IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	
Specialist (E-4) **RODRIGO L. URIETA,** United States Army, 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 under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

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 Articles 120 and 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920 and 907. (JA003–007, JA114). The military judge sentenced appellant to reduction to the grade of E-1, eight months of confinement, and a dishonorable discharge. (JA005–007, JA115). On October 13, 2022, the convening authority approved the adjudged sentence. (JA116). The military judge entered judgment on October 14, 2022. (JA117).

The Army Court affirmed the findings and sentence. (JA002). On August 29, 2024, this Court granted appellant's petition for grant of review on the above-referenced issue presented. (JA001).

Statement of Facts

A. Group voir dire and preliminary instructions.

Before the merits phase of trial, the military judge and counsel conducted voir dire of a group of members that included Sergeant First Class (SFC) WB. (JA032–033). After the members were sworn, the military judge provided preliminary instructions. (JA034). The military judge instructed the members that they were required to follow the court's instructions on the law, that they had a duty to hear the evidence and determine whether appellant is guilty, that the appellant is presumed innocent, and that the government bears the burden to prove

guilt "by legal and competent evidence beyond a reasonable doubt." (JA034). The military judge emphasized to the members that "it is of vital importance that [they] keep an open mind" throughout the trial and that they "must impartially hear the evidence." (JA035, JA038).

The military judge then reminded the members of the "seriousness with which this trial is viewed" and of the "very serious allegation" charged. (JA042, JA066). The military judge also confirmed that the members would apply a presumption of innocence, would establish guilt by legal and competent evidence, would hold the government to a standard of proof beyond a reasonable doubt, and understood that the burden never shifts to appellant. (JA047–049).

After the military judge's preliminary instructions and after trial counsel's group voir dire, appellant's military defense counsel conducted group voir dire. (JA058). The military defense counsel introduced himself, the other military defense counsel, and the civilian defense counsel, who was introduced as a "former green suiter" that "retired a couple years back" after twenty years of Army service. (JA058). Through questioning, the military defense counsel then confirmed with the members that they would not presume appellant did "something wrong" merely because he had counsel. (JA059). In the same way, the military defense counsel also confirmed that the group did not have "any reason" to believe that appellant was guilty merely because of anything that they had "heard so far, either in the

courtroom or outside the court[.]" (JA059).

Military defense counsel also asked the group, "Has anyone here ever heard it said that if a Soldier hires civilian defense counsel, it must mean the Soldier is guilty?" (JA069). SFC WB affirmed that he had heard such a thing said before, but he then affirmed that he himself would not "hold it against Specialist Urieta . . . for having hired a civilian defense counsel[.]" (JA069). After further group voir dire, the military judge and counsel conducted individual voir dire. (JA076).

B. Individual voir dire.

Counsel conducted individual voir dire of several members, including SFC WB. (JA076). The military defense counsel asked SFC WB, "[C]an you explain what your opinions are in civilian defense counsel?" He replied, "To me, hiring an outside civilian lawyer means that you don't trust your defense very much." (JA076). Regarding the term "your defense," the military judge later asked a follow-up question regarding what SFC WB meant when he used that term in one of his answers ("you don't trust your defense very much"): did that term refer to (1) the original "defense counsel, as in the attorneys"; or (2) "the case" that the original defense counsel was "going to present" on behalf of an accused? (JA079). And SFC WB replied that he meant both.[1] (JA079).

[1] The following is the exchange between the military judge and SFC WB:

Q. You said that you believe that hiring a civilian counsel

When defense counsel asked, "Do you think it's unusual when somebody hires a civilian defense counsel to represent them?", SFC WB shared details about what he had seen and experienced: "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." (JA077).

The military defense counsel also asked SFC WB if he held anything "against civilian defense counsel at all[.]" (JA076). SFC WB replied, "I do not." (JA076). The military defense counsel then asked, "Since . . . Civilian Defense Counsel, was hired in this case, would you hold it against us, I guess, based on your previous answers, as the military defense counsel[?]" SFC WB replied, "I wouldn't hold it against you, no—[i]t's just of perception." (JA076). And SFC WB later clarified that this "perception" about hiring civilian defense counsel was

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> means that you don't trust your defense very much.
> A. I did.
> Q. 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?
> A. All of it.
> MJ: I just wanted to clarify what you meant by that word. Thank you. . . .

