IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20250030
Specialist (E-4) **MATTHEW W. MARTIN,** United States Army, Appellant	Tried at Fort Campbell, Kentucky, on 17 September 2024, 16 December 2024, and 21-24 January 2025, before a general court-martial appointed by the Commander, Headquarters, Fort Campbell, Colonel John Maloney and Colonel Frederic Gallun, military judges, presiding.

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

Assignment of Error[1]

WHETHER IT WAS REVERSIBLE ERROR WHEN THE MILITARY JUDGE DENIED DEFENSE'S MOTIONS TO STRIKE THE BRIGADE COMMANDER WHO COMMANDED FOUR OTHER PROSPECTIVE PANEL MEMBERS AND CREATED AN IMPLIED "VOTING BLOC"

Statement of the Case

On 23 January 2025, a panel with officer and enlisted representation sitting as a general court-martial convicted appellant, contrary to his pleas, of one charge and specification of domestic violence in violation of Article 128b, Uniform Code

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

of Military Justice [UCMJ], 10 U.S.C. § 928b (2023).[2] (R. at 644; Charge Sheet). On 24 January 2025, the court-martial sentenced appellant to be reprimanded, to be reduced to the grade of E-1, to perform hard labor without confinement for three months, and to receive a bad-conduct discharge. (R. at 702).

On 5 March 2025, the convening authority approved the findings and sentence. (Action). On 10 March 2025, the military judge entered Judgment. (Judgment). This Court docketed appellant's case on 20 May 2025. (Referral and Designation of Counsel).

Statement of Facts Relevant to the Assignment of Error

A. First Set of Prospective Panel Members

On 16 December 2024, in accordance with Rule for Courts-Martial [R.C.M.] 911[3], panel members were randomized. (R. at 16; App. Ex. IV). The military judge ordered the first fourteen members to be present for voir dire scheduled for the morning of 21 January 2025. (R. at 17).

During the initial morning session of group voir dire it became apparent that four prospective members were a part of the same direct chain of command. (R. at

[2] Appellant was acquitted of two specifications of domestic violence. (R. at 644).
[3] All references to the Rules for Courts-Martial are contained in the 2024 Edition of the Manual for Courts-Martial.

53-54). Based, *inter alia,* on this information, individual voir dire was conducted into the specific relationships between prospective members.

During individual voir dire, prospective member, [redacted] noted that he was senior rated by [redacted] (3d Brigade Commander) and rated by [redacted] (squadron commander). (R. at 73). Defense moved to excuse [redacted] for implied bias as two other prospective members comprised his direct rating chain:

> I think that people on the outside looking in, if they heard that a major who's [sic] senior rater and [] rater were on the panel, that they would have a hard time believing that that made [sic] there [sic] is not going to be influenced by the views of [redacted] in this case and [redacted].

(R. at 83). The military judge ultimately granted the challenge, but chastised defense counsel for asking [redacted] a hypothetical about his ability to cast an unbiased vote even though his rater and senior rater might be on the panel, "I'm never going to let you ask another member that question. You're basically telling a field grade officer that he can't make up his mind and hold his ground. That's basically what you're saying; right? You don't need to respond." (R. at 83).

Defense counsel then sought clarification as to whether they could ever ask follow-up questions about a prospective member's rating chain. The military

judge responded, "I'm asking the questions. I will ask the questions. No, you cannot. You forfeited it." (R. at 84).

Due to challenges for cause from both parties, the court was unable to seat the required eight members after the morning session. (R. at 161).

B. Second Set of Prospective Panel Members

Another set of fourteen prospective members were present for the afternoon session of voir dire on 21 January. (R. at 177-78). Though different than that commanded by [redacted] in the morning session, it was noted that three prospective members were again in a chain of command. [redacted] was the battalion commander who rated Command[redacted] and was the commander of [redacted]. (R. at 251, 301). After further challenges from both parties, seven members remained from the afternoon session.

