52d MILITARY JUDGES COURSE

VOIR DIRE AND CHALLENGES

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Outline of Instruction

I. INTRODUCTION.

A. **IN GENERAL**. The Sixth Amendment right to a jury trial does not apply to military servicemembers. However, a military accused enjoys the right to trial before court members, as provided by Congress in Article 25, UCMJ. *See United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("Again, we note that a military accused has no right to a trial by jury under the Sixth Amendment. He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial.") (citations omitted); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002) ("The Sixth Amendment right to trial by jury does not apply to courts-martial.") (citations omitted).

1. "Congress has determined that the convening authority's command responsibility requires the authority to appoint court members, and the courts repeatedly have sustained this denial of the Sixth Amendment right to trial by jury." *United States v. Benedict*, 55 M.J. 451, 456 (Effron, J., dissenting).

2. While a military accused does not have a Sixth Amendment right to a trial by jury, Congress has provided for trial before members, so due process rights under the Fifth Amendment mandate fair and impartial members decide the case; the Due Process Clause then allows an accused to exercise both challenges for cause and peremptory challenges. *See United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("Part of the process due is the right to challenge for cause and challenge peremptorily the members detailed by the convening authority.").

3. The convening authority personally selects panel members with two significant limitations:

a. The convening authority ***cannot*** select members in any manner that systematically excludes a group of otherwise qualified candidates (for example, potential members cannot be excluded on the basis of rank, religion, race, or gender).

b. The convening authority ***cannot*** "stack" a panel to obtain a certain result (for example, cannot pick members who will dole out harsh sentences).

B. **IMPARTIAL MEMBERS**. Court members must be impartial. To ensure this impartiality, both sides have an unlimited number of challenges for cause against panel members. *See* Article 41(a), UCMJ.

C. **ORDER OF MARCH**. Counsel at courts-martial are usually afforded the opportunity to conduct voir dire of the venire (that is, the members actually appointed by the convening authority to sit on a given court-martial) and of individual members outside of the presence of the other members. It should be remembered, however, that RCM 912(d) Discussion states only that "the military judge *should* permit counsel to personally question the members." Thus, the military judge remains in virtually complete control. Depending on the military judge, the process generally follows this order:

1. Selection of members;

2. Drafting of a court-martial convening order (CMCO);

3. Selected members fill out questionnaires;

4. Case is referred to a certain CMCO.

5. After case is docketed, members are excused who are unavailable for the trial date and alternate members are added.

6. Counsel review questionnaires for the members who will sit

7. On the day of trial, members come to court and are sworn as a group; the military judge then asks the entire group questions.

8. Both counsel (normally with trial counsel going first and defense second) ask the group questions.

9. Parties may request permission from the military judge to question a member individually as necessary.

10. After all questioning, trial counsel asserts challenges for cause.

11. Defense then asserts challenges for cause.

12. Trial counsel can use a peremptory challenge and then defense counsel can use a peremptory challenge.

13. Finally, challenged members are excused and the trial proceeds.

D. **PURPOSES OF VOIR DIRE.** The questioning of panel members (known as voir dire) exists so parties can intelligently exercise both challenges for cause and peremptory challenges. *See* R.C.M. 912(d) Discussion, ("The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges."); *United States v. Bragg*, 66 M.J. 325 (C.A.A.F. 2008) ("The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel."). In addition to this primary purpose, there are three secondary purposes of voir dire:

1. Educate the panel and defuse weaknesses in the case. *But see* R.C.M. 912(d) Discussion ("[C]ounsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case").

2. Establish a theme.

3. Build rapport with members.

See also 2 FRANCIS A. GILLIGAN AND FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-53.00 at 15-29 (3d ed. 2006) ("Although voir dire can be used for many other purposes, such as highlighting various issues, educating the court members, or building rapport between counsel [and] members, such uses are improper unless done in the otherwise proper process of voir dire."); *id.* n.164 ("This is not to deny that voir dire may play a legitimate tactical role. Few questions can be asked in an entirely neutral fashion, and to require neutrality might well defeat the very purpose of voir dire. . . . The key, however, is that questions may not be asked for other purposes; they must have independent legitimacy as a proper part of the process of voir dire and challenges.").

E. **MILITARY JUDGE CONTROLS VOIR DIRE**. R.C.M. 912(d) Discussion states that "the military judge *should* permit counsel to personally question the members." Thus, the military judge remains in virtually complete control of voir dire.

II. MILITARY JUDGE CONTROL OF VOIR DIRE

A. **IN GENERAL**. Military judge has broad authority to control the nature and scope of voir dire.

1. Military judge will ask extensive preliminary questions. *See* R.C.M. 912(d) Discussion; DA PAM 27-9, *Military Judges' Benchbook*, para. 2-5-1 (list of 28 preliminary voir dire questions the military judge will ask the panel).

2. The nature and scope of voir dire is within the discretion of the military judge. R.C.M. 912(d). The military judge has broad discretion to control the court-martial proceedings; judge may require questions to be presented in writing. *United States v. Dewrell*, 55 M.J. 131 (C.A.A.F. 2001); *United States v. Torres*, 25 M.J. 555 (A.C.M.R. 1987).

3. *But see United States v. Simpson*, 58 M.J. 369 (C.A.A.F. 2003). In high profile case involving allegations of unlawful command influence and unfair pretrial publicity, court notes repeatedly that the military judge permitted counsel to conduct extensive individual voir dire prior to trial.

B. **BEFORE IMPANELED.** *United States v. Dewrell*, 55 M.J. 131 (C.A.A.F. 2001). The accused, an Air Force master sergeant with over 19 years service, was convicted by an officer panel for committing an indecent act upon a female less than 16 years of age. On appeal the accused alleged the MJ abused his discretion by refusing to allow any defense voir dire questions concerning the members' prior involvement in child abuse cases or their notions regarding preteen age girls' fabrications about sexual misconduct. The CAAF, using an abuse of discretion standard, upheld the trial judges' practice of having counsel submit written questions seven days prior to trial, not allowing either side to conduct group voir dire, and rejecting DC's request for case specific questions relating to child abuse or the possibility that preteen girls fabricate allegations of sexual misconduct.

C. **AFTER IMPANELED.** *United States v. Lambert*, 55 M.J. 393 (C.A.A.F. 2001). Right after the members returned a verdict of guilty to one specification of indecent assault, the CDC asked the MJ to allow *voir dire* of the members because one member took a book titled GUILTY AS SIN into the deliberation room. The MJ conducted *voir dire* of the member who brought the book into the deliberation room, but did not allow the defense an opportunity to conduct individual or group *voir dire*. Noting that neither the UCMJ nor the Manual gives the defense the right to individually question the members, and analyzing the issue under an abuse of discretion standard, the CAAF held the MJ did not err by declining to allow DC to *voir dire* the members.

D. **GOVERNMENT IS ALLOWED SAME VOIR DIRE AS DEFENSE.** *United States v. McDonald*, 57 M.J. 747 (N-M Ct. Crim. App. 2002), *rev'd on other grounds*, 59 M.J. 426 (2004). Military judge required written questions beforehand and allowed the trial counsel to ask several government questions (some of which the judge revised) over defense objection. Questions involved whether members ever discussed with their children what they should do if someone propositions them in an inappropriate way, and how the members thought a child would do if an adult solicited them for sex. Citing the *Belflower* standard discussed below (i.e., that "the appellate courts will not find an abuse of discretion when counsel is given an opportunity to explore possible bias or partiality") the court found no abuse of discretion. "Whether it is the Government or the accused, we believe that the aforementioned rules governing the content of voir dire apply equally. In other words, the TC had as much right to obtain information for the intelligent exercise of challenges as the TDC."

E. **MILITARY JUDGE CONTROL OF INDIVIDUAL VOIR DIRE**. Counsel must be able to state who they wish to voir dire individually and set out a factual basis for the request. *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999). A military judge's denial of a request for individual voir dire will be reviewed only for an abuse of discretion. *Id.*

1. Counsel must lay an adequate foundation in support of a request for individual voir dire. The military judge does not abuse discretion in denying individual voir dire where counsel fails to demonstrate that individual voir dire is necessary because certain areas could not be covered by group questioning. In order to ensure individual voir dire, defense counsel should: (1) ask detailed questions during group voir dire; (2) ask military judge to re-open group voir dire as necessary; or (3) if concerned about the limited value of group voir dire alone, counsel could request an Article 39(a) session to call the military judge's attention to specific matters, thus making a record for appeal. *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999).

2. *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). Military judge did not unreasonably and arbitrarily restrict voir dire by denying the defense's request for individual voir dire of member (SGM) who expressed difficulty with the proposition that no adverse inference could be drawn if accused failed to testify, and another member (MAJ) who disclosed that he had a few beers with one of the CID agents who would be a witness. Defense counsel did not conduct additional voir dire. The court held, "[s]ince defense counsel decided to forgo questioning, he cannot now complain that his ability to ask questions was unduly restricted."

3. *United States v. DeNoyer*, 44 M.J. 619 (A. Ct. Crim. App. 1996). Military judge's denial of request to conduct individual voir dire of members with rating chain or supervisory relationships not abuse of discretion where counsel was not limited in the number or type of questions asked during group voir dire.

F. **LIMITS TO MILITARY JUDGE'S CONTROL OF VOIR DIRE**.

1. *United States v. Richardson*, 61 M.J. 113 (C.A.A.F. 2005). Four members were identified as having a professional relationship with trial counsel. Military judge asked brief questions of each member regarding their relationship with the TC. During individual voir dire, defense questioned only one member regarding relationship with TC. After the close of individual voir dire, defense asked to recall three members to discuss their relationship with the TC, which the MJ denied stating, "there's been enough that's been brought out." Defense then challenged, under both the "actual and implied bias" theory, four members based on their alleged special relationship with the trial counsel. Military judge granted one challenge partially on that basis. CAAF held that the MJ abused his discretion by failing to reopen voir dire to obtain more information regarding the members' relationships with the TC. "The military judge had a responsibility to further examine the nature of the relationship[s] in the context of the implied bias review, particularly when asked to do so by defense counsel." Case reversed and remanded. CAAF refused to order a *Dubay* hearing because "little prospect" existed that five years after the original court-martial any hearing would yield determinative facts.

2. *United States v. Adams*, 36 M.J. 1201 (N.M.C.M.R. 1993). Abuse of discretion not to allow defense counsel to voir dire prospective members about their previous experiences with or expertise in drug urinalysis program, and their beliefs about the reliability of the program.

3. *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996). Military judge did not abuse his discretion by refusing to permit "double-teaming" by defense counsel during voir dire; and limiting individual voir dire and questions regarding burden of proof, inelastic attitude toward members, and credibility of witnesses when defense counsel admitted that initial questions in these areas were confusing. However, MJ did abuse discretion in not allowing defense to reopen voir dire to explore issue of potential bias of two members who stated they had friends or close relatives who were victims of crimes.

4. ***Waiver.*** *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). The military judge (MJ) did not unreasonably and arbitrarily restrict voir dire by denying a defense request for individual voir dire of member (SGM) who expressed difficulty with the proposition that no adverse inference could be drawn if accused failed to testify, and another member (MAJ) who disclosed that he had a few beers with one of the CID agents who would be a witness. Defense counsel did not conduct additional voir dire. The MJ granted the defense challenge for cause against the SGM. Defense peremptorily challenged the MAJ based on a theory that the denial of individual voir dire deprived the defense of an opportunity to sufficiently explore the basis for a challenge for cause. Court holds "[s]ince defense counsel decided to forego questioning, he cannot now complain that his ability to ask questions was unduly restricted."

G. **DISALLOWED QUESTIONS**.

1. ***"Commitment" questions***. *United States v. Nieto,* 66 M.J. 146 (C.A.A.F. 2008). The accused was charged with wrongful use based solely on a positive urinalysis result. During voir dire, trial counsel walked the panel through the government's case, asking specific questions about the reliability of urinalysis results. Trial counsel then received an affirmative response from each member to this confusing question: "Does any member believe that *any* technical error in the collection process, *no matter how small*[,] means that the urinalysis is *per se invalid*?" During individual voir dire, trial counsel aggressively attempted to rehabilitate members from this answer (which suggested the members would vote not guilty if evidence showed "any" technical error in the urinalysis collection process), using fact-intensive hypothetical questions related the accused's urinalysis.[1] On appeal, defense argued the trial counsel's hypothetical questions

[1] CAAF provided several exchanges between trial counsel and individual members during voir dire. This fact-intensive exchange was typical:

TC: And so it wouldn't necessarily be per se invalid if the coordinator didn't put his initials on the bottle[,] let's say. If it came back to the coordinator [and] the accused brought it back to the table, but the coordinator didn't

improperly forced the members to commit to responses based on evidence not yet before them, denying a fair trial. Because there was no objection at trial, CAAF upheld the case under a plain error analysis. However, three judges wrote concurring opinions arguing that counsel cannot ask members to commit to findings or a sentence based on case-specific facts previewed in voir dire; the three judges even suggest that a military judge could commit plain error by not ending such questioning (presumably the questions would have to be particularly egregious to trigger a plain error finding). This case may have had a different result if the defense counsel had objected at trial.

2. ***Jury Nullification***. In *United States v. Smith*, 27 M.J. 25 (C.M.A. 1988), accused was charged with premeditated murder of his wife. Defense counsel wanted to ask members, "Are you aware that a conviction for premeditated murder carries a mandatory life sentence?" Military judge could preclude defense counsel from asking this question where "jury nullification" was motive. Court noted that voir dire should be used to obtain information for the intelligent exercise of challenges. A per se claim of relevance and materiality simply because a peremptory challenge is involved is not sufficient. The broad scope of challenges does not authorize unrestricted voir dire.