(JA079).

"[j]ust an outside perception." (JA079–080). SFC WB specified that there was an "outside perception" that hiring a civilian defense counsel means "you don't trust the system from the military standpoint—that you have to go outside the military to bring somebody in." (JA079–080).

Finally, SFC WB made clear that, even though hiring civilian defense counsel was unusual in his experience, the hiring of civilian defense counsel did not signify "an admission of guilt"—or even "a thought of guilt." (JA077, JA079–080). In addition, SFC WB indicated that he would not in any way "hold it against Specialist Urieta because he's hired a Civilian Defense Counsel[.]" (JA080). He also indicated that he could follow the court's instructions on legal definitions. (JA079). In his last words to the court, SFC WB showed that, during his deliberations, he would not consider the hiring of a civilian defense counsel, because he said he would consider "[j]ust the facts." (JA080).

C. Challenge against SFC WB.

The military defense counsel challenged SFC WB based on alleged actual and implied bias. (JA090). Of hiring a civilian defense counsel, the military defense counsel claimed that SFC WB "would hold it against the defense team" and "would hold it against the accused." (JA090). Defense counsel also accused SFC WB of having a "prejudice against the defense team, he's going to harbor with him, and it's going to color his consider the consideration of the evidence

throughout this trial." (JA090). Defense counsel lastly alleged that there could not be "any member of the public" who would think that SFC WB "is open to the evidence," and that SFC WB "basically [doesn't] think somebody should hire a Civilian Defense Counsel." (JA090).

The military judge denied the challenge. (JA091). The military judge found that SFC WB believed that there is an "outside perception . . . that the public or others have, not that he personally holds that perception." (JA091). The military judge also elaborated on the court's findings regarding SFC WB's beliefs about hiring civilian defense counsel: "And when specifically asked if he [SFC WB] 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 had considered multiple challenges to various other members, been previously apprised by counsel of the liberal-grant mandate, and considered the liberal-grant mandate. (R. at 212, 215, 228; JA083, JA085, JA087). After ruling on SFC WB's challenge, which was the last one of the day, the military judge made clear that he "did consider the liberal grant mandate" when he had ruled on challenges against SFC WB and other members. (JA092).

D. The court's instructions before deliberation.

Before deliberation, the military judge provided findings instructions to the panel members, including SFC WB. (JA098). The military judge instructed that

the panel's findings must be "based upon the evidence presented here in court." (JA098). The military judge also reaffirmed that appellant is presumed innocent, that the government bears the burden to prove guilt beyond a reasonable doubt by legal and competent evidence, and that the burden never shifts to the defense. (JA098–099, JA103, JA110–111).

Summary of Argument

Based on SFC WB's sworn statements during voir dire, appellant cannot show that the military judge acted improperly when he denied the challenge to SFC WB. In response to the military defense counsel's questions, SFC WB told the court that the hiring of civilian defense counsel signified neither "an admission of guilt" nor "a thought of guilt," and that he would not hold appellant's hiring decision against either appellant or any defense counsel. (JA069, JA076, JA079–080). Furthermore, SFC WB confirmed that he would "[n]ot at all" hold appellant's hiring decision against appellant, and that he would consider "[j]ust the facts." (JA080). These statements provided more than enough for the military judge to have acted well within his discretion in allowing SFC WB to serve on the panel.

Appellant makes much of these three statements from SFC WB: (1) when SFC WB said that hiring civilian defense counsel was not an "admission of guilt" but was just "unusual" to him; (2) when SFC WB recounted that, in his experience,

he has "only ever seen people hire civilian counsel" when they do not "get the outcome they were looking for, so they went to retrial with a civilian lawyer"; and (3) when SFC WB said that the hiring of civilian defense counsel meant that "you don't trust your defense very much." (Appellant's Br. 2, JA076–077, JA079–080). Unlike the members' exceedingly biased statements in *United States v. Keago*, 84 M.J. 367, 375 (C.A.A.F. 2024), SFC WB's statements do not present a "close" case requiring excusal. The first statement fails to show bias and fails to show that SFC WB cast judgment on the decision to hire civilian defense counsel. The first statement merely implies that it was more usual for SFC WB to see an accused represented by military defense counsel. After defense counsel asked SFC WB if he thought hiring civilian defense counsel was "unusual," the second statement merely recounted what SFC WB experienced; he told the court that he saw people hire civilian defense counsel only in certain limited contexts. (JA077).

