is misplaced. (Appellee's Br. 21). The focus of the bias in *Napolitano* was on the member's possible bias *toward civilian defense counsel*; here the focus is on SFC Byer's bias *toward appellant* and appellant's personal beliefs of the strength of his case due to his hiring of a civilian defense counsel. *See United States v. Napolitano*, 53 M.J. 162, 166-67 (C.A.A.F. 2000). In *Napolitano*, the member did not comment on how the hiring of a civilian defense counsel would reflect on appellant; instead, the member had a problem with civilian defense counsel setting aside their moral beliefs because "they'll be paid." *Napolitano*, 53 M.J. at 164-65. Here, SFC

Byers' bias related to appellant: his "unusual" choice of counsel, which also meant appellant did not trust "all of it." (JA079-80).

B. Even if there is no actual bias, implied bias is present.

The government argues that "the absence of actual bias . . . strongly counsels against finding implied bias." (Appellee's Br. 20). The law quoted by the government "is not a reflection of a legal doctrine expressing judicial reticence or disdain for the finding of implied bias. Instead . . . where there is no finding of actual bias, implied bias must be independently established." *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007); *cf. Woods*, 74 M.J. 238, 245 (C.A.A.F. 2015) (Stucky, J., concurring) ("Contrary to much of this Court's jurisprudence [,] actual bias and implied bias are separate grounds for challenge, not just separate tests.") (internal citation omitted) (alteration added). This Court has "not hesitated to find implied bias where warranted." *Clay*, 64 M.J. at 277.

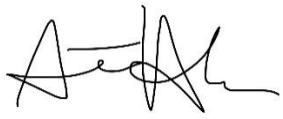
The government's analytical approach to implied bias through an actual bias 'lens' is inadvisable — unique features in the military justice system weigh against further constraining the already narrow doctrine of implied bias. *See United States v. Witham*, 47 M.J. 297, 304 (C.A.A.F. 1997) (Effron, J., concurring) ("These [significant structural differences between court-martial panels and civilian juries] mean that the ability of an accused to shape the composition of a court-martial is

relatively insignificant compared to the influence of the convening authority and trial counsel who represent the interests of the Government") (alteration added).

In the military justice system, "[t]he Government has the functional equivalent of an unlimited number of peremptory challenges" while the accused receives one. *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring). In such a system, where most often the same official who refers charges also chooses the members and unanimous verdicts are not required, the implied bias doctrine and the liberal grant mandate serve to protect the accused. *See Keago*, 84 M.J. at 372.

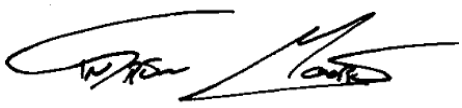
Conclusion

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



Amir R. Hamdoun
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 695-9862
USCAAF Bar No. 37920

Robert D. Luyties
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 37955



Andrew Moore
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar Number 38069

Autumn R. Porter
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 37938

Philip M. Staten
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 33796

Certificate of Compliance with Rules 24(c) and 37

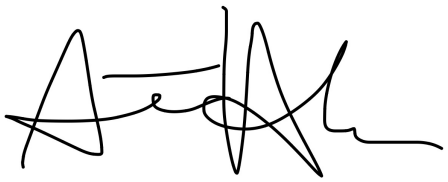
1. This Reply Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(c) because it contains 1,714 words.

2. This Reply Brief on Behalf of Appellant 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.

Amir R. Hamdoun
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 695-9862
USCAAF Bar No. 37920

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 filed with the Court and Government Appellate Division on November 19, 2024.



Amir R. Hamdoun
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
(703) 695-9862