3. ***Overly Broad***. In *United States v. Toro*, 34 M.J. 506 (A.F.C.M.R. 1991), trial counsel improperly converted lengthy discourses on the history and mechanics of drug abuse, and on the misconduct of the accused and others, into voir dire questions by asking whether the members "could consider this information in their deliberations?"

4. ***Sanctity of Life***. In *United States v. Nixon*, 30 M.J. 501 (A.F.C.M.R. 1989), accused was charged with unpremeditated murder of his Filipino wife. Air Force court found there was no abuse of discretion when military judge allowed trial counsel to ask panel whether Asian societies place a lower premium on human life and to ask if any member opposes capital punishment.

H. **LIBERAL VOIR DIRE & APPELLATE REVIEW**. In limiting voir dire, military judge should consider that liberal voir dire can save cases on appeal.

1. *United States v. Simpson*, 58 M.J. 369 (C.A.A.F. 2003) (in high profile case involving allegations of unlawful command influence and unfair pretrial publicity, court notes repeatedly that the military judge permitted counsel to conduct extensive individual voir dire prior to trial).

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put his initials on the bottle before it went back into the box. Would that be a violation that you couldn't over look [sic]? No matter what[,] that is an invalid test in your mind?

MBR (CWO2 [C]): In that case with the initials, no.

Nieto, 66 M.J. at 148 (alterations in original).

2. *United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004) (affirming a "novel" panel selection process, in part, due to the military judge allowing defense counsel to conduct extensive voir dire of members concerning their selection as panel members).

I. **DENIAL OF QUESTIONS TESTED FOR ABUSE OF DISCRETION**. *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999) (military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where defense did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire); *United States v. Pauling*, No. 9700685 (A. Ct. Crim. App. July 15, 1999) (unpub.) (military judge did not abuse his discretion in prohibiting defense counsel to ask, on voir dire, questions from a member concerning the impact of rehabilitative potential testimony).

III. INDIVIDUAL CHALLENGES FOR CAUSE.

A. **IN GENERAL**. Each side has an unlimited number of challenges for cause. *See* Article 41(a)(1); R.C.M. 912(f).

B. **LIBERAL GRANT MANDATE**.

1. ***Rule***. The convening authority selects the panel members, and can be said to have an unlimited number of peremptory challenges. The defense and the government are allowed only one peremptory challenge at trial. Military judges are to liberally grant challenges for cause to ensure that accused servicemembers are tried by court members who are impartial for findings and sentencing. *See United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987); *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985).

2. ***The* Moyar *mandate***. *United States v. Moyar*, 24 M.J. 635 (A.C.M.R. 1987). "The issue of denial of challenges for cause remains one of the most sensitive in current military practice. . . . Military law mandates military judges to liberally pass on challenges. Notwithstanding this mandate . . . some trial judges have at best only grudgingly granted challenges for cause and others frustrate the rule with *pro forma* questions to rehabilitate challenged members."

3. ***Applies only to defense challenges***. Military judges should only liberally grant challenges for cause for the defense. *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005). In a guilty plea for use and distribution of ecstasy before an officer panel for sentencing, the trial counsel questioned a member regarding her views on punishment in drug cases. Member responded that "it almost feels like a one shot deal . . . everyone has seen the *Air Force Times* showing the big drug bust in the Virginia area and all the [accused], and what sentences they have received . . . and it was kind of shocking to me . . . I just thought, wow, these guys made a mistake and look at the punishment for this." The member stated that she

could perform her duties as a court member and be fair to both sides. The military judge granted the government's challenge for cause against the member finding she would have an extremely difficult time considering the entire range of punishments. On appeal, CAAF ruled that "[g]iven the convening authority's broad power to appoint [panel members there is] no basis for application of the 'liberal grant' policy when a military judge is ruling on the Government's challenges for cause." Additionally, the court noted that besides the convening authority's Article 25 selection power, the government "has ample opportunity to affect the makeup of the panel before trial defense has any opportunity for input" because of the SJA's potential ability to excuse one third of the panel members under R.C.M. 505(c)(1)(B).

C. **DISCLOSURE OF POTENTIAL BASES FOR CHALLENGE FOR CAUSE**.

1. ***Trial Counsel duty to disclose.*** *United States v. Modesto*, 43 M.J. 315 (C.A.A.F. 1995). Trial counsel failed to disclose that court member (Brigadier General) had dressed as a woman at Halloween Party. Member, upon being asked about dressing in costume as a female, failed to disclose information during voir dire. In trial of Colonel charged with conduct unbecoming (performing as female impersonator at gay club, sodomy with another male, indecent touching with another male, cross-dressing in public), reversal of conviction not warranted because incident did not constitute grounds for a challenge for cause or preclude effective voir dire. Testimony raised issue whether SJA may have told TC not to disclose information to defense. However, government should have disclosed information that might be a basis for a challenge for cause.

2. ***Defense duty to review questionnaires.*** *United States v. Dunbar*, 48 M.J. 288 (C.A.A.F. 1998). When panel member questionnaire contains information that may result in disqualification, the defense must make reasonable inquiries into the member's background either before trial or during voir dire. The Government may not be required to provide the background for the disqualifying information in every situation. The accused was charged with dereliction of duty, conduct unbecoming an officer, and fraternization. A member's questionnaire revealed that she had testified as an expert witness in child-abuse cases prosecuted by the trial counsel. The defense failed to conduct voir dire on this issue. The defense waived the issue by failing to conduct voir dire after reviewing the questionnaire and then failing to exercise a causal or peremptory challenge. There was no additional affirmative requirement for the Government to disclose the information.

3. ***Duty of panel member to disclose.***

a. ***Duty defined.*** *United States v. Albaaj*, 65 M.J. 167 (C.A.A.F. 2007). Accused's brother testified as a merits witness. He was also recalled briefly as a defense sentencing witness, offering evidence in extenuation and mitigation. One of the members, LTC M, had a previous working

relationship with the brother, that defense described as "extremely antagonistic." During voir dire, military judge instructed the members to disclose any matter that might affect their partiality. During trial, the defense called the brother as a witness and LTC M did not indicate at any time that he knew him, even after he recognized him. Following a *DuBay* hearing, military judge found LTC M and the brother had professional contact while the brother was at Range Control and the member developed negative impressions of the brother that were memorialized in several e-mails. However, LTC M testified that, between the last e-mail and the trial (a period of 15 months), LTC M "developed a favorable opinion" of the brother. At the *Dubay* hearing, military judge found that LTC M "did not fail to honestly answer a material question on voir dire and that [LTC M] did not fail to later disclose his knowledge of [the brother] in bad faith." CAAF reversed. Applying the test from *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), CAAF found that LTC M violated his duty of candor as a panel member. First, LTC M incorrectly indicated that he did not know the brother during voir dire and then "fail[ed] to correct the misinformation." Second, LTC M "failed to disclose information that was material to the conduct of a fair and impartial trial" because as a result of the nondisclosure, the parties were unaware of LTC M's relationship with the brother. Third, the "correct response . . . would have provided a valid basis for challenge." Applying the implied bias standard, CAAF found that "[a] reasonable public observer of this trial would conclude that [LTC M's] actions injured the perception of fairness in the military justice system."

b. *United States v. Briggs*, No. ACM 35123, 2008 CCA LEXIS 227 (A.F. Ct. Crim. App. June 13, 2008) (unpublished). Accused was charged with selling survival vests and body armor taken from C-5s. This equipment was used to protect the flight crews manning these aircrafts. On appeal, defense argued for a new sentencing hearing because a member was a pilot. Essentially arguing implied bias, the defense claimed that the member, as a pilot, could not have been impartial because the crime involved "stealing safety and survival gear off an aircraft." First, the court noted the Supreme Court standard: "[F]or an accused to be entitled to a new trial due to an incorrect voir dire response the 'party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.'" (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)). In this case, the court held the member did fail to honestly answer a material question. Rather, he truthfully stated he worked with C-5 aircraft, which the accused "with his years and background in the Air Force" would have understood to mean the member was pilot. In biting language, the court noted, "[T]here is no evidence that the member failed to honestly answer a material question by not stating the obvious."

c. *United States v. Taylor*, 44 M.J. 475 (C.A.A.F. 1996). The accused was not entitled to relief based on an argument that the president of the panel, who was convicted of several sexual offenses against minor boys after accused's trial, failed to honestly answer general questions concerning fairness and impartiality. At the time of accused's trial, the president was not aware that he was under investigation, and there was no other evidence that his answers were untruthful. The accused, moreover, was unable to show how a correct response would have provided a basis for a challenge.

D. **GROUNDS FOR CHALLENGES FOR CAUSE -- GENERALLY**.

1. ***Nondiscretionary Bases***. R.C.M. 912(f)(1)(A)-(M).

2. ***Discretionary Bases—Actual or Implied Bias***. *See* R.C.M. 912(f)(1)(N). Test: Would a reasonable member of the public have "substantial doubt as to [the] legality, fairness, and impartiality" of the proceedings?"

3. ***Standards***:

a. ***Actual Bias***. Challenge for cause based on actual bias is one of credibility and is reviewed for an abuse of discretion. Credibility is a *subjective determination* viewed through the eyes of the MJ. The MJ's opportunity to observe the demeanor of court members will be given "great deference" on appellate review. *See United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). Test: Is the member's bias such that it will not yield to the evidence presented and the military judge's instructions? *See United States v. New*, 55 M.J. 95, 99 (C.A.A.F. 2001); *United States v. Warden*, 51 M.J. 78, 81 (C.M.A. 1999). This is a question of member's credibility and is reviewed for an abuse of discretion. *United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997).

b. ***Implied Bias***. Challenge for cause based on implied bias is reviewed on an *objective standard*, through the eyes of the public. "Implied bias exists when most people in the same position would be prejudiced." *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). In applying an implied bias theory, the focus is on "the perception or appearance of fairness of the military justice system." *United States v. New*, 55 M.J. 95, 100 (C.A.A.F. 2001). Accordingly, "issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo." *See United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004).

c. While two different tests exist, a challenge for cause invokes both principles. *United States v. Armstrong,* 54 M.J. 51 (C.A.A.F. 2000).

E. **REHABILITATING MEMBERS**. Once a member gives a response that shows a potential grounds for challenge, counsel or the military judge may ask questions of that member to rehabilitate him or her. *See United States v. Napolitano,* 53 M.J. 162 (C.A.A.F. 2000) (member indicated on questionnaire disapproval of civilian defense counsel's behavior in another case; judge did not abuse discretion in denying challenge for cause because member retracted opinion and said he was not biased against the counsel). Counsel should consider these questions when attempting to rehabilitate a member:

1. Can you follow the judge's instructions regarding the law?

2. Will you base your decision only on the evidence presented at trial, rather than your own personal experience?

3. Have you made your mind up right now concerning the type of punishment the accused should receive if convicted?

4. Can you give this accused a full, fair, and impartial hearing?

Note, these standard questions may not be sufficient, especially if counsel only gets "naked disclaimers" from the members. Counsel should tailor questions to the facts of the case and get clear, unequivocal answers. *But see United States v. Townsend*, 65 M.J. 460, 465 (C.A.A.F. 2008) ("[T]here is a point at which numerous efforts to rehabilitate a member will themselves create a perception of unfairness in the mind of a reasonable observer.").

F. **GROUNDS FOR CHALLENGE – KNOWLEDGE OF CASE, ISSUES, WITNESSES**.

1. ***Generally.*** *United States v. Briggs,* 64 M.J. 285 (C.A.A.F. 2007). Air Force technical sergeant was tried for larceny of survival vests from the aircraft he was responsible for maintaining and re-selling them. Military judge denied challenge for cause against CPT H, the wife of the appellant's commander; she had learned from her husband that "vests went missing." In finding that the member lacked actual bias, the military did not address the liberal grant mandate or implied bias. On appeal, using the implied bias theory, CAAF found military judge erred in denying the challenge for cause. The court cited a number of reasons why this challenge should have been granted, including: the safety of the member's husband's unit was placed at risk by the accused, the husband's performance evaluation could have been affected by the accused's criminal misconduct, and the member's husband was responsible for the initial inquiry into the misconduct and recommendation as to disposition. *See also United States v. Minyard*, 46 M.J. 229 (C.A.A.F. 1997) (military judge should have granted challenge for cause against member whose husband investigated case against accused, despite

member's claim that she knew little about the case, that she and he husband did not discuss cases).

