

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20220274

Staff Sergeant (E-6)
DANIEL L. VALDEZ,
United States Army,
Appellant

Tried at Fort Irwin, California, on 15 February, 17-20 May 2022, before a special court-martial convened by the Commander, National Training Center and Fort Irwin, California, Colonel Larry Babin and Colonel Matthew Fitzgerald, Military Judges, presiding.

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

Assignments of Error¹

I.

**WHETHER THE MILITARY JUDGE ERRED
WHEN HE DENIED THE DEFENSE CHALLENGE
FOR CAUSE AGAINST A MEMBER WHO HAD AN
INELASTIC PREDISPOSITION ABOUT
MANDATORY PUNISHMENT.**

¹ Appellant raises issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Appellants matters I – VI and VIII lack merit; if the court determines they are meritorious, the government requests an opportunity to brief the court. After a thorough review of the record, the government would not object to a supplemental, more detailed, briefing from appellant on his claims of ineffective assistance of counsel.

II.

WHETHER APPELLANT IS ENTITLED TO RELIEF FOR 952 DAYS OF POST TRIAL DELAY.

Statement of the Case

On 19 May 2022, a panel with officer and enlisted representation sitting as a special court-martial, convicted appellant, Staff Sergeant [SSG] Daniel Valdez [appellant], contrary to his pleas, of one specification of absence without leave, one specification of disrespect to a superior noncommissioned officer, one specification of disrespect to a superior commissioned officer, and one specification of battery upon a spouse, in violation of Article 86, 89, 91, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 889, 891, and 928 (2019) [UCMJ]. (R. at 613). On 20 May 2022, the military judge sentenced appellant to reduction to the grade of E-5 and to perform hard labor without confinement for 30 days (R. at 683). On 6 June 2022, the convening authority approved the sentence but took no action on the findings (Action). The military judge entered judgment on 12 December 2022 (Judgement). This court docketed the case on 27 December 2024 (Referral and Designation of Counsel).

Statement of Facts

A. Appellant's Crimes.

Appellant's misconduct spanned an approximate 16-month period from July 2020 through November 2021. (Charge Sheet; STR).

Appellant's earliest documented misconduct on the charge sheet occurred in August 2020, during the COVID pandemic, when he left his unit without authorization. At the time, appellant worked in Pennsylvania. (R. at 233). In early August, appellant claimed his mother fell ill.² (R. at 235). He told his co-workers that he submitted a leave request and made appropriate phone calls with his chain of command. (R. at 236). However, when Mr. JE, one of the civilians he worked with, contacted appellant's first sergeant, the first sergeant "had no idea" what Mr. JE was talking about. (R. at 252). During a subsequent Army Regulation 15-6 investigation, appellant provided a DA 31 signed only by appellant. (R. at 270). The investigation determined appellant left his unit without authorization from 11 August 2020 until 4 September 2020. (R. at 273). Appellant's unit initially handled this misconduct with a battalion commander level letter of reprimand. (Pros. Ex. 21).

² Throughout the court-martial there was conflicting testimony about the nature of her illness. The 15-6 IO testified she was suicidal (R. at 277). Appellant's wife testified that the mother suffered a "heart attack or stroke" but she was not "too sure." (R. at 517-18). Apparently during this period his son also was suffering from testicular cancer. (R. at 384, 657).

Appellant's behavior deteriorated over the next year. On 22 July 2021, appellant became disrespectful during a discussion with his first sergeant. (R. at 294). On 19 July, the acting first sergeant, 1SG SJ, directed appellant to come to his office at 1600 that day. (R. at 293, 298). Appellant failed to show but approached 1SG SJ several days later at physical training. (R. at 294, 298). He came up to the first sergeant, "voice elevated, high, and he was really mad" that 1SG SJ moved a Soldier from appellant's section. (R. at 294). Appellant behaved this way before the entire company. (R. at 295). First Sergeant SJ removed the Soldiers from the area before engaging with appellant. (R. at 295). Even then, appellant continued disagreeing with the senior noncommissioned officer, raising his voice and demonstrating anger. (R. at 295).