C. 3d Brigade Voting Bloc

In an attempt to achieve quorum, eleven members were present for a second round of group voir dire conducted the morning of 22 January. (R. at 297). The panel venire now contained five prospective members who were in the 3d Brigade chain of command. This was noted after the military judge began the second day by asking whether any of the prospective members were in each other's chain of command or rating chain. (R. at 298).

As the brigade commander of 3d Brigade, [redacted] was the rater, senior rater, or commander of four other members. (R. at 89, 96, 240, 273, 303-04, 312, 314). [redacted] and [redacted] were two of [redacted] battalion commanders. (R. at 89, 240, 303-04). [redacted] was the brigade operations sergeant major. (R. at 273, 312). [redacted] was a platoon sergeant in one of [redacted] companies. (R. at 314).

D. Challenges for Cause Against the Brigade Commander

Defense counsel first challenged [redacted] during the initial morning voir dire session on 21 January. (R. at 101). Defense argued implied bias:

> There are…members on the panel still who would be his subordinates in this case, and I think that somebody outside looking in, or my client, for example, might look at that and say he's going to have an undue influence on those members. And they may not acknowledge that, but he is going to have an undue influence.

(R. at 101). The defense also argued the liberal grant mandate. Though the military judge had granted defense's challenge for implied bias because of rating chain issues as to [redacted] just prior, he denied the motion to strike [redacted] (R. at 101).

During the 22 January morning session, after it was discovered that four members were in the direct rating chain or chain of command of [redacted], defense again moved to strike him, "It's almost like there's a voting block [sic] of

3d Brigade people at this point…. You could find that there's just too many of them together, and they could almost kind of form a clique, and I think we want to avoid that in panel selection." (R. at 307-08). The military judge again denied defense's challenge. (R. at 308).

The defense used their sole peremptory challenge on [redacted] (R. at 316).

Standard of Review

A. Implied Bias

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.'" *United States v. Urieta,* 85 M.J. 352, 357 (C.A.A.F. 2025) (quoting *United States v. Peters,* 74 M.J. 31, 33-34 (C.A.A.F. 2015)). There is 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." *Id.* (quoting *United States v. Keago,* 84 M.J. 367, 373 (C.A.A.F. 2024)).

B. Liberal Grant Mandate

"'Military judges must err on the side of granting defense challenges for cause.'" *Urieta,* 85 M.J. at 357 (quoting *Keago,* 84 M.J. at 372). The liberal grant

mandate is "intended to address 'certain unique elements in the military justice system including limited peremptory rights and the manner of appointment of court-martial members that presents perils that are not encountered elsewhere.'" *Id.* (quoting *Keago,* 84 M.J. at 372). If an implied bias challenge is a "close question, the challenge should be granted." *Id.*

Law

Rule for Courts-Martial 912(f)(1)(N) states that a member *shall* be excused for cause "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." (emphasis added).

"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) (citing *United States v. Mack,* 41 M.J. 51, 54 (C.M.A. 1994). "Indeed, 'impartial court-members are a *sine qua non* for a fair court-martial.'" *Id.* (quoting *United States v. Modesto,* 43 M.J. 315, 318 (C.A.A.F. 1995)). "That is not to say that an accused has a right to the panel of his choice, just to a fair and impartial panel." *Id.*

Argument

The military judge erred when he twice denied defense's motion to excuse Colonel RT for implied bias. This error mandates reversal. *Wiesen,* 56 M.J. at 173, 177.

A. The Appearance of Undue Deference to the Commander

This case is virtually a carbon copy of *Wiesen,* where the Court of Appeals for the Armed Forces [CAAF] set aside the findings and sentence when it found a military judge abused his discretion when he denied defense's challenge for cause of a brigade commander who had a supervisory position over two-thirds of the panel.

In *Wiesen,* alongside the challenged brigade commander during voir dire were three of his battalion commanders, one of his battalion executive officers, a first sergeant for one of his companies, and a sergeant major in the brigade. *Id.* at 173-74. Defense challenged the brigade commander for cause based on implied bias given his supervisory role. *Id.* at 174. The military judge denied the challenge and stated, "I think the panel members can each approach this with an individual voice and consideration. They've all indicated that they could express their opinions freely and openly and that they would not be inhibited or unduly influenced by any superior." *Id.* The CAAF found this reasoning to be error.