2. ***Knowledge of the case.*** *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999). In a high profile case, some knowledge of the facts of the offense or an unfavorable inclination toward an offense is not per se disqualifying. The critical issue is whether a member is able to put aside outside knowledge, association, or inclination, and decide the case fairly and impartially on its merits. Accused was convicted of various offenses arising out of issues related to Operation Uphold Democracy in Haiti. The defense challenged the entire panel based on the following: an acquittal would damage the reputation of the members individually, the general court-martial convening authority, and the 10th Mountain Division; several members knew key witnesses against the accused and would give their testimony undue weight; that members were exposed to and would be affected by pretrial publicity; and members evinced an inelastic attitude about a possible sentence in the case. The court held that there was no actual bias; members are not automatically disqualified based on professional relationships with other members or with witnesses; and some knowledge of the facts or an unfavorable inclination toward and offense is not per se disqualifying.

a. *United States v. Hollings*, 65 M.J. 116 (C.A.A.F. 2007). Military judge did not abuse his discretion in denying this challenge for cause for a member that the defense alleged met the definition of legal officer under R.C.M. 912(f)(1)(G). Under the facts elicited at trial, the member did not meet the definition of "legal officer." The accused also argued on appeal that the challenge should have been granted under an implied bias theory because he was a "career legal officer, he was familiar with [the accused's] case as a result of his duties, and at least some of those duties were legal in nature." The member's responses during voir dire did not reveal any actual or implied bias.

b. *United States v. Baum*, 30 M.J. 626 (N.M.C.M.R. 1990). Military judge improperly denied two causal challenges: first member was the sergeant major of alleged co-conspirator who had testified at separate Article 32, was interviewed by chief prosecutor, and had voluntarily attended accused's Article 32 investigation; second member was colonel who headed depot inspector's office, had official interest in investigation, and had discussed cases with chief investigator and government witness.

3. ***Member's "possible" knowledge of case may require excusal***. *United States v. Bragg*, 66 M.J. 325 (C.A.A.F. 2008). Accused was a Marine recruiter charged with rape and other offenses involving two female high students. Member stated during voir dire that he learned information about the case before trial. While he could not recall how he obtained this information, he knew the "general identity" of the victim, the general nature of the offense, and the investigatory measures taken by law enforcement. The member had been the deputy chief of staff for

recruiting and, in that capacity, he normally read relief for cause (RFC) packets of recruiters. The member could not recall if he had reviewed the accused's RFC packet, though he said that if he had, he "probably would have" recommended relief. The member said he could be impartial despite his prior knowledge of the case. CAAF reversed: "In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances." In this case, the member may have recommended adverse action against the accused, so he should have been excused.

4. ***Member knows about pretrial agreement***. *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). Knowledge of pretrial agreement does not per se disqualify the court member. Whether the member is qualified to sit is a decision within the discretion of the military judge.

5. ***Member knows about accused's sanity report***. *United States v. Dinatale*, 44 M.J. 325 (C.A.A.F. 1996). In an indecent acts on minors case, the MJ did not clearly abuse his discretion by denying a challenge for cause against a member (Chief of Hospital Services at the local military hospital) where voir dire supported the conclusion that the member's review of sanity report was limited to reading the psychologist's capsule findings, member did not recall seeing accused's report, member stated that she could decide the case based on the evidence and MJ instructions, and mental state of accused was not an issue at trial.

6. ***Member knows trial counsel.*** *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). MJ denied challenges for cause against three officer members who had been past legal assistance clients of assistant trial counsel. Professional relationship not a per se basis for challenge. Members provided assurances of impartiality.

7. ***Member is a potential witness***. *United States v. Perez*, 36 M.J. 1198 (N.M.C.M.R. 1993). Three officer members stated during voir dire that they observed "stacking incident" (assault on a warrant officer). In reversing, court held potential witnesses in case should have been excused for cause.

8. ***Member's outside investigation***. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Accused, who worked in the comptroller's disbursing office, was convicted of rape at a contested court-martial by members. LTC F, the eventual panel president, was the deputy comptroller and had pretrial knowledge of the accused and co-accused's cases through his own investigative efforts and newspaper articles. MJ granted seven of eight defense challenges for cause but denied the challenge against LTC F without making findings. CAAF held that LTC F's "inquiry went beyond a routine passing of information to a superior—. . . his inquires were so through that he subjectively believed he knew all there was to know—that he had the 'complete picture.'" Under the implied bias standard, an objective observer could reasonably question LTC F's impartiality and that the

MJ erred in denying defense's challenge for cause. Findings reversed. *Cf. United States v. Nigro*, 28 M.J. 415 (C.M.A. 1989) (in a bad check case, military judge properly denied challenge for cause against member who called credit union to ask about banking procedures; member's responses to inquiries were clear and unequivocal that he could remain impartial and follow judge's instructions).

9. ***Experience with Key Trial Issues.*** *United States v. Daulton*, 45 M.J. 212 (C.A.A.F. 1996). In a child sexual abuse case, military judge erred in failing to grant a defense challenge for cause against a member who stated that her sister had been abused by her grandfather, and was shocked when she first heard of her sister's allegations, "but had gotten over it." The member's responses to the MJ's rehabilitative questions regarding her ability to separate her sister's abuse from the evidence in the trial were not "resounding."

10. ***Member with position and experience***. *United States v. Lattimore*, 1996 WL 595211 (A.F. Ct. Crim. App. 1996) (unpub.). In case involving stealing and use of Demerol, no abuse of discretion to deny challenge for cause against 06-member who was a group commander; former squadron commander; had preferred charges in three or four courts-martial; recently forwarded charges of drug use; sat through portion of expert forensic toxicologist in unrelated drug case; and who indicated that, although not predisposed to give punitive discharge, some form of punishment was appropriate if accused was found guilty, but would consider sentence of no punishment. No per se exclusion for commanders and prior commanders who have preferred drug charges.

11. ***Knowledge of witnesses.*** *United States v. Albaaj*, 65 M.J. 167 (C.A.A.F. 2007). Accused's brother testified as a merits witness. He was also recalled briefly as a defense sentencing witness, offering evidence in extenuation and mitigation. One of the members, LTC M, had a previous working relationship with the brother, that defense described as "extremely antagonistic." During voir dire, military judge instructed the members to disclose any matter that might affect their partiality. During trial, the defense called the brother as a witness and LTC M did not indicate at any time that he knew him, even after he recognized him. On appeal, ACCA ordered a *Dubay* hearing that revealed LTC M and the brother had professional contact while the brother was at Range Control and LTC M worked at DOIM. LTC M developed negative impressions of the brother that were memorialized in several e-mails. However, LTC M testified at the *Dubay* hearing that, between the last e-mail and the trial (a period of 15 months), LTC M "developed a favorable opinion" of the brother. At the *Dubay* hearing, military judge found that LTC M "did not fail to honestly answer a material question on voir dire and that [LTC M] did not fail to later disclose his knowledge of [the brother] in bad faith." CAAF reversed. Applying the test from *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), CAAF found that LTC M violated his duty of candor as a panel member. First, LTC M incorrectly indicated that he did not know the brother during voir dire and then "fail[ed] to correct the misinformation." Second, LTC M "failed to disclose information that

was material to the conduct of a fair and impartial trial" because as a result of the nondisclosure, the parties were unaware of LTC M's relationship with the brother. Third, the "correct response . . . would have provided a valid basis for challenge." Applying the implied bias standard, CAAF found that "[a] reasonable public observer of this trial would conclude that [LTC M's] actions injured the perception of fairness in the military justice system."

a. *Cf. United States v. Ai*, 49 M.J. 1 (C.A.A.F. 1998). Military judge did not abuse his discretion in denying a challenge for cause against a member who was a friend and former supervisor of a key government witness. In a graft case, during voir dire, an officer member revealed that a key government witness had previously worked for him as a food manager for one year three years ago. The member indicated, during group and individual voir dire, that the relationship would not affect him as a member and he would follow all MJ instructions. CAAF recognized that while R.C.M. 912(f)(1)(N) is broad enough to permit a challenge for cause against a member on the basis of favoring witnesses for the prosecution, there was no "historical basis" in the record to support the challenge. The work relationship was limited in duration, negating any inference of predisposition.

b. *United States v. Napoleon*, 46 M.J. 279 (C.A.A.F. 1997) (holding that under both actual and implied bias standard, military judge properly denied challenge for cause against member who had *official* contacts with special agent-witness who was "very credible because of the job he has" and had knowledge of case through a staff meeting).

c. *United States v. Arnold*, 26 M.J. 965 (A.C.M.R. 1988). Member who had seen witness in another trial and formed opinion as to credibility should have been excused. However, the mere fact that a witness had appeared before the member in another case is not grounds by itself to grant a challenge; if so, this would virtually prohibit the repeated use in different trials of witnesses such as police officers and commanders.

d. As a practice point, trial and defense counsel should read a list of anticipated witnesses to the members during voir dire.

G. **GROUNDS FOR CHALLENGE–MEMBER HAS BIAS REGARDING COUNSEL**.

1. ***Negative bias against specific counsel.*** *United States v. Napolitano,* 53 M.J. 162 (C.A.A.F. 2000) (member indicated on questionnaire disapproval of civilian defense counsel's behavior in another case; judge did not abuse discretion in denying challenge for cause because member retracted opinion and said he was not biased against the counsel; different result likely if member has had adversarial dealings with counsel). *See also United States v. Rome*, 47 M.J. 467

(C.A.A.F. 1998) (military judge abused discretion by failing to grant a challenge for cause, based on implied bias, against member who judge determined had engaged in unlawful command influence in previous unrelated court-martial and who defense counsel had personally and professionally embarrassed through cross examination in previous high-profile case).

2. ***Bias against defense attorneys (in general).*** *United States v. Townsend*, 65 M.J. 460 (C.A.A.F. 2008). When asked his "opinions of defense counsels," member said he had a "mixed view." While he respected military defense counsel as military officers with high ethical and moral standards, he had a "lesser respect for some of the ones you see on TV, out in the civilian world," an apparent reference to the member's regular viewing of the television show *Law and Order*. Court upheld military judge's denial of the challenge for cause, noting no actual or implied bias was present.

H. **GROUNDS FOR CHALLENGE—VICTIM (OR INDIRECT VICTIM) OF SIMILAR CRIME**.

1. ***Considerations in victim analysis***:

a. Who was victim - panel member or a family member?

b. How similar was the accused's crime to the one the victim was involved in?

c. Was victim's crime unsolved?

d. Traumatic? How many times a victim?

e. Does the member give clear, reassuring, unequivocal answers about his impartiality?

2. *United States v. Terry,* 64 M.J. 295 (C.A.A.F. 2007). Military judge erred in not granting challenge for cause under the implied bias theory and liberal grant mandate. In rape trial, member's girlfriend (whom he intended to marry) was raped, became pregnant, terminated their relationship, and named the child after him. Although six years had passed, "most members in [the member's position] would have difficulty sitting on a rape trial . . . . Further, an objective observer might well have doubts about the fairness of Appellant's court-martial panel."

3. *United States v. Miles,* 58 M.J. 192 (C.A.A.F. 2003). Military judge abused his discretion by failing to grant challenge for cause based on implied bias where, during voir dire in guilty plea case involving wrongful use of cocaine, member revealed his ten-year old nephew died as a result of mother's pre-natal use of cocaine. Member described tragedy in article in base newspaper scheduled for

publication shortly after court-martial. Trial counsel commented that event "evidently" was "a very traumatic experience" for the member. "We conclude that asking [the member] to set aside his memories of his nephew's death and to impartially sentence Appellant for illegal drug use was 'asking too much' of him and the system." Sentence set aside. ***Practice Point*:** "Where a particularly traumatic similar crime was involved . . . we have found that denial of a challenge for cause violated the liberal-grant mandate." This is ultimately a fact-specific inquiry. *Cf. United States v. Denier*, 43 M.J. 693 (A.F. Ct. Crim. App. 1995). In drug case member stated his daughter was a recovering cocaine addict and he would be fair, but he would still be affected some but not intellectually; no abuse of discretion to deny challenge for cause).

4. *United States v. White*, No. 2001132 (A. Ct. Crim. App. Dec. 8, 2003) (unpub.). Appellant charged with attempted murder of wife; convicted of assault with intent to inflict grievous bodily harm and other offenses. Military judge abused discretion by denying challenge for cause of member whose wife was victim of domestic abuse by her first husband. Individual voir dire revealed wife suffered a broken neck from abuse; member stated that "I've told him, simply, that, 'If I ever see you and you look like you're going to raise a hand for her, I'm gonna kill you and then we'll sort it out later.' That's kind of the way I feel about it." While court found no abuse of discretion as to actual bias, the court found error as to implied bias. Notably, court gave MJ less discretion on implied bias because he did not address that issue on the record. "On these facts, an objective observer would likely question the fairness of the military justice system." Findings set aside.

5. *United States v. Lavender*, 46 M.J. 485 (C.A.A.F. 1997). The implied bias doctrine will not operate to entitle an accused on trial for larceny to have the entire panel removed for cause after two members had money stolen from their unattended purses in deliberation room. The implied bias doctrine is only applied in rare cases. *See Hunley v. Godinez*, 784 F. Supp. 522 (N.D. Ill.), *aff'd*, 975 F.2d 316 (7th Cir. 1992) (holding due process does not require a new trial every time a juror has been placed in a potentially compromising situation; doctrine of implied bias appropriately applied to defendant convicted of murder during a burglary where judge denied challenges for cause against members who changed vote from "not guilty" to "guilty" after becoming victims of burglary during overnight recess in sequestered hotel).

6. *United States v. Smith*, 25 M.J. 785 (A.C.M.R. 1988). Member in a rape case had been a larceny victim. Challenge denied; any recent crime victim is not automatically disqualified.

7. *United States v. Hudson*, 37 M.J. 968 (A.C.M.R. 1993). E-8 member in aggravated assault case involving shooting at NCO Club had been caught in crossfire during similar incident 15 years earlier in off-post bar fight. Member indicated that he could remain fair and impartial.

8. *United States v. Mack*, 36 M.J. 851 (A.C.M.R. 1993). Officer member in an assault case failed to disclose that he had been held at gunpoint, tied up, and threatened with death during armed robbery thirty years earlier. Member indicated that he had "forgotten about it." Returned for *DuBay* hearing to determine (1) was there a failure to honestly answer a material question?; (2) would the correct (honest) response provide a valid basis for challenge for cause? Case affirmed after *DuBay* hearing.