Appellant's misconduct continued. On 22 July 2021, appellant's executive officer, 1LT SD, approached appellant during physical fitness training because appellant and his team were running when they were supposed to be playing football. (R. at 339). First Lieutenant SD told appellant, "Hey, you can't do this. You can't have people not participating while everyone else is participating" and asked him to stop running and "go play football with everyone." (R. at 340). Appellant responded that 1LT SD did not have the authority to give him commands that way, or words to that affect. (R. at 340). 1LT SD felt that the response was "degrading and disrespectful." (R. at 341). She did not follow up

with a written counseling and waited a week before even relaying the conversation to the commander, who then ordered her to write a Memorandum For Record (MFR) about the situation. (R. at 341).

Several days following the incident with his company executive officer, appellant disobeyed a direct order from his company commander, CPT JO. (R. at 354; Pros. Ex. 12). Appellant and his team were on Temporary Duty (TDY) in late July 2021. The commander expected the group to return on or about 28 July 2021. (R. at 367). This was a cost saving measure as the team had no missions until 1 August 2021, so CPT JO expected them to return rather than remain TDY and expend unnecessary funds. (R. at 367). While CPT JO could not recall his exact communications with appellant that occurred between 26-28 July (R. at 372), on 29 July he sent an email to appellant, copying his detachment sergeant and first sergeant, which gave a direct order for appellant to return. (Pros. Ex. 12; R. at 373). Appellant responded to the email—adding the battalion XO, battalion commander, brigade sergeant major, and brigade commander—stating that he would not comply with the order. (R. at 375, Pros. Ex. 12). Eventually, with the intervention from the command sergeant major, appellant returned, but not before willfully disobeying the order from CPT JO. (R. at 376).

Finally, in November 2021 appellant engaged in an altercation with his wife that became physical when he knocked her to the ground and kicked her in her

injured ankle. (Pros. Ex. 1). Appellant admitted he “pushed her off the couch . . . kicked her on her left ankle.” (Pros. Ex. 1). She did not get back up after he kicked her. (Pros. Ex. 1).³

B. [REDACTED] voir dire and the defense challenge for cause.

During group voir dire, the military judge asked the standard question on whether any member had an “inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime or crimes for which the accused is to be sentenced, if found guilty.” (R. at 135). [REDACTED] indicated he did not believe he would be compelled to vote on a particular punishment. (R. at 135). The judge further asked the members whether they would “consider” the full range of punishments—from no punishment to the maximum punishment under the law. (R. at 135). Again, [REDACTED] indicated he would consider the full range of punishments. (R. at 135).

Later, the defense counsel requested individual voir dire of [REDACTED] based off his experience with an Absent Without Leave (AWOL) Soldier, that he knew someone who previously experienced physical abuse, and had a Soldier who failed to obey a direct order. (R. at 147).

³ His sworn statement and his wife’s testimony indicated she was trying to engage him in conversation and grabbed his face when he refused to talk to her. (Pros. Ex. 1; R. at 520-21). The military judge provided a self-defense instruction (R. at 561-63), which the panel rejected.

During individual voir dire, ██████ explained that as a former drill sergeant and current first sergeant, he dealt with Soldiers who refused to follow his direct orders. (R. at 183). He explained that his general procedure was to contact legal and the issue moved to summarized Article 15 proceedings. (R. at 184). In one case, when a Soldier refused to go on patrol in Iraq, the command sent the Soldier to behavioral health and “got him some counseling. We didn’t apply any sort of UCMJ just because of the circumstances in which we were dealing with.” (R. at 185).

While ██████ did have a relationship with a victim of domestic abuse, it was his ex-girlfriend and he did not have substantive knowledge of the abuse. (R. at 185). He did not know how the allegations resolved. (R. at 185). When defense counsel asked him whether there was any connection with what he read on the flyer, he responded:

Well, yeah. I mean, of course. It's always -- it makes you think about it, but I mean, it's also a completely different situation, a completely different incident. Those two don't complement each other in any sort of way or anything like that... (R. at 186).