And when the third statement is read in the context of SFC WB's other statements and in the context of his exchange with the military judge, the most reasonable interpretation is that "you don't trust your defense" means that an accused trusts neither the original "defense counsel" nor the "case" that the original defense counsel was "going to present" on his behalf. (JA079). Contrary to appellant's assertions, the plain words of SFC WB's statements show that SFC WB never claimed that appellant "did not believe he had *a* defense to the charges

he faced" or that "appellant had already lost his case"—as if appellant knew that he was actually guilty and that the government had him dead to rights. (Appellant's Br. 16–17 (emphasis added)). Instead, the third statement focuses simply on what an accused thinks of his original defense counsel's ability to craft an effective case for presentation.

Furthermore, SFC WB made clear statements showing impartiality—for example, that he would "[n]ot at all" hold appellant's hiring of civilian defense counsel against appellant, and that the hiring of civilian defense counsel shows neither an "admission of guilt" nor a "thought of guilt." (JA079–080). It is unreasonable to take SFC WB's third statement out of context and twist it into somehow saying that SFC WB believed hiring a civilian defense counsel revealed an accused's guilt in any way.

This Court's precedent recognizes the deference owed to military judges, who are in the "best position" to evaluate the demeanor and sincerity of a member's statements. *United States v. Schlamer*, 52 M.J. 80, 95 (C.A.A.F. 1999). Under this Court's precedent, the military judge's analysis and interpretation of SFC WB's statements should be given "'great deference.'" *United States v. Miles*, 58 M.J. 192, 194–95 (C.A.A.F. 2003) (quoting *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)). Appellant interprets the phrase "you don't trust your defense very much" to somehow mean that SFC WB believed that appellant "did

not believe he had a defense to the charges he faced" and that "appellant had already lost his case." (Appellant's Br. 16–17). But in allowing SFC WB to remain on the panel, the military judge certainly did not impute such patently biased beliefs to SFC WB's statements. Rather, the military judge interpreted SFC WB's statements in the context of his assurances that he would not "hold [appellant's hiring decision] in any way against" appellant and that "he would just look at the facts of the case". (JA091).

Therefore, because appellant fails to show how SFC WB's statements demonstrate any actual or implied bias, the findings and sentence must be affirmed.

Standard of Review

This Court reviews a military judge's actual-bias determinations for an abuse of discretion. *Keago*, 84 M.J. at 372. This Court reviews "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.'" *Id.* at 373 (quoting *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015)).

Law

A. Due process and Rule for Courts-Martial 912(f)(1).

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J.

172, 174 (C.A.A.F. 2001). Under Rule for Courts-Martial (R.C.M.) 912(f)(1)(N), a "member shall be excused for cause whenever it appears that the member" should not sit as a member "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[2]

R.C.M. 912(f)(1)(N) applies to both actual bias and implied bias. *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017). And in the case of R.C.M. 912(f)(1)(M), "which encompasses actual bias," a member must be excused when he or she has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged. *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012). A military judge's determinations on the issues of actual bias and implied bias are based on the totality of the circumstances. *Id.* "Actual bias and implied bias are separate legal tests, not separate grounds for challenge." *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000). This Court has also enjoined military judges to follow a liberal-grant mandate in evaluating an accused's challenges for cause. *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007). "However, the burden of persuasion remains with the party making the challenge." *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

B. Actual bias.

Actual bias is defined as "'bias in fact.'" *United States v. Hennis*, 79 M.J.

[2] R.C.M. citations are to the Manual for Courts-Martial, United States (2019 ed.).