9. *United States v. Campbell*, 26 M.J. 970 (A.C.M.R. 1988). Challenge should have been granted based on equivocal responses. Member "waffled" in response to questions about his impartiality. Member "[w]ould *try* to be open-minded, *somewhat* objective, but 'not sympathetic to thieves.'"

10. *United States v. Basnight*, 29 M.J. 838 (A.C.M.R. 1989). Member was victim of three larcenies and his parents were victims of two larcenies. Denial of challenge for cause proper in light of member's candor and willingness to consider complete range of punishments.

11. *United States v. Reichardt*, 28 M.J. 113 (C.M.A. 1989). Larceny of ATM card and money; member's wife had been victim of a similar crime. Not error to deny challenge based on judge's inquiry, unequivocal responses, and judge's findings.

I. **GROUNDS FOR CHALLENGE – MEMBER'S DUTY POSITION OR STATUS**.

1. ***Member is convening authority's son***. *United States v. Strand*, 59 M.J. 455 (C.A.A.F. 2004). Court member was son of officer who acted as convening authority in the case. The member's father acted to excuse and detail new members in the absence of the regular GCMCA. The defense did not challenge the son for cause. On appeal, the defense contended that the military judge had a *sua sponte* duty to remove the son for implied bias. The court held that the military judge did not abuse his discretion in declining to *sua sponte* excuse the member, and declined to adopt a per se "familial relationship" basis for excusal. Here, the government revealed the familial relationship and the military judge allowed both parties a full opportunity to voir dire the member. Although military judge may excuse an unchallenged member in the interest of justice, there must be justification in the record for such drastic action. The record did not show such a justification.

2. ***Member is "Alter Ego" of Convening Authority***. *United States v. Bryant*, 65 M.J. 746 (A.F. Ct. Crim. App. 2007). The accused, an Air Force technical sergeant, was convicted contrary to his pleas, by an officer panel, of eight specifications of violating a lawful general regulation and two specifications of providing alcohol to minors. One of the panel members selected by the GCMCA was an Individual Mobilization Augmentee (IMA) Colonel (O-6). During voir

dire, he stated that, although he had no knowledge of this case, he was "part of the [accused's wing] command section . . . [and was] used in capacity almost like a second vice commander." He would also "substitute in meetings for either the commander or vice commander." Over the course of a two-year period, he had served as the acting wing commander for a total of about a week. In this case, the accused's wing commander was the SPCMCA, had ordered the Article 32 investigation, and dismissed some of the charges based on the Article 32 officer's recommendations. Invoking both actual and implied bias, the defense challenged him for cause. The military judge denied the challenge for cause, providing brief findings as to both actual and implied bias. On appeal, the AFCCA held that the military judge abused his discretion in denying the challenge for cause against the member due to implied bias, stating, "[w]hether viewed as a 'second vice commander' or just the wing commander's IMA, he is likely to be perceived by most members of the Air Force and the public as the alter ego of the commander he serves." Additionally, "[b]ecause that commander is . . . the same SPCMCA who played a substantial role in the court-martial process of this [accused, this member's] position as a prospective court-member raised an appearance of unfairness."

3. ***Member's status as commander***. *United States v. Lattimore*, 1996 WL 595211 (A.F. Ct. Crim. App. 1996) (unpub.). In case involving stealing and use of Demerol, no abuse of discretion to deny challenge for cause against O-6 member who was a group commander and former squadron commander; had preferred charges in three to four courts-martial; recently forwarded charges of drug use; sat through portion of expert forensic toxicologist in unrelated drug case; and who indicated that, although not predisposed to give punitive discharge, some form of punishment was appropriate if accused was found guilty, but would consider sentence of no punishment. No per se exclusion for commanders and prior commanders who have preferred drug charges.

J. **GROUNDS FOR CHALLENGE – MEMBER INFLEXIBLE AS TO SENTENCE**.

1. ***Rule***. A member is not automatically disqualified merely for admitting an unfavorable inclination or predisposition toward a particular offense.

2. ***Draconian view of punishment.*** *United States v. Schlamer*, 52 M.J. 80 (C.A.A.F. 1999). Member disclosed her severe notions of punishment ("rape = castration;" "you take a life, you owe a life"). Nevertheless, she was adamant that she had not made up her mind in accused's case, that she believed in the presumption of innocence, and that she would follow the judge's instructions. CAAF held the military judge did not abuse his discretion in denying the challenge. Similarly, the judge's grant of a government challenge against a member who had received an Article 15 and stated he would be "uncomfortable" judging the accused was within the judge's discretion and comported with the "liberal grant" mandate.

3. ***Would you <u>consider</u> no punishment as a sentencing option?*** *United States v. Rolle*, 53 M.J. 187 (C.A.A.F. 2000). Accused, a Staff Sergeant, pled guilty to use of cocaine. Much of voir dire focused on whether the members could seriously consider the option of no punishment or whether they felt a particular punishment (like a punitive discharge) was appropriate. One member, CSM L, stated "I wouldn't" let the accused stay in the military, and "I am inclined to believe that probably there is some punishment in order there . . . I very seriously doubt that he will go without punishment." CSM L conversely noted there was a difference between a discharge and an administrative elimination from the Army. Another member, SFC W, stated, "I can't [give a sentence of no punishment] . . . because basically it seems like facts have been presented to me because he evidentially [*sic*] said that he was guilty." Military judge denied the challenges for cause against CSM L and SFC W; CAAF noted that "[p]redisposition to impose some punishment is not automatically disqualifying." (citing *United States v. Jefferson*, 44 MJ 312, 319 (C.A.A.F. 1996); *United States v. Tippit*, 9 MJ 106, 107 (C.M.A. 1980)). "[T]he 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."

a. *United States v. Martinez*, 67 M.J. 59 (C.A.A.F. 2008) (per curiam). During voir dire in drug case, member stated, there is "no room in my Air Force for people that abuse drugs – you know – violate the articles and law that we have set forth." After several rehabilitation questions, the member hesitated about whether he would consider the full range of punishment, to include no punishment: "So, there has to be a punishment to fit the crime—whatever that case may be. . . . [W]e'll weigh it from no punishment to the max. I can do that, but something has to be done." CAAF reversed, finding the member "did not disavow an inelastic attitude toward punishment."

b. *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993). Despite member's initial responses that he could not consider "no punishment" as an option where accused charged with rape, sodomy, and indecent acts, member's later responses showed he would listen to the evidence and follow the judge's instructions. Member's responses to defense counsel's "artful, sometimes ambiguous questioning" does not necessarily require that a challenge for cause be granted. The majority opinion included this conclusion: "I would have substantial misgivings about holding that a military judge abused his discretion by refusing to excuse a court member who could not in good conscience consider a sentence to no punishment in a case where all parties agree that a sentence to no punishment would have been well outside the range of reasonable and even remotely probable sentences." *Id.* at 119 n.*.

c. *United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993), *aff'd*, 42 M.J. 168 (C.A.A.F. 1995). Member indicated an officer convicted of conduct unbecoming should not be permitted to remain on active duty. Member

stated she would follow guidance of military judge. Denial of challenge for cause not abuse of discretion.

d. *United States v. Greaves*, 48 M.J. 885 (A.F. Ct. Crim. App. 1998). Accused pled guilty to wrongful use of cocaine. Military judge did not abuse his discretion by failing to grant a challenge for cause against member who stated during voir dire that, while he would keep an open mind, he thought that a sentence of no punishment would be an unlikely outcome, adding that in "99.9 percent of the cases, some punishment would be in order." *Id.* at 887. Court held the member did not express an inflexible attitude toward sentencing; he merely stated "what should be patently obvious to all; while a sentence to no punishment is an option which should be considered, it is not often appropriate." *Id.*

4. ***Member's strong predisposition to punitive discharge may require excusal***. *United States v. Giles*, 48 M.J. 60 (C.A.A.F. 1998). Military judge "clearly" abused his discretion by failing to grant a challenge for cause against a member who demonstrated actual bias by his inelastic attitude toward sentencing in a case involving attempted possession of LSD with intent to distribute and attempted distribution of LSD. While member indicated that he could consider all evidence and circumstances, he responded to defense questions that anyone distributing drugs should be punitively discharged and that he had not heard of or experienced any circumstance where a punitive discharge would not be appropriate. These responses disqualified member under R.C.M. 912(f)(1)(N). *But see Rolle, supra*, a later case with similar facts but an opposite outcome.

5. ***Suggested rehabilitation questions for sentencing predisposition***:

a. Are you aware that punishment can range from no punishment, to the slight punishment of a letter of reprimand, all the way to a discharge and confinement?

b. Do you understand that you should not decide on a punishment until you hear all of the evidence?

c. Can you follow the judge's instructions regarding the law?

d. Will you listen to all of the evidence admitted at trial, before deciding a sentence?

e. Can you give this accused a full, fair, and impartial hearing?

6. ***Military judge must make findings of fact and law***. *United States v. Clay,* 64 M.J. 274 (C.A.A.F. 2007). Accused was convicted of one specification of rape and two specifications of indecent assault. During voir dire, the senior panel

member, a Marine O-6, "was asked whether his ability to judge the case would be affected by the fact that he had two [teenage] daughters." The member stated, "[I]f I believed beyond a reasonable doubt that an individual were guilty of raping a young female, I would be *merciless within the limit of the law*." TC attempted to rehabilitate the member and the MJ denied the defense challenge for cause without providing any reason. CAAF, reversing, recognized that "[a] military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not." The court stated that, while the facts presented were a close call, the MJ failed to make findings of fact and the liberal grant mandate warranted excusing COL J on implied bias grounds.

K. **GROUNDS FOR CHALLENGE—MEMBER AFFECTED BY UNLAWFUL COMMAND INFLUENCE**.

1. ***Courts maintain that it is in the "rare case" where implied bias will be found.*** *United States v. Youngblood*, 47 M.J. 338 (C.A.A.F. 1997). Application of the implied bias standard is appropriate to determine whether a military judge abused his discretion in denying challenges for cause against court members based on counsel argument that members were affected by unlawful command influence. Prior to court-martial, each member attended staff meeting where convening authority and SJA gave a presentation on standards, command responsibility, and discipline; during presentation, SJA and convening authority expressed dissatisfaction with a previous commander's disposition of an offense.

2. *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002). Six of nine members either received email from brigade commander threatening to "declare war on all leaders not leading by example," to "CRUSH all leaders in this Brigade who don't lead by example" or attended a "leaders conference" where the same issues were discussed. MJ denied defense challenges for cause based on implied bias, but did not conduct a hearing concerning claim of UCI. Reversed and remanded for *Dubay* hearing. Case illustrates nexus between UCI and implied bias. Quantum of evidence to raise UCI is "some evidence;" quantum of evidence to sustain challenge for cause is greater. Just because burden not met on challenge does not mean burden not met to raise UCI. "[I]n some cases, voir dire might not be enough, and . . . witnesses may be required to testify on the issue of UCI."

L. **CASES CONSIDERING IMPLIED BIAS**.

1. *United States v. Townsend*, 65 M.J. 460 (C.A.A.F. 2008). Member stated during voir dire that he is the son of a police officer, holds police officers in high esteem, has been a legal officer, was in night law school and studying criminal law, hoped to become a prosecutor, and "expressed a disdain for defense lawyers." Specifically, the member stated that he wanted to be a criminal prosecutor, "putting the bad guys in jail, and keeping the streets safe." The member expressed that he could follow the military judge's instructions and

disclaimed any bias. The military judge denied the defense challenge for cause, making express findings as to his demeanor and responses to the voir dire questions. The N-MCCA held that the military judge did not abuse his discretion in denying the challenge for cause. The CAAF affirmed as well. None of the issues raised – desire to be a prosecutor, regard for law enforcement, and disdain for defense counsel – overcame the fact that he "understood and appreciated the role of the court member, including his obligation to apply the law as instructed upon by the military judge and his obligation to remain unbiased." Additionally, "a reasonable observer . . . would have harbored no questions about LT B's neutrality, impartiality, and fairness."

2. *United States v. Briggs*, 64 M.J. 285 (C.A.A.F. 2007). Accused pled not guilty to selling and stealing unit survival vests from the aircraft he was responsible for maintaining. At trial, defense challenged for cause (CfC) a member, Capt H, because she was the spouse of the accused's commander. The MJ denied the CfC "without expressly addressing implied bias or the liberal grant mandate on the record." The AFCCA held the denial of the CfC was proper because the member's spouse was not a witness and the member's responses showed her knowledge of the case was minimal. CAAF, reversing, held that "[t]he decision to retain Capt H, the spouse of [accused's] immediate commander, unnecessarily raised the perception of improper command bias." The court cited a number of reasons why this challenge should have been granted, including, the safety of the member's husband's unit was placed at risk by the accused, the husband's performance evaluation could have been affected by the accused's criminal misconduct, and the member's husband was responsible for the initial inquiry into the misconduct and recommendation as to disposition.

3. *United States v. Terry*, 64 M.J. 295 (C.A.A.F. 2007). The accused was convicted of rape by an enlisted panel. The MJ denied two defense challenges for cause, against a Maj H and Capt A, without placing her reasoning on the record. Maj H's wife had been a victim of sexual assault but Maj H and his wife had not discussed the issue in five years and his wife had reconciled with the familial perpetrator. The court reasoned that Maj H properly sat on the accused's court-martial. Capt A, however, should have been dismissed from the court-martial for implied bias reasons. A long time girlfriend of Capt A was raped, causing his girlfriend to break off their relationship, but the girlfriend named the child after Capt A. CAAF, reversing, stated that "the liberal grant mandate exists not just to protect an accused's right to a fair trial, but also to protect society's interest, including the interests of the Government and the victims of the crime, in the prompt and final adjudication of criminal accusations."