██████ also supervised Soldiers with their own domestic abuse allegations, and he agreed that dealing with those “is a little emotionally taxing and tiring to constantly have to deal with it.” (R. at 186). But he recognized that “each

situation is different,” and that he could “compartmentalize my emotions so one thing is not going to bleed into another.” (R. at 187).

Not surprisingly, [REDACTED] also dealt with AWOL and missing Soldiers during his career. He explained that during his deployment to Iraq in 2008, two individuals from his platoon went home on leave and never returned to Iraq. (R. at 187). One of the Soldiers worked for [REDACTED] and would eventually be discharged from the Army. (R. at 187). Closer in time with respect to the court-martial, he had another Soldier go AWOL to Puerto Rico after his brother was murdered. (R. at 187-88). [REDACTED] explained that the Soldier’s mother worked for the Puerto Rican government and was receiving threats; the Soldier went AWOL because he felt uncomfortable leaving his family alone after his brother’s murder. (R. at 188). The Soldier received a field grade Article 15 for his misconduct. (R. at 188).

[REDACTED] was sympathetic but also recommended punishment. (R. at 189). He explained that while he “totally [understood] where the Soldier is coming from . . . there’s multiple things that he could have done that we could have helped with.” (R. at 189). The Soldier could have “contacted us and let us know the situation.” (R. at 189). There are military personnel in Puerto Rico that could have helped him; the unit could have given him leave. (R. at 189). Ultimately, the commander did not maximize the punishment, suspended some

punishments, and considered the circumstances of the Soldier. (R. at 188-89). [REDACTED]

[REDACTED] took issue with the Soldier’s failure to communicate with the unit. (R. at 189).

[REDACTED] also discussed a more recent AWOL—just three weeks prior to the trial—where a Soldier facing involuntary discharge for drugs did not show up at formation. (R. at 190). The unit eventually convinced him to come back. (R. at 190). [REDACTED] did not describe any punishment administered to the Soldier; the defense counsel did not ask whether the unit punished the Soldier. (R. at 190).

The defense counsel eventually asked [REDACTED] whether he “believe[d] that UCMJ punishment is always appropriate when a Soldier goes AWOL?” (R. at 190). [REDACTED] responded in the affirmative, stating:

I do. If there is not any sort of extenuating circumstances, even for the individual that is deal with the family issues, you know, what’s right is right. And I think all those sorts of misconduct deserve some sort of punishment. (R. at 191).

The defense counsel followed up, asking, “And I can’t change your mind that the misconduct doesn’t deserve some sort of punishment?” (R. at 191). [REDACTED] responded, “No. No, you’re not going to change my mind.” (R. at 191).

The government asked several follow up questions but were mainly focused on whether [REDACTED] believed individuals should be punished before they are found guilty. (R. at 191-92). Neither party asked whether he would consider “no punishment” as one of the authorized punishments under the UCMJ.

The defense challenged [REDACTED] for cause, citing his inelastic attitude towards punishment in AWOL offenses and his prior relationship with a woman who was the victim of domestic violence. (R. at 203). Defense counsel’s argument focused on [REDACTED] inelastic disposition towards AWOL offenses. (R. at 203-4). The military judge denied the challenge. First, he determined that the member had no actual bias, stating, “the challenge is denied on the actual bias because I received no information or indication from either group voir dire or individual voir dire that the [REDACTED] held an inelastic predisposition that would not yield to the evidence presented or the judge’s instructions.” (R. at 211). The military judge continued:

When tested on a particular example, he demonstrated a knowledge that somebody has to be found guilty, and to the punishment phase, extenuation and mitigation could be considered. In that example, he mentioned suspension of punishments, punishments that were warranted under the circumstances, yet, also showed grace and temperament in recommending, again, because of the mitigation and extenuating circumstances.

However, he was also very clear to point out that the Soldier had options during -- that he didn't execute when the Soldier was believed to have been AWOL, and that is,

notify the chain of command, seek an extension of his leave, seek support from military personnel at Puerto Rico, because he didn't exercise those options. So based on all the information provided by the first sergeant, *I don't believe -- it's a close call as to implied bias as well,*⁴ and I believe he will yield to the instructions. (R. at 211-12) (emphasis added).