370, 384 (C.A.A.F. 2020) (quoting *United States v. Wood*, 299 U.S. 123, 133 (1936)). "It is the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial." *Id.* (citing *Nash*, 71 M.J. at 88; *Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007)) (internal quotation marks omitted). The existence of actual bias is a "question of fact," and this Court thus provides the military judge with "significant latitude in determining whether it is present in a prospective member." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007). "Because a challenge for cause for actual bias is essentially one of credibility, the military judge's decision is given great deference because of his or her opportunity to observe the demeanor of court members and assess their credibility during voir dire." *Miles*, 58 M.J. at 194–95 (citing *Daulton*, 45 M.J. at 217) (internal quotation marks omitted).

C. Implied bias.

The test for implied bias is "'whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high.'" *Keago*, 84 M.J. at 372 (quoting *United States v. Woods*, 74 M.J. 238, 243–44 (C.A.A.F. 2015)). In asking that question, courts consider the totality of the circumstances, and assume the public is familiar with the unique structure of the military justice system. *Id.* Specifically, "this Court has observed that implied

bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced [i.e. biased]." *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004) (citing *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)) (brackets in original) (internal quotation marks omitted).

"[R]esolving claims of implied bias involves questions of fact and demeanor, not just law." *Woods*, 74 M.J. at 243 n.1. Consequently, this Court "has suggested that the test for implied bias also carries with it an element of actual bias." *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006). Accordingly, this Court "has generally found that when there is no actual bias, implied bias should be invoked rarely." *Strand*, 59 M.J. at 458 (citing *United States v. Warden*, 51 M.J. 78, 81–82 (C.A.A.F. 1999)) (internal quotation marks omitted). Thus, "where a military judge considers a challenge based on implied bias, recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed will indeed be rare." *Clay*, 64 M.J. at 277.

Argument

A. SFC WB's statements during voir dire establish that he had no actual bias, and the military judge did not abuse his discretion in rejecting appellant's actual-bias claim.

Upon being questioned by trial counsel and defense counsel, SFC WB made

sworn statements showing that he held no actual bias and that he had not formed or expressed a definite opinion as to the guilt or innocence of appellant. (JA069, JA076–077, JA079–080). SFC WB stated that he would not hold appellant's hiring of civilian defense counsel against either civilian defense counsel or military defense counsel. (JA076). And after hearing that appellant had hired civilian counsel, SFC WB confirmed that he had not yet heard anything that would give him "any reason to believe that Specialist Urieta is guilty." (JA058–059). SFC WB also affirmed that he did not think that appellant "must have done something wrong" merely because he had defense counsel. (JA059).

Trial counsel asked SFC WB several straightforward, open-ended questions. When trial counsel asked, "[D]o you think it's more likely that Specialist Urieta is guilty solely because he has hired a Civilian Defense Counsel?", SFC WB answered, "I don't think it's an admission of guilt, or a thought of guilt, by hiring a civilian attorney." (JA079–080). When asked if he would "hold it against Specialist Urieta because he's hired a Civilian Defense Counsel," SFC WB answered unequivocally, "Not at all." (JA080). He also affirmed that he would consider "[j]ust the facts." (JA080).

Based on these statements of impartiality, the military judge—who observed SFC WB's live sworn statements, evaluated his credibility and sincerity, and applied the liberal-grant mandate—acted well within his discretion when he

rejected appellant's actual-bias claim. (JA091–092). Unlike the highly problematic statements by the members in *Keago*, 84 M.J. at 375, SFC WB's unequivocal statements established his impartiality and do not present a "close" case requiring excusal.

B. Because SFC WB showed that he was impartial and could follow the court's instructions, there was no risk of implied bias.

Appellant's claim of implied bias must be rejected. There is no risk that the public would perceive that the accused received anything less than a court of fair, impartial members because of (1) SFC WB's sworn statements showing his impartiality; (2) his indicated willingness to follow the military judge's instructions; (3) the absence of actual bias; and (4) the fact that the military judge placed his analysis on the record and considered the liberal-grant mandate.

1. SFC WB's sworn statements show his impartiality.

First, SFC WB's statements established that he would be impartial. (JA069, JA076–077, JA079–080). SFC WB stated that he would not hold appellant's hiring of civilian defense counsel against either civilian defense counsel or military defense counsel. (JA076). He said that hiring a civilian defense counsel suggested neither "an admission of guilt" nor "a thought of guilt." (JA079–080). Of note, his last words to the court unequivocally affirmed that he would "[n]ot at all" "hold it against Specialist Urieta because he's hired a Civilian Defense Counsel" and that he would consider "[j]ust the facts" in his deliberations. (JA080).