4. *United States v. Hollings*, 65 M.J. 116 (C.A.A.F. 2007). The accused was tried before a panel of officer members at a special court-martial and convicted of disrespect toward a noncommissioned officer, failure to obey a lawful order, and violation of a general order. During voir dire, one CWO-5 member stated that he was "dual-hatted" as the squadron personnel officer, as well as the installation

personnel officer. In that capacity, "he was on the distribution list for the squadron weekly legal report." Additionally, he remembered seeing the accused's name on the report, the particular UCMJ articles he was alleged to have violated, and that the accused was pending court-martial. He has also received legal officer training, been assigned as a legal officer two years after receiving the legal officer training, and assisted a legal officer in a previous assignment. However, he was not currently serving as a legal officer. Finally, the member stated that he had interaction with the squadron legal officer and occasionally certified the unit diaries when the legal officer was not present. "[A]lthough certification of unit diaries was a job that a legal officer could do and usually did, . . . it was a job that a personnel officer was required to do." At trial, the defense challenged the member for cause because he was a "legal officer" for purposes of R.C.M. 912(f)(1)(G), not under R.C.M. 912(f)(1)(N). The military judge denied the challenge. The N-MCCA affirmed, finding that the sole basis for challenge was that the member was a legal officer and that there was no actual or implied bias. On appeal, CAAF stated that, under the facts elicited at trial, the member did not meet the definition of "legal officer" under R.C.M. 912(f)(1)(G). The accused also argued on appeal that the challenge should have been granted under an implied bias theory because he was a "career legal officer, he was familiar with [the accused's] case as a result of his duties, and at least some of those duties were legal in nature." (internal quotations omitted). Despite the liberal grant mandate and the fact that a military judge who fails to addresses actual and implied bias on the record is afforded less discretion than one who does, the member's responses during voir dire did not reveal any actual or implied bias and the MJ did not abuse his discretion in denying the challenge.

5. *United States v. Bryant*, 65 M.J. 746 (A.F. Ct. Crim. App. 2007). The accused, an Air Force technical sergeant, was convicted contrary to his pleas, by an officer panel, of eight specifications of violating a lawful general regulation and two specifications of providing alcohol to minors. One of the panel members selected by the GCMCA was an Individual Mobilization Augmentee (IMA) Colonel (O-6). During voir dire, he stated that, although he had no knowledge of this case, he was "part of the [accused's wing] command section . . . [and was] used in capacity almost like a second vice commander." He would also "substitute in meetings for either the commander or vice commander." Over the course of a two-year period, he had also served as the acting wing commander for a total of about a week. In addition, in his capacity as acting wing commander, he had relied on the advice of the assistant trial counsel in the case. In this case, the accused's wing commander was the SPCMCA, had ordered the Article 32 investigation, and dismissed some of the charges based on the Article 32 officer's recommendations. Invoking both actual and implied bias, the defense challenged him for cause. The military judge denied the challenge for cause, providing brief findings as to both actual and implied bias. The defense counsel exercised its peremptory challenge against this member, but preserved the issue for appeal under the old "but for" rule. (*See* Executive Order 13387, dated 18 October 2005 amending R.C.M. 912(f)(4).) On appeal, the AFCCA held that the military judge

abused his discretion in denying the challenge for cause against the member due to implied bias, stating, "[w]hether viewed as a 'second vice commander' or just the wing commander's IMA, he is likely to be perceived by most members of the Air Force and the public as the alter ego of the commander he serves." Additionally, "[b]ecause that commander is . . . the same SPCMCA who played a substantial role in the court-martial process of this [accused, this member's] position as a prospective court-member raised an appearance of unfairness." As the military judge "fail[ed] to indicate on the record the basis for his ruling, either as to the legal standard applied or the relevant facts upon which he relied," the AFCCA accorded the military judge "no deference". Findings and sentence set aside.

6. *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001). This case, most noted for resolving the issue of who decides the 'legality' of an order, also raised the issue of the MJ's authority to deny defense challenges for cause. On appeal the defense argued that the MJ erred by denying their causal challenge against a member who previously ordered a subordinate to deploy to Macedonia. The court held there was no error. First, it deferred to the MJ on the issue of actual bias. Then it turned to the issue of implied bias and reasoned, "It is unlikely that the public would view all … who have ever given an order as being disqualified from cases involving disobedience of orders that are similar to any they may have given in the past."

7. *United States v. Henley*, 53 M.J. 488 (C.A.A.F. 2000). LtCol M was asked questions about his friendship with two individuals who were victims of sexual abuse. Neither friend was abused as a child. LtCol M said he could put aside his knowledge of his friends' background and judge the accused based solely on evidence presented. DC also challenged LtCol M because he said he believed someone with an extensive collection of pornography probably had a "fixation or something of that nature." he also stated that he would not convict anyone of a sexual offense solely because they possessed large quantities of pornography. The CAAF ruled the military judge did not err in denying the challenge, as there was neither actual nor implied bias on the part of the member. "There is a substantial difference between a court member who has 'friends' who were victims or who may know a victim of a crime and a member who may have had 'family' as a victim of a crime."

8. *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999). In a high profile case, some knowledge of the facts of the offense, or an unfavorable inclination toward an offense, in not *per se* disqualifying. The critical issue is whether a member is able to put aside outside knowledge, association, or inclination, and decide the case fairly and impartially on its merits. Here, the defense challenged the entire panel based on the following: an acquittal would damage the reputation of the members individually, the general court-martial convening authority, and the 10th Mountain Division; several members knew key witnesses against the accused and would give their testimony undue weight; that members were

exposed to and would be affected by pretrial publicity; and members evinced an inelastic attitude about a possible sentence in the case. The CAAF concurred with the Army court's holding that there was no actual bias — members are not automatically disqualified based on professional relationships with other members or with witnesses, and some knowledge of the facts or an unfavorable inclination toward and offense is not *per se* disqualifying.

9. *United States v. Warden*, 51 M.J. 78 (C.A.A.F. 1999). Military judge did not abuse his discretion when he denied a challenge for cause against member who, mid-way through trial, announced that he knew one of the government witnesses, that she was the wife of a soldier who had worked for him at a prior duty station. The member stated he would "have faith" in the testimony of the witness' husband (who was also to testify) but stated he would weigh all the evidence. The court found no actual bias, and found that the record did not reasonably suggest implied bias. As to actual bias, the court found the member's dialog with the judge and counsel showed his concern with being fair and that he was capable of weighing the evidence objectively. Concerning implied bias, there was no evidence that their relationship was anything other than official, and the member's candor and concern enhanced the perception that the accused received a fair trial.

10. *United States v. Lavender*, 46 M.J. 485 (C.A.A.F. 1997). The implied bias doctrine will not operate to entitle an accused on trial for larceny to have the entire panel removed for cause after two members had money stolen from their unattended purses in deliberation room. The implied bias doctrine is only applied in rare cases. *See Hunley v. Godinez*, 784 F.Supp. 522 (N.D. Ill.), *aff'd*, 975 F.2d 316 (7th Cir. 1992) (due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Doctrine of implied bias appropriately applied to case of accused convicted of murder during course of burglary where judge denied challenges for cause against members who changed vote from not guilty to guilty after becoming victims of burglary during overnight recess from trial in sequestered hotel).

11. *United States v. Rome*, 48 M.J. 467 (C.A.A.F. 1998). MJ abused discretion by failing to grant a challenge for cause, based on implied bias, against member who MJ determined had engaged in unlawful command influence in previous unrelated court-martial and who defense counsel had personally and professionally embarrassed through cross examination in previous high-profile case. Member (LTC M) had a supervisory relationship with an enlisted member of panel, had professional relationship with trial counsel, and also relationship with special agent who was prosecution witness in addition to previous engagement in unlawful command influence. During voir dire, LTC M stated that he "knew defense counsel only from courts-martial" and that she "did a good job" in supporting her client. CAAF bases implied bias only on UCI situation (personal embarrassment via defense counsel "grilling"). Attempted robbery conviction reversed. Judge Crawford strongly dissents, noting again the majority's lack of

faith in member rehabilitation, and questions whether commanders and senior NCO's can ever serve as court members.

12. *United States v. Velez*, 48 M.J. 220 (C.A.A.F. 1998). In a case involving two specifications of rape and two specifications of assault, the MJ did not err by failing, *sua sponte*, to remove three panel members on the basis of implied bias. The implied bias doctrine was not invoked because the record established the following: the member who admitted knowing one of the rape victims had a tenuous relationship with victim, disavowed that this relationship would influence him, and the defense failed to challenge the member on such grounds; second member disavowed that command relationship with Government rebuttal witness would influence him, and the defense counsel failed to challenge the member on that ground; the third member frankly disclosed that he had two friends who were victims of rape, and that he has a 15-year-old daughter he wanted to protect from rape, but disavowed improper influence and stated that he would follow the MJ's instructions.

13. *United States v. Daulton*, 45 M.J. 212 (C.A.A.F. 1996). In a child sexual abuse case the MJ erred in failing to grant a defense challenge for cause against a member who stated that her sister had been abused by her grandfather, and was shocked when she first heard of her sister's allegations, "but had gotten over it." The member's responses to the MJ's rehabilitative questions regarding her ability to separate her sister's abuse from the evidence in the trial were not "*resounding*."

14. *United States v. Baum*, 30 M.J. 626 (N.M.C.M.R. 1990). Military judge improperly denied two causal challenges: first member was the sergeant major of alleged co-conspirator who had testified at separate Article 32, was interviewed by chief prosecutor, and had voluntarily attended accused's Article 32 investigation; second member was colonel who headed depot inspector's office, had official interest in investigation, and had discussed cases with chief investigator and government witness.

M. **MAKING THE RECORD**. *United States v. Smith*, 30 M.J. 631 (N.M.C.M.R. 1990) (military judge abused his discretion in limiting scope of voir dire to prevent defense counsel from developing possible grounds for disqualification of judge). *See also United States v. Adams*, 36 M.J. 1201 (N.M.C.M.R. 1993) (reversible error to refuse defense counsel an opportunity to question prospective court members regarding their previous experiences with or expertise in drug urinalysis program and their beliefs about the reliability of the program).

N. **PANEL MEMBERS AND QUESTIONS**. UCMJ art. 46; R.C.M. 703(a); R.C.M. 801(c). *United States v. Hill*, 45 M.J. 245 (C.A.A.F. 1996). The fact that panel members ask an exceptionally large number of questions does not necessarily reflect a lack of impartiality and establish a basis for a challenge for cause. Panel members submitted approximately 125 "member questions," many containing multiple questions. The member questions reflected a thorough immersion in the trial and attentiveness to the

testimony and issues. Findings reflected precision (accused fully acquitted of half the charges) and sentence imposed for larceny, wrongful appropriation, receipt of stolen property, and wrongful possession of pistol was not harsh (BCD, 1 year confinement, total forfeitures, reduced to E-1).

O. **COMBINATION OF BIASES**.

1. *United States v. Guthrie*, 25 M.J. 808 (A.C.M.R. 1988). Accused charged with wrongful distribution of cocaine. Member was a friend of the accused's company commander, had a degree in criminology, and had a brother-in-law who overdosed on cocaine.

a. Judge should first ask if TC opposes challenge before ruling.

b. An experienced prosecutor may join in the challenge to avoid needless appellate issues and the risk of reversal on appeal, and to keep the outcome of the trial "free from doubt."

c. The record. The judge questioned the member closely and extensively, assessed his credibility, and determined that he could properly serve as a panel member.

2. *United States v. Carns*, 27 M.J. 820 (A.C.M.R. 1988). Member worked in bad check office and rater was government witness in bad check case. Question of bias is essentially one of credibility and demeanor; due to his superior position, judge's determination of bias is entitled to great deference.

P. **DURING-TRIAL CHALLENGES**.

1. Although challenges to court members are normally made prior to presentation of evidence, R.C.M. 912(f)(2)(B) permits a challenge for cause to be made "at any other time during trial when it becomes apparent that a ground for challenge may exist." Peremptory challenges may not, however, be made after presentation of evidence has begun

2. *United States v. Camacho*, 58 M.J. 624 (N-M. Ct. Crim. App. 2003). During lunch break after completion of Government case on merits and rebuttal, the President of panel was overheard stating to government witness, "It's execution time," and making certain gestures, "including a vulgar one with his finger." Challenge for cause granted, which left only two members in this BCD-Special CM. Four new members were detailed, two of whom remained after voir dire and challenges. The remaining members were read all testimony without original members present. HELD: Affirmed. NOTE: "Of great importance in this case is the fact that the defense offered no objection to the detailing of new members and the reading of testimony to those members . . . ."

3. *United States v. Bridges,* 58 M.J. 540 (C.G. Ct. Crim. App. 2003). After findings, DC moved to impeach findings due to unlawful command influence (SJA email reporting child sex abuse case). DC claimed that, had she known of email, she would have questioned members about it and "might have elicited some information as to bias." BUT, DC did not challenge any member for cause at that time or specifically ask the military judge to permit additional voir dire on the issue. HELD: The email on its own was not "an apparent ground for challenge for cause." As such, the military judge did not abuse his discretion by failing to *sua sponte* reopen voir dire

4. *United States v. Millender*, 27 M.J. 568 (A.C.M.R. 1988). During break in court-martial, member asked legal clerk if it would be possible to learn the "other sentence." Challenge denied; no exposure to extra-judicial information which could influence deliberations.

a. Legal clerk did not answer member's question.

b. Immediately reported to judge who investigated contact and found no outside information.