Finally, the military judge noted that the member was not “properly tested” because he was unaware of the minimum punishment. (R. at 213). The military judge noted that during group voir dire, when directly asked if he would consider no punishment, ██████████ answered in the affirmative. (R. at 213). Based off this information and applying the liberal grant mandate, the military judge denied the challenge for implied bias.

Following findings, appellant elected to be sentenced by military judge alone. (R. at 614-15).

C. Post Trial Delay.

The trial concluded on 20 May 2022. (R. at 683; STR). The Staff Judge Advocate prepared her clemency advice on 6 June 2022 and the convening authority signed his action on the same day. (Action). The military judge signed the Judgment of the Court on 22 December 2022. (Judgment). Almost two years

⁴ Appellant claims the military judge stated that, “it’s a close call as to implied bias as well.” (Appellant Br. 6). Reviewing the entirety of the military judge’s colloquy and his plain language quoted above, it is clear he stated it was *not* a close call.

later, on 6 December 2024, the OSJA forwarded the record of trial to this court. (Chronology Sheet). In total, the processing of this case took 931 days from sentence to forwarding. (Chronology Sheet).

The deputy staff judge advocate, LTC Brett Cramer, prepared a letter of lateness for this court. (Letter of Lateness for Record of Trial Submission in United States v. SSG Daniel Valdez) (Letter of Lateness). In it, he explained that “a series of personnel shortages in key post-trial positions contributed to the delay in this case.” (Letter of Lateness). Specifically, he cited the vacant Military Justice Operations NCO position from December 2019 through February 2024; the loss of the resident court-reporter on 23 May 2022 and replacement with a junior E-3 on 19 July 2022; the departure of the deputy SJA on 15 June 2022 and replacement on 2 September 2022; the loss of the Chief Paralegal NCO on 15 August 2022 and the position remaining vacant until 10 February 2023; and the vacant post-trial civilian paralegal position until 26 January 2023. (Letter of Lateness).

Additionally, while the OSJA requested assistance from court-reporters from JBLM and Alaska, their transcription times depended on their caseloads at their respective installations. (Letter of Lateness).

Finally, the installation saw a 200% increase in its docket from its historical average, which dramatically reduced time available for transcription work. (Letter of Lateness). In June 2023, Fort Irwin executed a contract for transcription services

to address its backlog of over 900 hours of audio, including this case. (Letter of Lateness).

ASSIGNMENTS OF ERROR

I.

WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE CHALLENGE FOR CAUSE AGAINST A MEMBER WHO HAD AN INELASTIC PREDISPOSITION ABOUT MANDATORY PUNISHMENT.

Standard of Review

“This court reviews a military judge’s actual bias determination for an abuse of discretion.” *United States v. Urieta*, __ M.J. __, slip op. at 6 (C.A.A.F. 24 March 2025). The 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.’” *Urieta*, __ M.J. __, slip op. at 7 (quoting *United States v. Peters*, 74 M.J. 31, 33-34 (C.A.A.F. 2015)). In doing so, the court uses a sliding standard—a military judge who cites the correct law and explains his implied bias reasoning on the records receives more deference, while the military judge who fails to do so receives less deference from this court. *Id.*

Law and Argument

“As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel. Indeed, '[i]mpartial court-members

are a *sine qua non* for a fair court-martial.” *Urieta*, __ M.J. __, slip op. at 5 (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (bracket in original)). In the Rules for Court Martial, the President proscribes specific grounds for disqualification and excusal of panel members—including when removing the member is “in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.” Rule for Court-Martial (R.C.M.) 912(f)(1)(N).⁵ This applies when the member demonstrates actual bias or implied bias. *Urieta*, __ M.J. __, slip op. at 5.