SFC WB's statements do not show any implied bias—let alone a "close case" of implied bias requiring excusal for cause. In *Keago*, 84 M.J. 367, two members made problematic biased statements that exemplify what ranks as a "close" case of implied bias. The first member, Lieutenant Commander (LCDR) Charlie stated, "The fact that there are charges suggests that something happened. I understand that false sexual assault accusations don't make it very far under scrutiny." *Id.* at 371. LCDR Charlie also stated that "since we are at the court-martial stage, a flimsy or easily proven[]false accusation would have been dropped by now." *Id.* (brackets in original). He further explained that "the fact that you get through charges in a proceeding like this means that it is not a simple he said/she said . . . I feel like something had to have happened." *Id.* (alterations in original).

LCDR Charlie also repeatedly expressed his desire to hear the accused's testimony, and he stated that the accused's failure to put on a case would be "self-defeating." *Id.* He also agreed that the accused "should testify to prove his innocence," and that "it would help to see some other sort of evidence or witness to corroborate his innocence." *Id.* Even when LCDR Charlie agreed that he would not hold the accused's refusal to testify against him, LCDR Charlie equivocated when he stated that it would "come to mind that he didn't." *Id.* And after claiming that he understood the accused's right to not testify, LCDR Charlie still stated, "I would like to hear the Defense's side of the story." *Id.* at 374.

The second problematic member in *Keago*, LCDR Mike, stated that she could not imagine a sexual encounter in which one party "honestly believed there was consent, but the other party did not consent." *Id.* at 371. LCDR Mike stated that "we should err on the side of believing rather than on the side of disbelieving" alleged sexual-assault victims; LCDR Mike further stated that, as a panel member, she should "believe over disbelie[ve]" someone who makes a claim of sexual assault. *Id.* (brackets in original). Furthermore, during voir dire, LCDR Mike agreed that a person "needs to essentially give sort of clear and unequivocal consent for sexual activity." *Id.* at 374. Finally, unlike the military judge in the present case, the military judge in *Keago* "never asked any clarifying questions or offered any corrections" regarding the two members' problematic statements. *Id.* at 375.

This Court concluded that these two members' highly biased statements "presented a close case of implied bias." *Id.* at 374–75. In stark contrast here, SFC WB's statements bear no resemblance to the biased statements in *Keago*. Therefore, SFC WB's statements neither cast any doubt on his impartiality nor present any close case of implied bias.

2. SFC WB indicated his willingness to follow the military judge's instructions.

Second, SFC WB indicated that he would follow the court's instructions when he confirmed that he would follow the military judge's given legal

definitions. (JA079). The military judge's instructions before and after the presentation of evidence included admonishments about the importance of following the court's instructions on the law, the significance of keeping an open mind throughout trial, the presumption of innocence, the government's non-shifting burden to prove guilt beyond a reasonable doubt by legal and competent evidence, and other important guidelines. (JA034–035, JA038, JA042, JA047–049, JA066, JA098–099, JA103, JA110–111). These were the instructions that SFC WB indicated he could follow and that he is presumed to have followed. Indeed, absent evidence to the contrary, it is presumed that SFC WB "understood and followed the military judge's instructions." *United States v. Hasan*, 84 M.J. 181, 221 (C.A.A.F. 2024).

3. SFC WB's statements show no actual bias.

Third, because SFC WB exhibited no actual bias and because the military judge observed SFC WB's demeanor and credited SFC WB's assurance to look at only the facts of the case, there is no risk of implied bias. Under *Woods*, 74 M.J. at 243 n.1, an analysis of implied bias involves questions of fact and demeanor, so it is noteworthy that the military judge here specifically emphasized SFC WB's guarantees of impartiality. In order to support the court's ruling on SFC WB's challenge, the military judge highlighted and credited SFC WB's guarantees to not "hold [appellant's hiring decision] in any way against" and to "just look at the facts

of the case." (JA091). Indeed, the absence of actual bias here strongly counsels against finding implied bias.