5. Member recognizes a witness. *United States v. Arnold*, 26 M.J. 965 (A.C.M.R. 1988). Conduct individual voir dire to test for bias.

Q. **CHALLENGES AFTER TRIAL**.

1. *United States v. Sonego*, 61 M.J. 1 (2005). Members sentenced the accused after his guilty plea to ecstasy use. During voir dire CPT Bell, a member, stated in response to the MJ's group voir dire questions that he did not have an inelastic predisposition as to punishment. Approximately a month after the accused's court-martial his attorney was representing another airman for drug use. During that court-martial CPT Bell stated that any service member convicted of a drug offense should receive a BCD. A verbatim transcript was not made for this second court-martial because it resulted in acquittal but the defense attorney submitted an affidavit recounting CPT Bell's different responses. On an issue of first impression the CAAF granted review to determine the "measure of proof required to trigger an evidentiary hearing" based on an allegation of juror dishonesty. Noting that the federal circuits differ on this issue, the CAAF adopted a "colorable claim" test requiring "something less than proof of juror dishonesty before a hearing is convened." The court, ordering a *Dubay* hearing, ruled that the defense attorney's affidavit constituted a "colorable claim" of juror dishonesty to warrant a further evidentiary hearing.

2. *United States v. Humphreys*, 57 M.J. 83 (2002). Defense submitted a post-trial motion for a new trial based on discovery that two members were in the same rating chain, although both answered the military judge's question on that issue in

the negative. The military judge held a post-trial 39(a) session and questioned the involved members, during which both responded that they did not remember the military judge asking the question, and their answers were not an effort to conceal the rating chain relationship. The military judge concluded the members' responses during trial were "technically . . . incomplete," but their responses in the Article 39(a) session caused him to conclude he would not have granted a challenge for cause based on the relationship. He denied the defense motion for new trial. HELD: affirmed. In order to receive a new trial based on a panel member's failure to disclose info during voir dire, defense must make two showings: (1) that a panel member failed to answer honestly a material question on voir dire; and (2) that a correct response would have provided a valid basis for a challenge for cause. "[A]n evidentiary hearing is the appropriate forum in which to develop the full circumstances surrounding each of these inquiries." Appellate court's role in process is to "ensure the military judge has not abused his or her discretion in reaching the findings and conclusions." Here the military judge did not abuse his discretion where he determined that "full and accurate responses by these members would not have provided a valid basis for a challenge for cause against either or both."

3. *United States v. Dugan*, 58 M.J. 253 (2003). The military judge refused to grant a post-trial 39(a) session to voir dire members concerning UCI in deliberations. The CAAF remanded for a *Dubay* hearing. Under these circumstances, MRE 606(b) "permits voir dire of the members regarding what was said during deliberations about [the alleged UCI comments of a commander], but the members may not be questioned regarding the impact of any member's statements or the commander's comments on any member's mind, emotions, or mental processes."

R. **MILITARY JUDGE'S DUTY TO *SUA SPONTE* CHALLENGE MEMBERS**.

1. ***Rule***. Under R.C.M. 912(f)(4), a military judge may excuse a member *sua sponte* for actual or implied bias: "Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge *may*, in the interest of justice, excuse a member against whom a challenge for cause would lie."

2. *United States v. Strand*, 59 M.J. 455 (C.A.A.F. 2004). Court member was son of officer who acted as convening authority in the case. The member's father acted to excuse and detail new members in the absence of the regular GCMCA. The defense did not challenge the son for cause. On appeal, the defense contended that the military judge had a *sua sponte* duty to remove the son for implied bias. The court held that the military judge did not abuse his discretion in declining to *sua sponte* excuse the member, and declined to adopt a *per se* "familial relationship" basis for excusal. Here, the government revealed the familial relationship, and the military judge allowed both parties a full opportunity to voir dire the member. Although the military judge may excuse an unchallenged member in the interest of justice, there must be justification in the

record for such a drastic action. The record in this case did not reveal an adequate justification for such action.

3. *See also United States v. Collier*, NMCCA 20061218, 2008 CCA LEXIS 53 (N-M. Ct. Crim. App. Feb. 21, 2008) (unpublished). In a bizarre case, trial counsel challenged a member for cause, based on implied bias. Defense counsel objected to the challenge, which the government then withdrew. On appeal, defense argued the military judge should have excused the member *sua sponte* for implied bias. During voir dire, the member stated he was an Administration Officer, knew three of the witnesses in the case (he interacted with them on a daily basis and was in the rating chain for two of them), and recognized the accused's name from reviewing personnel rosters. The member had been on a cruise for seven months and had no knowledge of the facts of the case. In response to the government challenge for cause of this member, the defense counsel said: "[W]e feel that there's no problem with him. He's been on [a] cruise and has no knowledge of any of that." The military judge asked defense counsel why he objected to the government challenge and, before counsel could answer, the trial counsel withdrew the challenge for cause, but added, "We were more concerned with appearance. But, we'll withdraw our challenge for cause, if defense objects to that." In affirming the case, the court noted the member's minimal knowledge of the accused was "matter-of-fact and devoid of emotion." The member also stated that his professional relationship with three government witnesses would not affect his assessment of their testimony. Finally, in deciding there was no bias, the court noted "perhaps most tellingly" that the defense counsel at trial objected to the challenge.

S. **TIMING OF CHALLENGES**. UCMJ art. 41.

1. UCMJ art. 41(a). If exercise of challenge for cause reduces court below minimum required per Article 16 (5 members for GCM, 3 members for SPCM), the parties shall exercise or waive all other causal challenges *then apparent*. Peremptories will not be exercised at this time.

2. UCMJ art. 41(b). Each party gets one peremptory. If the exercise of a peremptory reduces court below the minimum required by Article 16, the parties must use or waive any remaining peremptory challenge against the remaining members of the court *before* additional members are detailed to the court.

3. UCMJ art. 41(c). When additional members are detailed to the court, the parties get to exercise causal challenges against those new members. After causal challenges are decided, each party gets one peremptory challenge against members not previously subject to a peremptory challenge.

4. *See United States v. Dobson*, 63 M.J. 1 (2006). The accused selected an enlisted panel to hear her contested premeditated murder case. After the MJ's grant of challenges for cause (CfCs) and peremptory challenges (PCs) the

GCMCA needed to twice detail additional members for the court-martial to obtain ⅓ enlisted members, as required by Article 25, UMCJ. The CAAF, in their opinion, provided the following chart as to the progression of the panel's composition:

Panel Composition	**Total**	**Officer**	**Enlisted**
Initial	10	6	4
After 1st causal challenges	7	5	2 (No 25 quorum)
After 1st peremptory challenges	**5**	**4**	**1**
After 1st additions	10	6 *(added*	4 *(added 3)*
After 2d causal challenges	8	6	2 (No 25 quorum)
After 2d peremptory challenges	**7**	**5**	**2**
After 2d additions	10	5 *(added*	5 *(added 3)*
After 3d causal challenges	9	5	4
Final (after 3d peremptory)	8	5	3

The issue on appeal was whether the MJ erred by granting the parties' PCs (**bolded above**) after the ⅓ enlisted quorum, as required by Article 25, UCMJ, was busted after the 1st and 2nd CfCs (underlined above) were granted. While ⅓ enlisted quorum was broken after the 1st and 2nd CfCs, the panel membership never dropped below five members as required for a general court-martial under Article 16, UCMJ. The defense argued that the MJ should not have granted the parties' PCs once the ⅓ enlisted quorum was broken under Article 25, UCMJ even though the total membership requirements of Article 16, UMCJ were met. Article 41, UCMJ states that if the exercise of CfCs drops panel membership below Article 16 requirements that additional members will be detailed and PCs will not be granted at that time. Article 41, UCMJ, however, does not address panel membership falling below Article 25, UCMJ ⅓ enlisted requirements. The CAAF held that the MJ did not error by granting PCs when Article 25 quorum was lacking but Article 16 quorum was met. The CAAF reasoned that "[t]he enlisted representation requirement in Article 25 employs a percentage, not an absolute number[, unlike Article 16,]. . . [a]s a result, there are circumstances in which an enlisted representation deficit under Article 25 can be corrected through exercise of a peremptory challenge against an officer." Defense also objected to the GCMCA detailing two additional officers to the panel after the 1st CfCs were granted as an attempt to dilute enlisted representation. The CAAF stated that the accused is entitled only to ⅓ enlisted membership and the rules do not "require the [GCMCA] to add only the minimum number and type [of members] necessary to address a deficit under Article 16 or 25."

5. What about the members who have already been subjected to *voir dire*? Do they have to sit through the voir dire session with the new members?

a. No. Under RCM 912(d), the military judge may excuse the original members while voir dire of the newly-detailed members occurs. *Cf.* RCM 805(b).

T. **PRESERVING DENIED CAUSAL CHALLENGES**. R.C.M. 912(f)(4).

1. ***Background***. Executive Order Amended R.C.M. 912(f)(4) and the "But For" Rule. *See* Executive Order 13387 – 2005, dated 18 October 2005. R.C.M. 912(f)(4) was amended by deleting the fifth sentence and adding other language to state: "When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review."

2. ***Old rule***. *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). The CMA translated the old version of R.C.M. 912 (f)(4) as follows:

a. If counsel does not exercise her peremptory challenge, she waives her objection to the denied causal challenge. She preserves the denied causal if she uses her peremptory against any member of the panel. But,

b. If she uses her peremptory against the member she unsuccessfully challenged for cause and fails to state the "but for" rule, she waives your objection to the denied causal. So...,

c. Counsel preserves her denied causal if she uses her peremptory against the member she unsuccessfully challenged for cause and she states the "*but for"* rule.

3. ***Current rule.*** . If "objectionable" member does not sit on the panel (for example, if defense counsel uses preemptory challenge to excuse the member), the appellate court will not review the military judge's denial of a challenge for cause for that member. *See* R.C.M. 912(f)(4)

a. *Ross v. Oklahoma*, 487 U.S. 81 (1988). Defense had to use peremptory challenge to remove juror who should have been excused for cause; no violation of Sixth Amendment or due process right to an impartial jury. "Error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him."

b. *Cf. United States v. Eby*, 44 M.J. 425 (C.A.A.F. 1996). The defense failed to preserve for appeal the issue of prejudice under R.C.M. 912(f)(4) by using its peremptory challenge against a member who survived a

challenge for cause without stating that the defense would have peremptorily challenged *another member* if the MJ had granted the challenge for cause.

IV. PEREMPTORY CHALLENGES.

A. **IN GENERAL.** One per side, unless new members are detailed. *See* Article 41(b)(1), UCMJ.

1. ***Additional Peremptory***. *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988). Judge denied defense request for additional peremptory after panel was "busted" and new members were appointed.

a. No Sixth Amendment right to a peremptory challenge. *Ross* v. *Oklahoma*, 487 U.S. 81(1988).

b. No Fifth Amendment due process right to peremptory challenge. *United States v. Martinez-Salazar*, 528 U.S. 504 (2000).

2. ***No conditional peremptory challenges***. *United States v. Newson*, 29 M.J. 17 (C.M.A. 1989). It was improper for judge to allow trial counsel to "withdraw" peremptory challenge after defense counsel reduced enlisted membership below one-third quorum. *But See United States v. Owens*, No. 200100297, 2005 CCA LEXIS 182 (N-M. Ct. Crim. App. June 17, 2005) (unpub.). Government exercised its peremptory challenge (PC), defense exercised its PC, and the MJ then asked defense if they had any objection to the government's PC. Defense objected but prior to the MJ's ruling the government withdrew its PC and then the MJ allowed the government to PC a different member to which procedure the defense objected. While "ordinarily" the government must exercise its PC prior to the defense and the MJ cannot alter this procedure "'without a sound basis,'" the N-MCCA reasoned that a sound basis existed because of the defense's untimely objection which if timely made would have allowed the government to exercise its PC prior to the defense. In the alternative, even if the MJ erred no prejudice accrued to the accused particularly where the member, who the government tried to PC with defense objection, ultimately sat on the case.

3. ***If additional members are detailed (busted quorum).*** If the exercise of a peremptory reduces court below the minimum required, the parties must use or waive any remaining peremptory challenge against the remaining members of the court *before* additional members are detailed to the court. *United States v. Owens*, No. 200100297, 2005 CCA LEXIS 182 (N-M. Ct. Crim. App. June 17, 2005) (unpub.). Government exercised its peremptory challenge (PC), defense exercised its PC, and the MJ then asked defense if they had any objection to the government's PC. Defense objected but prior to the MJ's ruling the government withdrew its PC and then the MJ allowed the government to PC a different

member to which procedure the defense objected. While "ordinarily" the government must exercise its PC prior to the defense and the MJ cannot alter this procedure "without a sound basis," N-MCCA reasoned that a sound basis existed because of the defense's untimely objection which if timely made would have allowed the government to exercise its PC prior to the defense. In the alternative, even if the MJ erred no prejudice accrued to the accused particularly where the member, who the government tried to PC with defense objection, ultimately sat on the case. *See also United States v. Carter*, 25 M.J. 471 (C.M.A. 1988) (military judge erroneously denied defense request for additional peremptory after panel was "busted" and new members were appointed).