“Actual bias is a personal bias that will not yield to the military judge’s instructions and the evidence presented at trial.” *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000). “Because a challenge based on actual bias involves judgments regarding credibility . . . a military judge’s ruling on actual bias is afforded great deference.” *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007). Implied bias, however, is “viewed through the eyes of the public, focusing on the appearance of fairness.” *Id.* (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). It is “evaluated objectively under the totality of the circumstances” *United States v. Dockery*, 75 M.J. 91, 96 (C.A.A.F. 2017). Implied bias is “bias attributable in law to the prospective juror regardless of actual partiality.” *United States v. Keago*, 84 M.J. 367, 372 (C.A.A.F. 2024)

⁵ R.C.M. citations are to the Manual for Courts-Martial, United States (2019 ed.).

(quoting *United States v. Hennis*, 79 M.J. 370, 385 (C.A.A.F. 2020)). The military judge’s ruling, while not reviewed de novo, is given less deference for implied bias. *Dockery*, 75 M.J. at 96.

Moreover, when considering defense causal challenges, the military judge is enjoined to apply the liberal grant mandate, which requires the military judge to excuse members in close cases. *Urieta*, __M.J. __, slip op. at 7. “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).

When “evaluating challenges for cause based on claims of an inelastic attitude, [courts] have held that an unfavorable inclination toward an offense is not automatically disqualifying.” *United States v. McLaren*, 38 M.J. 112, 118 (C.M.A. 1993). “The test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions.” *United States v. McGowan*⁶, 7 M.J. 205, 206 (C.M.A. 1979).

Moreover, “member’s responses to ‘artful, sometimes ambiguous’ questioning do not necessarily require that a challenge for cause be granted.”

⁶ In *McGowan*, “the member indicated he was predisposed to some form of punishment upon conviction” but not that he was disposed to “impose a punitive discharge solely based on the nature of the offense and without regard to the evidence presented at trial.” *McGowan*, 7 M.J. at 206. The Court of Military Appeals held that the military judge properly denied appellant’s challenge for cause. *Id.*

McLaren, 38 M.J. at 118 (quoting *United States v. Tippit*, 9 M.J. 106, 108 (C.M.A. 1980)).

A. Appellant does not establish actual bias.

██████████ demonstrated impartiality, and the defense counsel failed to establish any actual bias during the individual voir dire of the member. The member's statements indicate that he would carefully consider the evidence, apply the law, and consider the full range of sentences available.

As an initial matter, there is no evidence suggesting that ██████████ would unfairly consider the facts when determining the guilt or innocence of the appellant. During the group voir dire, his answers indicated he would consider the evidence, not prejudge the appellant, and appropriately vote on punishment if the panel convicted appellant of any crime. Later, during his individual colloquy with the parties, he clearly articulated his understanding of the importance of listening to the evidence before reaching a conclusion. He shared multiple anecdotes to demonstrate this principle, such as the case of the Soldier who refused to go on patrol but was referred to behavioral health and not punished based on the particular circumstances. (R. at 185).

Moreover, while he expressed the emotionally taxing consequences of dealing with domestic violence allegations, his answers did not indicate any prejudgment of those allegations against appellant. The experiences he discussed—

dealing with allegations of domestic violence against Soldiers within his unit—are common experiences for Army leaders and certainly not disqualifying experiences for a panel member. His experience with his ex-girlfriend, who was a victim of domestic violence, did not disqualify him. His demonstrated limited knowledge of her allegations and was not emotionally invested. He was no longer even in that relationship and did not maintain contact with her.

His answers about punishment also do not establish actual bias. In response to a specific question from the defense counsel about whether he believed UCMJ punishment “is always appropriate when a Soldier goes AWOL,” he answered, “I do.” Taken out of context, this answer may seem troublesome. However, his answers to other questions clearly indicated his understanding of mitigation evidence and the importance of considering the evidence before him before voting on a punishment. Moreover, he did not object during group voir dire to the judge’s question about considering the full range of punishments—from no punishment to the maximum under the law. As the military judge noted, the defense counsel failed to provide that option to the member and test whether he could follow that instruction. While [REDACTED] answers indicate he thought the crime of AWOL a serious offense worthy of punishment, “an unfavorable inclination toward an offense is not automatically disqualifying.” *McLaren*, 38 M.J. at 118.

