

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220432

Specialist (E-4)

RODRIGO L. URIETA

United States Army,

Appellant

Tried at Fort Stewart, Georgia, on 22 April, 20 July and 22-25 August 2022, before a general court-martial appointed by the Commander, 3d Infantry Division and Fort Stewart, Lieutenant Colonel Albert G. Courie III., Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error

- I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST [REDACTED], WHO BELIEVED A SOLDIER WHO HIRED A CIVILIAN DEFENSE COUNSEL DID NOT BELIEVE IN HIS DEFENSE**
- II. WHETHER APPELLANT’S DUE PROCESS RIGHTS WERE VIOLATED WHERE APPELLANT WAS CHARGED WITH COMMITTING SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT WITHOUT CONSENT, BUT THE GOVERNMENT EVIDENCE AND THEORY WAS SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT WHILE ASLEEP.**

Statement of the Case

On 2 August 2023 appellant filed his initial brief. On 29 November 2023 the government issued their brief. This is appellant's reply. This reply only addresses appellant's first assignment of error. If this court needs to address appellant's second assignment of error, this court should reserve judgment on appellant's second assignment of error until a decision by the Court of Appeals for the Armed Forces is issued in *United States v. Mendoza* No. 23-0210/AR, 2023 CAAF LEXIS 699, at *1 (C.A.A.F. Oct. 10, 2023) (Order Granting Review).

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

A. Deference

The government contends the military judge's ruling in this case is entitled to deference because, "the military judge cited his consideration of the liberal grant mandate and *placed a detailed analysis of the law to the facts on the record*; therefore 'deference is surely warranted.'" (Gov't Br. at 10) (emphasis added).

The government makes this conclusory claim, but notably fails to cite any pages in the record where the judge conducted this so-called "detailed analysis of

the law and the facts on the record.” They do not revisit this argument at any point. This is because the military judge failed to conduct any analysis on implied bias and the liberal grant mandate at any point on the record.

The only time the military judge mentioned the liberal grant mandate was *after* the military judge had already denied the defense challenges for cause. (R. at 400). “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.” (R. at 400). It was as if the military judge remembered—at the last moment—that he had forgotten to conduct an implied bias analysis and consider the liberal grant mandate. Rather than go back and do an individual analysis for each denied challenge, he offered only a talismanic, one-size-fits-all, cleansing statement.

In *Peters*, the military judge announced at trial

Concerning implied bias, implied bias exists if an objective observer would have a substantial doubt about the fairness of this court-martial proceeding. And I think that an objective observer who heard [REDACTED] and saw [REDACTED] responding to the questions of counsel would not have any reason to doubt his impartiality in this case. So, I don't believe that there's actual or implied bias established in this case. And I am considering the liberal grant mandate that the Appellate Courts have asked me to consider in deciding whether or not to grant these challenges.

United States v. Peters, 74 M.J. 31, 33 (C.A.A.F. 2015)

The Court of Appeals for the Armed Forces did not believe the military judge had done nearly enough. The Court described the military judge’s analysis as doing no more than “invoke the implied bias doctrine. . .” *Peters*, 74 M.J. at 36. The military judge in *Peters* offered a much more detailed and individualized analysis than the one that was done here—at the very least the judge in *Peters* mentioned the member he was applying the analysis to. Even that was absent here. No deference should be afforded to the military judge’s decision.

B. Unyielding View

The government suggests [REDACTED] was not impliedly or actually biased because “like the panel member in *Hines*, there was no evidence that SFC WB’s views were unyielding.” (Gov’t Br. at 12) (citing, *United States v. Hines*, 75 M.J. 734, 743 (Army. Ct. Crim. App. 27 July 2016)).

In *Hines*, the panel member held the belief that Army policy dictated if a person had any alcohol they cannot consent to sex. *Id.* at. 739. The military judge in *Hines* sternly disabused the panel member of that notion, “that is not the law. . .” *Id.* Then, after telling the panel member that he had an incorrect view of the law, the judge still gave the panel member an out by asking, “are you going to have any

problem distinguishing between the two . . . [i]f you are, that is okay, and you get to go home right now.” *Id.* Each time the panel member expressly stated he could follow the instructions and would have no problem doing so. *Id.*

No such strong rebuke of [REDACTED] mistaken views about civilian defense counsel occurred here. And, [REDACTED] never *totally* disclaimed his personal view as the panel member did in *Hines*. [REDACTED], stated hiring civilian counsel indicates a soldier doesn’t trust his defense attorneys, and doesn’t believe he has a defense. (R. at 385). [REDACTED] always maintained that hiring a civilian defense counsel is “unusual to me.” (R. at 385-86).

C. Fundamental Tenet of Criminal Law

The government describes the right to be represented by counsel of your choosing as, “closer to a legal technicality easily overcome by the military judge’s correction and is not important to the legal issue in question to the case.” (Gov’t Br. at 13-14) (internal citation omitted).

The government is simply wrong on this point, the “right to civilian counsel is a most valuable right.” *United States v. West*, 59 M.J. 276, 278 (C.A.A.F. 2004) (holding a continuance should be granted to give appellant the opportunity to find civilian counsel).

It would seem strange for a mere technicality to appear at the beginning of an arraignment as one of the first advisements given to an accused by the military judge. “In addition to your military defense counsel, you have *the right* to be represented by a civilian counsel at no expense to the government.” Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 2-2-1 (October 25, 2023)(emphasis added).

Right to civilian counsel was specifically codified by Congress in the Uniform Code of Military Justice. “The accused may be represented by civilian counsel if provided by him.” Article 38b(2), UCMJ 10 USCS § 838 (b).

Further, contrary to the government’s argument, [REDACTED] views on hiring civilian counsel does implicate his presumption of innocence. [REDACTED] [REDACTED] view was that hiring a civilian defense counsel means the accused does not have a good defense to present. (R. at 385-86).

“As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.” *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (internal quotations omitted) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). A panel member whose view runs

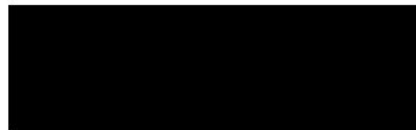
contrary to a tenant so fundamental that both CAAF and Congress have recognized is, at best, impliedly biased.

Conclusion

For having a clearly biased panel member, this court should set aside appellant's convictions and sentence.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on December 1, 2023.



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