Contrary to appellant's assertion, *Napolitano*, 53 M.J. 162, actually bolsters the military judge's decision to allow SFC WB to remain on the panel. Captain Malanowski, the challenged member in *Napolitano*, made highly problematic statements exhibiting a clear bias against civilian counsel, but this Court still affirmed the military judge's decision to deny a challenge against the member.

In *Napolitano*, Captain Malanowski first described the manner in which civilian defense counsel assist criminal defendants; then he said, "You know, that kind of creates problems with me . . . . So, you know, it creates some problems there." *Napolitano*, 53 M.J. at 165 (emphasis omitted). The military judge tried to explain the proper role of defense counsel to Captain Malanowski and then asked him if he had "a problem with that at all," but Captain Malanowski still equivocated: "A slight bit, sir, but I mean I can live with that, sir. I was not aware of how far that went as you just described." *Id.* (emphasis omitted). When the military judge tried to further explain defense counsel's role, Captain Malanowski exhibited begrudging acceptance:

> MJ: . . . Do you understand that? Do you have any problems with it?
> MEM: I guess that's the only way that it could really work.
> MJ: Would you have any difficulty with that at all
> MEM: No, sir.

Id. Later, the trial counsel attempted to rehabilitate Captain Malanowski:

> TC: . . . So, regardless of what you may think about the role of a defense attorney, you would in no way hold that against the accused in this case, would you
> MEM: I wouldn't.
> TC: You would be able to listen to all the evidence and make your determination of guilt or innocence based upon the evidence and not based upon the performance of a particular lawyer?
> MEM: Based on the evidence.

Id. at 166 (emphasis omitted). When defense counsel challenged Captain Malanowski, the military judge denied the challenge without providing an explanation: "I am going to deny that challenge for cause." *Id.* Nonetheless, this Court affirmed the decision, finding that the military judge did not abuse his discretion when he found no actual bias, and holding that this matter "is not a case where implied bias exists." *Id.* at 167.

Here, SFC WB never said anything nearly as biased as Captain Malanowski did; to the extent that SFC WB made any problematic statements, he never gave hesitating assurances of impartiality, as Captain Malanowski did. SFC WB was far clearer and firmer in his assurances of impartiality. For example, he unequivocally affirmed that he would consider "[j]ust the facts" and would "[n]ot at all" hold appellant's hiring decision against him. (JA079–080). In addition, the military judge here offered far more explanation for his decision than the *Napolitano* military judge, who summarily denied the accused's challenge for cause.

Napolitano, 53 M.J. at 166. Because this Court deferred to the military judge's decision in *Napolitano*, 53 M.J. 162, this case here certainly warrants deference to the military judge's assessment of SFC WB's statements.

4. The military judge's decision warrants deference because he placed his analysis on the record and considered the liberal-grant mandate.

Fourth, the military judge's decision to deny the challenge against SFC WB must be left undisturbed because he considered appellant's implied-bias challenge, recognized his duty to liberally grant defense challenges, and placed his reasoning on the record. (JA091–092). In such cases, "deference is surely warranted." *Downing*, 56 M.J. at 422 ("While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted."); *see also United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) ("Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.").

Appellant argues that the military judge did not consider the liberal-grant mandate, and that the liberal-grant mandate required SFC WB's excusal because SFC WB's matter presents at least a "close" case. (Appellant's Br. 19, 22). But because of SFC WB's clear statements of impartiality, SFC WB's challenge does not present a "close" case. *Keago*, 84 M.J. at 373. Furthermore, the military judge indeed considered the liberal-grant mandate. Right after ruling on SFC WB's challenge, the military judge explicitly stated that he "did consider the liberal grant

mandate." (JA092). Furthermore, the record demonstrates that the military judge was well aware of his duty to liberally grant challenges because he mentioned it earlier, and counsel earlier cited it too. (R. at 212, 215, 228; JA083, JA085, JA087).

Considering SFC WB's statements of impartiality and his indicated willingness to follow the court's instructions, most, if not all, people in the same position as SFC WB would not "be prejudiced [i.e. biased]." *Strand*, 59 M.J. at 459. Therefore, the public would be assured that appellant received a court of fair, impartial members.