The military judge, who observed the entire proceeding and is afforded the opportunity to make credibility determinations, determined that the member did not have any actual bias. He is afforded “great deference” in this determination. *Clay*, 64 M.J. at 276. The military judge’s facts are not clearly erroneous, and he correctly applied the law. This court should not disturb his determination that [REDACTED] did not have actual bias.

B. Appellant does not establish implied bias.

There is no risk that the public would perceive that appellant received anything less than a fair trial, and therefore this court should reject the appellant’s argument regarding the challenge for implied bias.

As an initial matter, the accused selected the military judge to conduct sentencing proceedings. Assuming, *arguendo*, that this court determines [REDACTED] statements concerning punishment for an AWOL offense would otherwise offend the public perception of the fairness of this trial, appellant’s decision to elect a military judge for sentencing waives this argument. The public would not be offended by [REDACTED] attitude towards sentencing when [REDACTED] did not sentence appellant.

Even if this court rejects waiver regarding appellant’s decision to have military judge alone sentencing, there is still no basis to find implied bias. First, [REDACTED] clearly articulated he would consider the evidence presented before

making any type of determinations. When appellant's counsel asked about punishment after conviction, ██████ responded, "I do. If there is not any sort of extenuating circumstances, even for the individual that is dealing with the family issues . . . and I think that all those sorts of misconduct deserve some sort of punishment." (R. at 191).

The above statement indicates two facts: first, ██████ believes individuals who abandon their units likely deserve some sort of punishment; second, he would consider extenuating circumstances. This, combined with his extensive answers that provided extenuating circumstances and anecdotal cases in which Soldiers receive less punishment—or no punishment at all—for AWOL offenses, eliminate any basis for finding implied bias on the part of the member.

Appellant attempts to smear the first sergeant's impartiality with suggestions that he would punish a Soldier who went AWOL due to the death of a sibling. (Appellant Br. 3, 5, 13). Appellant repeats this throughout the brief to demonstrate the member's inflexible attitude towards punishment. This takes the ██████ well-reasoned explanation out of context. As ██████ explained, the Soldier in question failed to contact the unit during his absence—they would have worked with him had he done so. (R. at 89).

████████████████████ explanation, clearly stated on the record, was that the Soldier's failure to communicate with the unit while absent without leave

contributed to the decision to punish him despite the mitigating circumstances. While this might seem strict, it is a reasonable explanation for the Soldier's punishment for unauthorized absence, understandable to anyone with military experience. Additionally, ██████ noted that the command suspended part of the punishment and did not impose the maximum penalty under the Article 15's jurisdiction, considering the circumstances. (R. at 189). An outside observer "familiar with the unique structure of the military justice system" would not perceive this as an unfair situation. *Urieta*, __ M.J. __, slip op. at 6.

While the ██████ indicated to the defense attorney that he "could not change" his mind "that that [AWOL] misconduct does deserve some sort of punishment," (R. at 191), he made this statement in a vacuum without the context that he could vote for no punishment for that offense. The defense attorney did not inquire further, and did not establish that the member understood his ability to consider no punishment for the offense. Moreover, relying on this statement to argue ██████ had an inelastic disposition towards punishment ignores ██████ anecdotal description of the deployed Soldier, who, after refusing to go on patrol, was not punished but instead provided help through behavioral health. (R. at 185). The entire colloquy with the defense counsel demonstrated that ██████ thoughtfully considered the misconduct of his subordinates, applied extenuation and mitigation to the situation before making a final determination or

recommendation on a course of action. The public, viewing the entire voir dire, would not harbor concerns about the fairness of this member, particularly when appellant elected judge alone sentencing. This is the type of “artful, sometimes ambiguous” questioning by defense counsel that does “not necessarily require that a challenge for cause be granted.” *McLaren*, 38 M.J. at 118.