In the present case, the military judge used almost the exact same incorrect reasoning, "I've had the ability to see their demeanor, [redacted] was firm. There was no hesitation, no question in his mind, nor in his response that he could appear on the opposite side of an issue from [redacted]…[redacted] indicated he wouldn't use any outsized influence, despite what you've argued about his rank and his role in the…rating chain…." (R. at 102). The military judge repeated this refrain when he denied defense's second challenge for cause based on the chain of command implied bias for [redacted]. "Of course we want members to have a full and fair discussion. I have no indication that because several of them belong to the same organization that that wouldn't happen." (R. at 308). But this is precisely what CAAF was guarding against – not that any member would actually be biased, but that the appearance of such a large contingent of a commander and his subordinates would have the appearance of undue deference. And the appearance was enough to cause CAAF to set aside the case.

The CAAF in *Wiesen* went on to note that an objective member of the public, looking in on the court-martial, might ask "to what extent, if any, does deference (a.k.a. respect) for senior officers come into play?" *Id.* The CAAF agreed with defense counsel that having the commander and so many of his

subordinates on the panel created "the wrong atmosphere" and in that context, "there is simply too high a risk that the public will perceive that the accused received something less than a jury of ten equal members, although something more than a jury of one." *Id.* So, too, here. Any objective member of the public would certainly be concerned that four subordinates—three of whom were rated by Colonel RT—may give undue deference to the commander. Though each averred their ability to deny deference to their commander, defense correctly argued the appearance—not the members' actual ability to disagree with the person who controlled their career—was the reason that Colonel RT should be struck. Despite the military judge's offense at defense's questions and arguments, their reasoning was not only proper, but was correct.

B. Implied Bias

"It is well settled that a senior-subordinate/rating relationship does not *per se* require disqualification of a panel member." *Wiesen,* 56 M.J. at 175. However, at no point did defense argue a *per se* rule nor actual bias for any member. Rather, each objection was based on an implied bias because of what amounted to an unreasonable, two-thirds 3d Brigade voting bloc led by the brigade commander. (R. at 307-08).

Analyzing under an implied bias framework, the CAAF in *Wiesen* held that, contextually, having the commander and so many of his subordinates on the panel placed "an intolerable strain on public perception of the military justice system." *Id.* at 175. "The American public should and does have great confidence in the integrity of the men and women who serve in uniform, including their integrity in the jury room. However, public perception of the military justice system may nonetheless be affected by more subtle aspects of military life." *Id.* at 176.

"We have no doubt that 'viewed through the eyes of the public,' serious doubts about the fairness of the military justice system are raised when the senior member of the panel and those he commanded or supervised commanded a two-thirds majority of members…." *Id.*

Just as in *Wiesen,* [redacted] and his subordinates "commanded two-thirds majority of members." Defense counsel summed it up perfectly: "It's almost like there's a voting bloc of 3d Brigade people at this point." (R. at 307). This again is precisely the appearance of improper deference that CAAF sought to guard against.

Two separate times, defense challenged [redacted] for implied bias based on his commander/subordinate relationship with four other prospective members. Twice the military judge denied the challenges and relied on the notion that

[redacted], like the other prospective members, would not let rank influence decisions, and there would be "full and fair discussion." (R. at 308). Yet paradoxically, the military judge recognized the chain of command issue because he—not defense counsel—controlled the 22 January session of voir dire and sought to gather more information on the specific command relationships each member was a part of. (R. at 298).

The military judge's error is further compounded by the fact that just prior to defense's first motion to strike [redacted], the military judge had granted their motion—for the same implied bias reasons related to the chain of command—against [redacted]. (R. at 83). Yet it is clear the military judge became upset at defense counsel and their argument for implied bias. (R. at 83-84). He told defense counsel they "forfeited" their ability to ask questions about whether someone looking at a panel from the outside would have concern that multiple members were in a commander's rating chain. (R. at 81-84). Inexplicably, the military judge struck a junior member, yet kept the commander who was the root cause of the implied bias issue.