C. The Court should reject appellant's claim that SFC WB's statements suggested "critical misunderstandings about appellant's fundamental constitutional rights."[3]

Appellant asserts that SFC WB's statements "suggested critical misunderstandings about appellant's fundamental constitutional rights." (Appellant's Br. 22). But a plain reading of all of SFC WB's statements show no such misunderstanding.

To support his argument, appellant makes much of these three statements from SFC WB: (1) when SFC WB said that hiring civilian defense counsel was not an "admission of guilt" but was just "unusual" to him; (2) when SFC WB recounted that, in his experience, he has "only ever seen people hire civilian

[3] (Appellant's Br. 22).

counsel" when they do not "get the outcome they were looking for, so they went to retrial with a civilian lawyer"; and (3) when SFC WB said that the hiring of civilian defense counsel meant that "you don't trust your defense very much." (Appellant's Br. 2, JA076–077, JA079–080).

Nonetheless, SFC WB's statements present no case of implied bias. As discussed earlier, *Keago*, 84 M.J. at 374–75, exemplifies a "close" case of implied bias, but SFC WB's three statements do not share any similarities with the two members' highly biased statements in *Keago*. When plainly read in context, SFC WB's statements do not call into question his impartiality.

1. SFC WB's first statement did not indicate bias.

The first statement fails to show bias and fails to show that SFC WB cast judgment on the decision to hire civilian defense counsel. Seeing an accused soldier represented by civilian counsel might not be "usual"—i.e., not within SFC WB's common experience—but that bears no weight on whether SFC WB thought appellant was guilty. The first statement merely implies that it was more usual for SFC WB to see an accused soldier represented by military defense counsel.

To the extent that SFC WB's first statement showed any bias, the military judge still acted well within his discretion by denying the challenge, because of SFC WB's clear statements of impartiality (e.g., that he would not hold appellant's hiring decision against either appellant or any defense counsel); his presumed and

indicated willingness to follow the court's instructions; and the military judge's thorough instructions about impartiality, presumed innocence, and other similar topics. *See United States v. Ovando-Moran*, 48 M.J. 300, 303–04 (C.A.A.F. 1998) ("While LT M's feeling that the accused's silence would be 'unnatural' might cause the defense to have concerns about presenting a case-in-chief in which the accused elected not to testify, it clearly does not rise to *per se* disqualification. Even though a layperson at the outset of a trial may believe that it would be 'unnatural' for a criminal defendant to not testify, it is possible for that person to serve as an impartial court member after proper voir dire and instructions by the military judge.").

2. SFC WB's second statement merely reflected what he had previously observed and experienced.

The second statement came in response to military defense counsel's question asking if SFC WB thought it was "unusual" when a client "hires a civilian defense counsel to represent them[.]" (JA077). In SFC WB's reply, he merely recounted what he himself observed and experienced: he told the court that he saw people hire civilian defense counsel only in certain limited contexts. (JA077).

3. SFC WB's third statement must be read in context, rather than in a vacuum.

When the third statement is read in the context of SFC WB's other statements and in the context of his exchange with the military judge, the most

reasonable interpretation is that "you don't trust your defense" means that an accused trusts neither the original "defense counsel" nor the "case" that the original defense counsel was "going to present" on his behalf. (JA079). Contrary to appellant's assertions, the plain words of SFC WB's statements show that SFC WB never claimed that appellant "did not believe he had *a* defense to the charges he faced" or that "appellant had already lost his case"— as if appellant knew that he was actually guilty and that the government had him dead to rights. (Appellant's Br. 16–17 (emphasis added)). Instead, the third statement focuses simply on what an accused thinks of his original defense counsel's ability to put together an effective case for presentation.