Finally, while the military judge receives less deference than abuse of discretion, this court should still grant him deference because he appropriately articulated his reasoning on the record before denying the challenge. The military judge correctly considered implied bias—explaining to the confused defense counsel that:

implied bias exists when, despite a disclaimer, most people in the same position as the court member would be prejudiced, right? In determining whether the implied bias is present, military judges to look to the totality of the circumstances.”

If an objective observer would have a substantial doubt about the fairness of the accused's court-martial panel, that may be implied bias, correct? (R. at 209).

The military judge concluded by stating:

I don't believe he was properly tested because he wasn't aware what the minimum punishment would be, if the only punishment he had to consider was a punishment for an Article 86 violation. And not knowing what the minimum punishment would be, it was hard to test him on that unless you asked him directly and that question wasn't posed. However, this court did pose that question of whether he would consider the range of punishments all the way from

no punishment, if that was the minimum, all the way to the maximum punishment. And his answer to that was in the affirmative, that he would follow that instruction. So based off that, the challenge is denied. (R. at 213).

The military judge properly cited the law and facts before him. This court should affirm the trial courts findings and sentence as this was not a close call as actual nor implied bias.

II.

WHETHER APPELLANT IS ENTITLED TO RELIEF FOR 952 DAYS OF POST TRIAL DELAY.

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Winfield*, 83, M.J. 662, 666 (Army Ct. Crim. App. 2023).

Law and Argument

There are two distinct analyses in addressing claims of post-trial delay: determining whether appellant suffered a due process violation under the Constitution, and determining sentence appropriateness under Article 66(d), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

A. Due Process

Servicemembers convicted at courts-martial have a due process right under the Fifth Amendment to post-trial processing without unreasonable delay. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022). Appellate courts analyze four

factors for Due Process violations in post-trial delay: “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice.” *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Moreno*, 63, M.J. 129, 135 (C.A.A.F 2006)). The four *Barker* factors must be balanced, and “[n]o single factor is dispositive, and absence of a given factor does not prevent finding a due process violation..” *Anderson*, 82 M.J. at 82. The *Barker* analysis, however, is not required if this court determines that any due process violation is harmless beyond a reasonable doubt. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

In situations where an appellant is unable to show they have suffered prejudice, the court will find a due process violation only when, “in balancing the other three factors, [the post-trial] delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Id.* This analysis is “separate and distinct from the consideration of prejudice as one of the

four *Barker* factors.” *Id.* Under this review, the court considers “the totality of the circumstances” based on the “entire record.” *Id.* The court “will not presume prejudice from the length of the delay alone,” but instead requires “evidence of prejudice in the record.” *Id.*⁷

In this case, the first and second factors clearly weigh in favor of appellant. The length of the delay in this case—approximately two and a half years to complete a three-volume court-martial with a 683-page transcript—is clearly unreasonable. Moreover, the government’s explanation for the delay, which generally cites personnel issues, “are not legitimate reasons justifying otherwise unreasonable post-trial delay.” *United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011). The government agrees that the first and second factors of the *Barker* analysis favor appellant.

Nevertheless, this court should not determine there is violation of appellant’s Due Process. Appellant never requested speedy post-trial processing, and appellant is not prejudiced by the delay. Appellant was not oppressively incarcerated by this delay—his relatively light sentence of 30 days hard labor and reduction leaves no opportunity for oppressive incarceration. Appellant does not claim any

⁷ Additionally, CCAs will also further examine prejudice considering three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant’s anxiety and concern while awaiting the outcome of the appeal; and (3) limiting the possibility of impairment of the grounds for appeal and defense at a possible rehearing. *Moreno*, 63 M.J. at 139–40.

particularized anxiety and concern arising from the excessive delay.⁸ As discussed in the first assignment of error, the legal error he claims should not grant any relief.

Finally, while excessive, the delay in this case is not “so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system.” *Anderson*, 82 M.J. at 88. Additionally, there is no indication of bad faith on the part of the government. *Id.* Courts have rejected claims of Due Process violations with delays longer than this delay and the court can determine any prejudice is harmless beyond a reasonable doubt. *See United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009). As there is no prejudice to appellant and the public’s perception would not be adversely affected by this delay, there is no Due Process violation in this case.