Defense counsel accurately stated the implied bias test in their first challenge of [redacted], that "somebody outside looking in…might look at that and say he's going to have an undue influence on those members." (R. at 101). The military

judge erred in denying defense's motion because he erroneously relied on the actual bias standard—that members stated they would not be influenced. He relied on the same reasoning for defense's second motion to strike.

The military judge's application of the incorrect test warrants no deference to his subsequent rulings and this Court should review this issue de novo. Even if the military judge had applied the correct implied bias test, his ultimate denial of the motions to strike were still error and in contravention to the CAAF's holding in *Wiesen.*

C. Prejudice

1. The Issue is Preserved

Appellant, just as in *Wiesen,* utilized his sole peremptory challenge against the brigade commander.[4] (R. at 316). While R.C.M. 912(f)(4) normally precludes review of a peremptorily challenged member, this rule operates under the assumption of a military judge's correct ruling. Here, however, the military judge erred when he denied defense's two motions to excuse based on implied bias. Therefore, the issue is preserved for this Court's review.

[4] Rule for Courts-Martial 912(g) allows appellant only one peremptory challenge.

2. Appellant Was Prejudiced by Having to Utilize His Sole Peremptory Challenge on [redacted]

"To say that appellant cured any error by exercising his one peremptory challenge against the offending member is reasoning that, if accepted, would reduce the right to a peremptory challenge from one of substance to one of illusion only." *Wiesen,* 56 M.J. at 177.

The CAAF found prejudice in *Wiesen* when the appellant was forced to use their peremptory challenge to strike a member who was empaneled after an erroneous ruling. 56 M.J. at 177 (citing *United States v. Armstrong,* 54 M.J. 51, 55 (C.A.A.F. 2000) (finding reversable error where the military judge erroneously denied the servicemember's challenge of a prospective panel member and the defense's peremptory challenge was used on that prospective member)). Because of the "limited peremptory rights" afforded to appellant due to our "unique" system, appellant was prejudiced by having to strike the "offending member." *Wiesen,* 56 M.J. at 177.

Stated plainly, "the military judge's denial of the challenge for cause against [the commander] prejudiced appellant's right to exercise a peremptory challenge against another member of his choice." *Wiesen,* 56 M.J. at 177.

Appellant twice attempted to cure the issue of implied bias by challenging [redacted] The military judge erred twice in denying the motions. As appellant

was forced to use his sole peremptory challenge on a member who was erroneously allowed to remain, appellant was prejudiced. Just as in *Wiesen,* this Court should hold that the "military judge abused his discretion in denying the challenge for cause against [the commander] and that such error resulted in prejudice to appellant." *Id.*

Conclusion

Based on the foregoing reasons, this Court should set aside the findings and sentence.

[redacted]
Eli M. Creighton
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division

[redacted]
Kelsey Mowatt-Larssen
Major, Judge Advocate
Branch Chief
Defense Appellate Division

[redacted]
Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division

[redacted]
Frank E. Kostik, Jr.
Colonel, Judge Advocate
Chief
Defense Appellate Division

APPENDIX A

Appendix A: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following matters:

I. WHETHER THE CASE IS FACTUALLY AND LEGALLY INSUFFICIENT WHEN THE ALLEGED VICTIM TESTIFIED THAT APPELLANT DID NOT "REALIZE WHAT HE WAS DOING," WHICH PROVED APPELLANT DID NOT ACT INTENTIONALLY OR KNOWINGLY, NOR DID HE ACT WITH RECKLESSNESS IN MERELY ATTEMPTING TO RETRIEVE HIS PHONE WHICH THE ALLEGED VICTIM HAD WRONGFULLY TAKEN

II. WHETHER APPELLANT WAS IMPROPERLY PUNISHED WHEN HIS UNIT DID NOT HAVE HIM BEGIN HARD LABOR UNTIL SEVERAL WEEKS AFTER THE ANNOUNCEMENT OF HIS SENTENCE

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on November 13, 2025.

[redacted]

MICHELLE L.W. SURRATT
Paralegal Specialist
Defense Appellate Division
[redacted]