4. ***Additional peremptory when additional members are detailed.*** *United States v. Pritchett*, 48 M.J. 609 (A.F. Ct. Crim App. 1998). Military judge erred to the prejudice of the accused by denying the accused his statutory right to exercise a peremptory challenge against one of the new court members added after the original panel as supplemented fell below quorum. In a forcible sodomy and indecent liberties with a child case, the panel twice fell below quorum. After the third voir dire, the military judge denied both sides the right to exercise peremptory challenges. The defense implied that it desired to exercise the challenge and the MJ replied "*I don't want to hear anymore about it. I ruled.*" The exercise of a peremptory challenge is a statutory right. Deprivation of that right carries a presumption of prejudice, absent other evidence in the record, requiring automatic reversal.

B. **BATSON *AND DISCRIMINATORY USE OF PEREMPTORY CHALLENGES***. The Supreme Court has never specifically applied *Batson* to the military. However, military caselaw has applied *Batson* to the military peremptory challenges through the Fifth Amendment. The military courts have, in some instances, made *Batson* even more protective of a juror's right to serve. Under *Batson*, counsel cannot exercise a peremptory challenge based on race or gender.

1. ***Recent Application of* Batson**. *Snyder v. Louisiana*, 128 S. Ct. 1203, 552 U.S. ___ (2008). A civilian defendant was convicted of first-degree murder and sentenced to death. On appeal, defense argued the trial court erred by allowing the prosecution to use a peremptory challenge against an African-American juror despite a *Batson* challenge. In a 7-2 decision, the Court ruled the trial judge committed "plain error" by denying the *Batson* challenge.

a. Before jury selection, 85 prospective jurors were questioned during normal voir dire. Of those 85, only 36 survived challenges for cause; five of those remaining jurors were black. Under Louisiana practice, each side had 12 peremptory challenges. "[A]ll 5 of the prospective black jurors were eliminated by the prosecution through the use of peremptory strikes." At issue on appeal, the defense lodged a *Batson* challenge against the prosecution's peremptory challenge of one of the five black prospective jurors. Pursuant to *Batson* and its progeny, the prosecution gave two race-

neutral reasons for using a peremptory. First, the prospective juror "looked very nervous" during questioning. Second, the prospective juror was a student teacher and said during voir dire that he was concerned jury duty might keep him from completing his requirements for the semester. Based on this second challenge, the prosecution speculated, "[H]e might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase."[2]

b. The Court looked at the other 50 members of the venire who said that jury duty would be an "extreme hardship." Of those 50, there were 2 white members who had serious scheduling conflicts. First, Mr. Laws was a general contractor; he said that he had "two houses that are nearing completion" so if he served on the jury, those people would not be able to move in to their homes. Mr. Laws further said that he wife recently had a hysterectomy so he was taking care of his children. He added, "[S]o between the two things, it's kind of bad timing for me." Second, Mr. Donnes approached the court with an "important work commitment" later that week; though not developed on the record, it was important enough that Mr. Donnes re-raised the conflict on the second day of jury selection.

c. The Court focused on the third *Batson* step, concluding that the prosecution's "pretextual explanation naturally gives rise to an inference of discriminatory intent." During jury selection, the judge's law clerk called the dean at the prospective juror's university, who said he could complete his student teaching observation even if he served on the jury. The Court concluded that the student teaching obligations were not a valid reason for exercising a peremptory, particularly in light of the other conflicts offered by two white jurors who ultimately sat as members.

2. **Batson *in the military***.

a. *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988) (equal protection right to be tried by a jury from which no racial group has been excluded is part of due process and applies to courts-martial). Court in *Santiago* recognized that "in our American society, the Armed Services have been a leader in eradicating racial discrimination," and held that government's use of only peremptory challenge against minority court member raised *prima facie* showing of discrimination.

b. In the military, a trial counsel addressing a *Batson* challenge cannot proffer a reason that is "unreasonable, implausible, or that otherwise

[2] Under Louisiana law in effect at the time, a capital jury would deliberate on findings and then only deliberate on sentence if the defendant was found guilty of an offense for which the death penalty was authorized. In this case, if the jury had found the defendant guilty of unpremeditated murder, the jurors would have been excused and the judge would decide the sentence.

makes no sense." *See United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997). By contrast, civilian courts only need a reason that is not "inherently discriminatory," even if explanation is not "plausible." *See Rice v. Collins*, 546 U.S. 333 (2006).

c. *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989) adopted a per se rule that "every peremptory challenge by the Government of a member of an accused's race, upon objection, must be explained by trial counsel." This is further expanded by *Powers* below.

3. The accused and the challenged member need not be of the same racial group. *Powers v. Ohio,* 499 U.S. 400 (1991). "The Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely on their race. . . ."

a. The Court's holding removes the requirement from *Batson* that the accused and challenged juror be of the same race.

b. Court's ruling in *Powers* is very broad. Focuses on both the rights of the accused as well as the challenged member

c. Prosecutors must now be prepared to articulate a race-neutral reason for all peremptory challenges, regardless of the races of the accused or member.

4. ***Making a* Batson *challenge***. If either side exercises a challenge against a panel member who is a member of a minority group, then the opposing side may object and require a race-neutral reason for the challenge.

5. **Batson *applies to defense***. *United States v. Witham*, 47 M.J. 297 (C.A.A.F. 1997) (holding *Batson* applicable to defense in courts-martial); *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (holding that the Constitution prohibits a civilian criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges). If the government can show a prima facie case, the burden shifts to the defense to provide a race neutral reason for their peremptory challenge.

6. ***Race defined***. *Hernandez v. New York*, 500 U.S. 352 (1991) (extending *Batson* to potential jurors who were bilingual Latinos, with the Court viewing Latinos as a cognizable race for *Batson* purposes and referring to Latinos as both a race and as an ethnicity). *See also United States v. Martinez-Salazar*, 528 U.S. 304 (2000) ("a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race"). To date the Supreme Court has applied *Batson* only to classifications which have received heightened scrutiny; race, gender, and ethnic origin (thus far limited to

Latinos). *But see Rico v. Leftridge-Byrd*, 340 F.3d 178 (3d Cir. 2003) (*Batson* prohibits the exercise of peremptory challenges based on ethnic origin of Italian-Americans).

7. ***Gender-Based Peremptory Challenges.*** As discussed above, *Batson* applies to gender-based challenges. *JEB v. Alabama*, 511 U.S. 127 (1994). *JEB* held that the Equal Protection Clause prohibits litigants from striking potential jurors solely on the basis of gender. Ruling extends the concept that private litigants and criminal defense attorneys are "state actors" during voir dire for purposes of Equal Protection analysis. *See also United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993) (prosecutor claimed that he used peremptory challenges against two single females because he thought they "would be attracted to the defendant" because of his good looks; court finds this was gender-based discrimination).

a. *United States v. Witham*, 47 M.J. 297 (C.A.A.F. 1997). Gender, like race, is an impermissible basis for the exercise of a peremptory challenge by either the prosecution or the military accused.

b. *United States v. Ruiz*, 49 M.J. 340 (C.A.A.F. 1998). The per se rule developed in *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989), is applicable to Government peremptory challenges based on gender whether a MJ requests a gender neutral reason or not.

8. *United States v. Bradley*, 47 M.J. 715 (A.F. Ct. Crim. App. 1997). Accused charged with rape and assault. Trial counsel's exercise of peremptory challenge against one of two remaining members based on fact that member challenged was investigating officer on a case involving the legal office was gender-neutral and valid under *Batson, and did not require MJ to grant defense request for additional voir dire to explore the basis of the trial counsel's supporting reason*. Neither *Witham* nor *Tulloch* elevate a peremptory challenge to the level of a causal challenge (party making peremptory challenge need only provide a race neutral explanation in response to a *Batson* challenge).

9. ***Occupation-Based Peremptory Challenges.*** *United States v. Chaney,* 53 M.J. 383 (C.A.A.F. 2000). The government used its peremptory challenge against the sole female member. After a defense objection, TC explained that member was a nurse. Military judge interjected that in his experience TCs "rightly or wrongly" felt members of medical profession were sympathetic to accuseds, but that it was not a gender issue. Defense did not object to this contention or request further explanation from TC. CAAF upheld the military judge's ruling permitting the peremptory challenge, noting that the military judge's determination is given great deference. CAAF noted it would have been preferable for the MJ to require a more detailed clarification by TC, but here DC failed to show that the TC's occupation-based peremptory challenge was unreasonable, implausible or made no sense.

10. ***What Are "Racially Neutral Reasons"?*** The Supreme Court has held that the "genuineness of the motive" rather than "the reasonableness of the asserted nonracial motive" is what is important. *Purkett v. Elem*, 514 U.S. 765 (1995) (Missouri prosecutor struck two African-American men from panel stating "I don't like the way they looked," and they "look suspicious to me;" this is a legitimate hunch, and the *Batson* process does not demand an explanation that is "persuasive or even plausible;" only facial validity, as determined by trial judge, is required). *See Rice v. Collins*, 546 U.S. 333 (2006). The prosecutor struck a minority female because (1) she had rolled her eyes in response to a question from the court; (2) she was young and might be too tolerant of a drug crime, and (3) she was single and lacked ties to the community. The trial judge did not observe the eye roll but allowed the challenge based on the second and third grounds. The trial judge noted that the government also used a PC against a white male juror because of his youth. The Supreme Court, citing *Purkett v. Elem*, 514 U.S. 765 (1995), stated that a race neutral explanation "does not demand an explanation that is persuasive, or even plausible, so long as the reason is not inherently discriminatory, it suffices." *See also Hernandez v. New York*, 500 U.S. 352 (1991) ("[A]n explanation based on something other than the race of the juror. . . Unless a discriminatory intent is inherent in the prosecutor's explanation the reason offered will suffice.").

a. ***Different standard for trial counsel***. Peremptory challenges are used to ensure qualified members are selected, but, in the military, the convening authority has already chosen the "best qualified" after applying Article 25, UCMJ. Therefore, under *Batson, Moore*, and *Witham*, trial counsel may not strike a person on a claim that is unreasonable, implausible, or otherwise nonsensical. *United States v. Tulloch*, 47 M.J. 283 (C.A.A.F. 1997). *Tulloch* is a departure from Supreme Court precedent, which requires only that counsel's reason be "genuine." *Purkett v. Elem*, 514 U.S. 765 (1995).

(1) *Tulloch:* Accused was African-American. Trial counsel moved to strike African-American panel member based on "demeanor," claiming member appeared to be "blinking a lot" and "uncomfortable." CAAF held this was insufficient to "articulate any connection" between the purported demeanor and what it indicated about the member's "ability to faithfully execute his duties on a court-martial." Trial counsel's peremptories are assessed under a "different standard."

(2) Trial counsel must be able to defend the peremptory challenge as non-pretext.

(3) Counsel cannot simply affirm his good faith or deny bad faith in the use of the peremptory.

(4) Counsel must articulate a connection between the observed behavior, etc., and a colorable basis for challenge (e.g., "member's answers to my questions suggested to me she was not comfortable judging a case based on circumstantial evidence alone," etc.).

(5) Military judge should make findings of fact when the underlying factual predicate for a peremptory challenge is disputed, particularly where the dispute involves in-court observations of the member. The military judge should make "findings of fact that would establish a reasonable, plausible race-neutral explanation for a peremptory challenge by the Government of a member chosen as 'best qualified' by a senior military commander." *Tulloch*, 47 M.J. 289.

(6) *United States v. Robinson*, 53 M.J. 749 (A. Ct. Crim. App. 2000). Trial counsel's proffered reason for striking minority member (that he was new to the unit and that his commander was also a panel member) was unreasonable. Counsel did not articulate any connection between the stated basis for challenge and the member's ability to faithfully execute the duties of a court-martial member. Sentence set aside.

b. ***The Numbers Game and Protecting Quorum***. *United States v. Hurn*, 55 M.J. 446 (C.A.A.F. 2001). The DC objected after the TC exercised the government's peremptory challenge against panel's only non-Caucasian officer. TC's basis "was to protect the panel for quorum." CAAF held the reason proffered did not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which is to protect the participants in judicial proceedings from racial discrimination. Case remanded for *Dubay* hearing based on TC's affidavit, filed two and a half years after trial, which set forth other reasons for challenging the member in question.