Contrary to what appellant claims, this third statement does not suggest a "critical misunderstandings about appellant's fundamental constitutional rights." (Appellant's Br. 22). Expressed in lay terms, SFC WB's third statement reflects a common-sense understanding of the importance of trust between client and attorney. *See Polk County v. Dodson*, 454 U.S. 312, 324 n.17 (1981) ("Our adversary system functions best when a lawyer enjoys the wholehearted confidence of his client."); *United States v. Iverson*, 5 M.J. 440, 443 (C.M.A. 1978) ("The relationship between an attorney and client is personal and privileged. It involves confidence, trust and cooperation."). After all, reasonable members of the public would understand that a criminal defendant should trust both his counsel

and his counsel's services, because criminal lawyers have the awesome power to make binding decisions and arguments that mean the difference between acquittal and conviction. *See Gonzalez v. United States*, 553 U.S. 242, 248 (2008) ("As to many decisions pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962)) (internal quotation marks omitted)). Accordingly, SFC WB's third statement—about not trusting "your defense counsel" or "the case that you're going to present"—is most reasonably understood as SFC WB's belief about the level of trust that an accused has in defense counsel and in the case that counsel crafted for presentation.[4] (JA079).

Furthermore, SFC WB made clear statements showing impartiality—for example, that he would "[n]ot at all" hold appellant's hiring of civilian defense counsel against appellant. (JA079–080). It is unreasonable to take SFC WB's third statement out of context and twist it into somehow saying that SFC WB believed hiring a civilian defense counsel revealed an accused's guilt in any way. (JA079–080).

[4] To be clear, SFC WB's third statement may reflect an immaterial overstated understanding about why some clients might hire civilian defense counsel. Of course, clients might hire civilian defense counsel for reasons other than a lack of trust in the original defense counsel's legal services. But any misconception was not about whether appellant evinced guilt by hiring civilian defense counsel.

This Court's precedent recognizes the deference owed to military judges, who are in the "best position" to evaluate the demeanor and sincerity of a member's statements. *Schlamer*, 52 M.J. at 95. For example, in *Schlamer*, 52 M.J. at 86, a member in a capital premeditated-murder case wrote in a questionnaire that there "should be a set punishment for a set crime" and that rape, for example, should lead to "castration." The member also wrote, "If you take a life, you owe a life." *Id.* The military judge denied a challenge for cause, explaining, "I listened to her, talked to her, and I heard her answers to both counsel. And although I certainly gave her every opportunity, and I know Mr. McNeil [civilian defense counsel] did, too, to allow her the opportunity to say that she had already made up her mind. On her own, she clearly stated that she had not. I completely believe her." *Id.* at 92 (brackets in original). On the question of actual and implied bias, this Court found no abuse of discretion in the military judge's decision, stating that even though the member's "responses might cause concern if considered standing alone, they would not cause a reasonable person to question the fairness of the proceedings, when considered in the context of the entire record[.]" *Id.* at 93–94.

Hence, under this Court's precedent, the military judge's analysis and interpretation of SFC WB's statements must be given "great deference." *Miles*, 58 M.J. at 194–95. Appellant interprets the phrase "you don't trust your defense very much" to somehow mean that SFC WB believed that appellant "did not believe he

had a defense to the charges he faced" and that "appellant had already lost his case." (Appellant's Br. 16–17). But in allowing SFC WB to remain on the panel, the military judge certainly did not impute such patently biased beliefs to SFC WB's statements. Rather, the military judge interpreted SFC WB's statements in the context of his assurances that he would not "hold [appellant's hiring decision] in any way against" appellant and that "he would just look at the facts of the case". (JA091).

One should also recall that the military judge was the one who asked SFC WB the question about whether "your defense" means "your defense counsel, as in the attorneys" or the "defense as in the case that you're going to present?"—so the military judge was especially well-positioned to best understand and interpret what SFC WB's response meant. (JA079). And the military judge placed his analysis of these statements on the record. (JA091). In contrast to a review of a "cold appellate record," the military judge's analysis arose from observing SFC WB's statements, demeanor, and sincerity in court, so deference to the military judge's interpretation and analysis of those statements is warranted. *Clay*, 64 M.J. at 277.

Therefore, because appellant fails to show how SFC WB's statements cast a substantial doubt on the court-martial's legality, fairness, and impartiality, the findings and sentence must be affirmed.

Conclusion

WHEREFORE, the government respectfully requests that this Honorable Court affirm the findings and sentence.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains **6,913** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on October 30, 2024.

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