B. Article 66 Sentence Appropriateness.

Absent a due process violation, this court next considers whether relief for excessive post-trial delay is warranted based on the CCA’s sentence

⁸ Appellant claims his anxiety and concern are different because he could not adjudicate his appeal. (Appellant Br. 24). He does not explain why this is different from the anxiety and concern rejected by the *Anderson* court, which he cites as favorable precedent. *Anderson*, 82 M.J. at 87. The court ruled that it must be a particularized anxiety or concern and not speculative. *Id.* Appellant fails this test, and the anxiety and concern he cites is not distinguishable from the “normal anxiety experienced by prisoners awaiting an appellate decision.” *Arriaga*, 70 M.J. at 58.

appropriateness authority under Article 66(d)(1), UCMJ. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

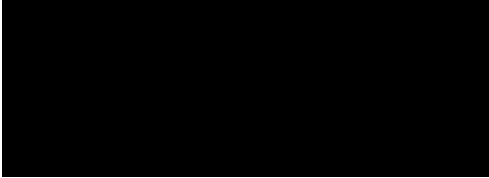
Additionally, pursuant to Article 66(d)(2), UCMJ, a CCA “may provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record.” Because Article 66(d)(2), UCMJ, does not define “excessive delay,” “in considering whether a delay is excessive this court will broadly focus on the totality of the circumstances surrounding the post-trial processing timeline for each case, balancing the interplay between factors such as chronology, complexity, and unavailability, as well as the unit’s memorialized justifications for any delay.” *Winfield*, 83 M.J. at 666. Even if there is excessive delay, “Article 66(d)(2) dictates [that this court] ‘may provide appropriate relief’ and leaves the determination as to whether relief is provided, and what type of relief is appropriate, to [this court’s] discretion.” *Id.*

“‘Appropriate relief’ is not synonymous with ‘meaningful relief.’” *United States v. Valentin-Andino*, __ M.J. __, slip op. at 8 (C.A.A.F. 1 April 2025). “If a Court of Criminal Appeals decides relief is warranted for excessive post-trial delay under Article 66(d)(2), that relief must be ‘appropriate,’ meaning it must be suitable considering the facts and circumstances surrounding that case.” *Valentin-Andino*, __ M.J. __, slip op. at 10.

Here, appellant received a relatively light sentence of reduction to E-5 and 30 days hard labor for absence without leave, disrespect to a superior noncommissioned officer, disrespect to a superior commissioned officer, willfully disobeying a superior commissioned officer, and battery upon his spouse. However, the extraordinary post-trial delay warrants relief. Considering the facts and circumstances of this case, the government recommends this court disapprove appellant's sentence. Further relief—such as disapproving the findings of the panel—would be an unwarranted windfall for the appellant in the absence of prejudice. The relief the government recommends appropriately addresses the Fort Irwin Office of the Staff Judge Advocate's negligent processing of this case, protects appellant's post-trial rights, and corrects potential public perception of the post-trial delay in this case.

Conclusion

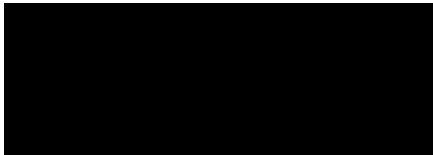
WHEREFORE, the Government respectfully requests that this honorable court affirm the findings and a sentence of no punishment.



MARC B. SAWYER
MAJ, JA
Branch Chief, Government
Appellate Division



JUSTIN L. TALLEY
MAJ, JA
Branch Chief, Government
Appellate Division



RICHARD E. GORINI
COL, JA
Chief, Government
Appellate Division

CERTIFICATE OF FILING AND SERVICE,

I certify that a copy of the foregoing was sent via electronic submission to the
Defense Appellate Division at [REDACTED]
[REDACTED] on this 25 day of April 2025.

[REDACTED]
ANGELA R. RIDDICK
Paralegal Specialist
Government Appellate Division