(1) Post-*Dubay: United States v. Hurn,* 58 M.J. 199 (C.A.A.F. 2003). In *Dubay* hearing, TC testified he also removed the member because the member had expressed concern about his "pressing workload." MJ determined challenge was race-neutral. CAAF affirmed, finding no clear error: "The military judge's determination that the trial counsel's peremptory challenge was race-neutral is entitled to great deference and will not be overturned absent clear error" (internal quotations and citations omitted). *But see Greene*, below (holding where part of the reason for a challenge is not race-neutral, the entire reason must fail).

c. ***Valid logistical reasons for using peremptory.*** *United States v. Clemente*, 46 M.J. 715 (A.F. Ct. Crim. App. 1997). Trial counsel's use of peremptory challenge to remove only Filipino member of panel because

d. *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989) (Cox, J., *dicta*) ("[T]he judge must determine whether trial counsel articulated a neutral explanation *relative to this particular case*, giving a clear and reasonably specific explanation of the legitimate reasons to challenge this member.").

e. *United States v. Shelby*, 26 M.J. 921 (N.M.C.M.R. 1988). Trial counsel peremptorily challenged junior African-American officer in sodomy trial of African-American accused. Inexperience of junior member was accepted racially-neutral explanation, even though other junior enlisted members remained.

f. *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989), *rev'd on other grounds,* 33 M.J. 101 (C.M.A. 1991). Trial counsel challenged African-American member who stated that serving on court-martial in a capital case would be a good "learning experience." Upheld as a racially-neutral explanation.

g. *United States v. Dawson*, 29 M.J. 595 (A.C.M.R. 1989). Educational background in criminal justice, junior status on the panel, and lack of experience (officer challenged was member of accused's race and female) was supported by voir dire and valid basis for challenge.

h. *United States v. Allen*, 59 M.J. 515 (N-M Ct. Crim. App. 2003). Government challenged officer panel member for cause "based on the fact he had previously been a criminal accused in a military justice case and, therefore, would likely hold the Government to a higher standard of proof than required by law." Military judge denied challenge for cause; government exercised its peremptory against the same member and defense made *Batson* challenge. Government gave same reason for peremptory as for challenge for cause. Court held the TC articulated a reasonable, race neutral and plausible basis for challenge.

i. *United States v. Woods*, 39 M.J. 1074 (A.C.M.R. 1994). TC says, "We just did not get the feeling that SSG Perez was paying attention and would be a good member for this panel. It had nothing to do with the fact that his last name was Perez. I mean there is no drug stereotype here." Court holds TC's articulated basis (inattentiveness) was not pretext for intentional discrimination.

11. ***Mixed motive challenges are improper***. *United States v. Greene*, 36 M.J. 274 (C.M.A. 1993). Two reasons for exercise of peremptory challenge: one reason

was facially valid and race-neutral; the second amounted to a "gross racial stereotype" and was clearly not race neutral. Where part of the reason for a challenge is not race neutral, the entire reason must fail. Findings and sentence set aside.

12. ***Purposeful Discrimination***.

a. *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *aff'd on reh'g, Miller-El v. Dretke*, 361 F. 3d 849 (5th Cir. Tex. 2004), *rev'd, Miller-El v. Dretke*, 545 U.S. 231 (2005). The Supreme Court reversed lower court decision and remanded a death penalty case for further proceedings based on allegations that prosecutors systematically exercised peremptory challenges to exclude African-American jurors. Dallas County prosecutors used 10 of their 11 peremptory challenges against African-Americans. The Court noted the evidence of discrimination: the prosecution questioned African American prospective jurors differently than white jurors; the prosecution engaged in a practice known as "jury shuffling," which tended to exclude African-American jurors; and evidence of a "systematic policy of excluding African-Americans from juries." This latter evidence was adduced from actual policy documents, including a circular that read, "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." Applying the three-step *Batson* framework, the state conceded that petitioner met the first step by demonstrating a prima facie claim of discrimination. The state proceeded to step two and offered race-neutral explanations for strikes. The Court then considered whether the defense proved purposeful discrimination; crucial to this determination is the "persuasiveness of the prosecutor's justification for his peremptory strike." In other words, "whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." It is here that the lower courts' rationale fell short, as those courts merely accepted the state court's finding of credibility of the prosecutor's proffered rationale, but did not consider that credibility in light of all the other evidence of purposeful discrimination. The case was remanded to the 5th Circuit, which rejected the defendant's claim. *Miller-El v. Dretke*, 361 F.3d 849 (5th Cir. 2004). In 2005, the Supreme Court granted certiorari and again reversed, holding that the accused was entitled to prevail on his federal habeas corpus claim that the prosecutors in his trial had made race-based peremptory strikes of potential jurors, in violation of the Fourteenth Amendment.

b. *United States v. Norfleet*, 53 M.J. 262 (C.A.A.F. 2000). Trial counsel challenged the sole female member of the court. In response to defense

request for a gender-neutral explanation, TC stated the member "had far greater court-martial experience than any other member" (so she would arguably dominate the panel) and had potential "animosity" toward the SJA office. Failure of the MJ to require TC to explain "disputes" between member and OSJA was not abuse of discretion. When proponent of peremptory challenge responds to *Batson* objection with a valid reason and a separate reason that is not inherently discriminatory and on which opposing party cannot demonstrate pretext, denial of *Batson* may be upheld on appeal.

13. ***Beyond race, ethnic group, and gender,* Batson *is generally inapplicable.***

a. Peremptory challenges based on marital status do not violate *Batson*. *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991).

b. Peremptory challenges based on age do not violate *Batson*. *Bridges v. State*, 695 A.2d 609 (Md. Ct. Spec. App. 1997).

c. The Supreme Court has not ruled on whether *Batson* extends to religious-based peremptory challenges.

(1) *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). TC peremptorily challenged a member who was the senior African-American officer after he indicated that he was a member of the Masons. The accused was also a Mason. No abuse of discretion for the MJ to grant the peremptory challenge where the TC indicated the race neutral reason was that the member and accused were members of the same fraternal organization. While recognizing that the Supreme Court has not extended *Batson* to religion, the court noted that the record in this case was "devoid of any indication of [the member's] religion." CAAF cites *Casarez v. Texas*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (on rehearing), and *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994), as authority that *Batson* does not apply to religion.

(2) Two federal circuits have decided the status of religion-based *Batson* strikes on the merits.

(a) *United States v. DeJesus*, 347 F.3d 500 (3d Cir. 2003). Court drew a distinction between a strike motivated by religious beliefs and one motivated by religious affiliation. The court found strikes motivated by religious beliefs (i.e. heightened religious activity) were permitted; no occasion to rule on issue of religious affiliation. The Seventh Circuit

makes the same distinction in dicta, but did not resolve the issue because the court found no plain error. *United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998)

(b) *United States v. Brown,* 352 F.3d 654 (2d Cir. 2003). *Batson* applies to challenges based on religious affiliation. "Thus, if a prosecutor, when challenged, said that he had stricken a juror because she was Muslim, or Catholic, or evangelical, upholding such a strike would be error. Moreover, such an error would be plain." Strikes at issue involved heightened religious activity, so did not violate *Batson*.

d. **Batson *does not apply to membership in organizations.*** *United States v. Williams*, *supra*. Accused and senior officer member of panel were members of the Masons. Peremptory challenge based on "fraternal affiliation" is race-neutral.

C. **PROCEDURAL ISSUES**.

1. ***Timing***. Defense should object to government's peremptory challenge immediately after it has been stated by the government. *See United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). The accused attacked military practice because it unnecessarily permits the Government a peremptory challenge even when it has not been denied a challenge for cause, contrary to *Ford v. Georgia*, 498 U.S. 411 (1991), which states: "The apparent reason for the one peremptory challenge procedure is to remove any lingering doubt about a panel member's fairness . . . ." In the military, accused asserted that "the [unrestricted] peremptory challenge becomes a device subject to abuse." The CAAF noted that Article 41(b) provides accused and the trial counsel one peremptory challenge. Neither *Ford*, nor any other case invalidates this judgment of Congress and the President.

2. ***Privacy***. Military judge should use appropriate trial procedures to best protect privacy interest of challenged member.

3. ***Type of proceedings to substantiate reasons***.

a. Argument by defense is typically enough to complete the record. But see *United States v. Downing*, 56 M.J. 419 (C.A.A.F. 2002). Appellant failed to meet burden of establishing that a court-martial panel member should have been dismissed for cause (bias), so it did not matter that the trial judge may have applied the wrong standard for challenge.

b. Affidavit, adversary hearing, and argument allowed, but evidentiary hearing denied. *United States v. Garrison*, 849 F.2d 103 (4th Cir.), *cert. denied*, 109 S.Ct. 566 (1988). *See also Ruiz* (above).

4. ***Findings on record***.

a. Judge should enter formal findings concerning sufficiency of proffered reasons. MJ should make findings of fact when underlying factual predicate for a peremptory challenge is in dispute. *See Tulloch*, above and *United States v. Perez*, 35 F.3d 632, 636 (1st Cir. 1994).

b. Military judge not required to raise the issue sua sponte, question member, or recall member for individual voir dire. *See Clemente* and *Bradley*, above.

5. ***Waiver***.

a. *United States v. Galarza,* No. 9800075 (A. Ct. Crim. App. May 31, 2000) (unpub.) (where defense made *Batson* objection to TC's peremptory challenge of a female panel member, and TC stated member showed "indecisiveness" during voir dire, DC's failure to object or to dispute TC's proffered gender-neutral explanation for the peremptory challenge waived issue on appeal).

b. *United States v. Irvin*, 2005 CCA LEXIS 99 (A.F. Ct. Crim. App. Mar. 24, 2005) (unpub.). Trial counsel peremptorily challenged only African-American panel member in a contested rape court-martial. MJ asked the TC for a race-neutral *Batson* reason, *sua sponte*, for the challenge. TC responded that the panel member might have preconceived ideas or positions from a rape court-martial she had previously sat on the week prior and she had previously heard testimony from one of the investigators. MJ accepted this reason and defense did not object to the TC's reason or the MJ's ruling. AFCCA held the defense counsel's failure to object waived the issue and further that the MJ did not abuse his discretion in finding no purposeful discrimination by the TC.

c. MJ not required to raise the issue *sua sponte*, question the member, or recall member for individual voir dire. *See Clemente* and *Bradley*, *supra*.

6. ***Making the record of a* Batson *challenge—the outer limits.*** *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). Military judge erred in not requiring counsel to articulate a "race-neutral" explanation for the Government's use of its peremptory challenge against one of only two African-American panel members. Trial counsel did, however, provide a statement at the next court session, stating a race-neutral explanation for the challenge (claiming the member's responses

concerning the death penalty were equivocal). Trial counsel's statement provided a sufficiently race-neutral explanation for the challenge, and the court found that public confidence in the military justice system had not been undermined. The military judge is required to make a determination as to whether trial counsel's explanation was credible or pretextual and, optimally, an express ruling on this question is preferred. However, here the military judge clearly stated his satisfaction with trial counsel's disavowal of any racist intent in making the challenge.

7. ***Avoid the issue***. Government should use peremptory challenge sparingly and only when a challenge for cause has not been granted, *Batson* will likely be satisfied.

V. CONCLUSION.

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VI. APPENDIX - VOIR DIRE AND CHALLENGES SUMMARY

MAJOR POINT	*SUMMARY*
MILITARY JUDGE'S CONTROL OF VOIR DIRE	• RCM 912 grants a MJ broad authority to control the conduct of voir dire. A MJ may deny a request for individual voir dire, may limit the amount of counsel who participate in voir dire, and restrict the type of questions asked. A MJ, however, should be cautious in placing extreme limits on counsel. While the MJ may foreclose or limit counsel during voir dire, the appellate courts will review whether the MJ abused his/her discretion.
CAUSAL CHALLENGES: STANDARDS FOR EVALUATION	• MJs are to liberally grant challenges for cause (*Moyar* mandate) for the defense only (*James*). • A causal challenge based on actual bias is one of credibility and is reviewed for an abuse of discretion. MJs have significant latitude in making this subjective determination because of the opportunity to observe the demeanor of the court member. Great deference is given to MJ determination. • The bases for causal challenges include inelastic attitude on sentencing, an unfavorable inclination toward a particular offense, being a victim of a offense similar to the one being prosecuted, rating chain challenges, knowledge of the case, and/or expertise in the issues to be litigated. A member is disqualified only after a showing that the basis for a challenge will prohibit the performance of duties as a member.
THE IMPLIED BIAS DOCTRINE	• RCM 912(f)(1)(N) also embodies the implied bias doctrine. A MJ must determine whether a member should be disqualified for implied bias based on an objective standard. The question to ask is "would a reasonable member of the public have substantial doubt as to the legality, fairness, and impartiality of the proceedings?" Implied bias occurs when the member's position, experience, or situation indicates that he/she should not sit, even though the member disavows any adverse impact on their ability to perform member duties. • Impact of *Wiesen* – grant challenge if greater that 2/3 "work" for senior member.
PROCEDURAL ISSUES ASSOCIATED WITH CHALLENGES	• Article 41 provides the procedure for challenges. The underlying intent of Article 41 is to ensure that each party gets one and only one peremptory challenge, and that causal challenges are liberally granted but for defense only. • When a causal challenge reduces a court below Article 16, as opposed to Article 25, quorum, the parties must exercise all causal challenges then apparent. Peremptory challenges will not be exercised until the CA details additional members to the court and then after causal challenges. • When a peremptory challenge reduces a court below Article 16 quorum, the parties must use or waive any remaining peremptory challenges against remaining members before additional members are detailed to the court. When additional members are detailed, causal challenges are done and the parties get peremptory challenges against the new members.
***BATSON* AND PEREMPTORY CHALLENGES**	• *Batson v. Kentucky* prohibits the use of unlawful discrimination in the exercise of a peremptory challenge. Military case law applies *Batson* to courts-martial. A MJ, upon receiving a *Batson* objection, must ask the party making the peremptory challenge to provide a supporting race and/or gender neutral reason, and then determine whether that reason is in fact race and/or gender neutral. A *trial counsel* may not base a peremptory challenge on a reason that is implausible, unreasonable, or otherwise makes no sense. *Tulloch*. • *Batson* is applicable to the defense. See *Witham*. • The MJ does not have a *sua sponte* duty to raise a *Batson* challenge. In addition, an MJ is not required to conduct individual voir dire in a peremptory challenge situation. • The Supreme Court has not ruled on whether *Batson* prohibits peremptory challenges based on religion. Two federal circuits have held that it does. Civilian cases support that *Batson* does not prohibit peremptory challenges based on age. There is no military case on age.

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