IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **R.H. CAUTHEN**

UNITED STATES

v.

Christopher M. LUCAS
Staff Sergeant (E-6), U.S. Marine Corps

NMCCA 200300760 Decided 15 September 2005

Sentence adjudged 15 January 2002. Military Judge: L.K. Burnett. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Corps Detachment, Fort Leonard Wood, MO.

LT COLIN A. KISOR, JAGC, USNR, Appellate Defense Counsel
LT GUILLERMO J. ROJAS, JAGC, USNR, Appellate Government Counsel

CAUTHEN, Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of four specifications of cruelty and maltreatment and three specifications of assault, in violation of Articles 93 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 893 and 928. After findings were announced, the military judge dismissed two of the assault specifications as being an unreasonable multiplication of charges. The sentenced as adjudged and approved consisted of a reduction to pay grade E-1 and a bad-conduct discharge.

After carefully considering the record of trial, the appellant's assignments of error[1], the Government's response and

[1] I. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN SHE PROHIBITED APPELLANT FROM MAINTAINING HIS INNOCENCE IN HIS UNSWORN STATEMENT ON SENTENCING.

II. THE MILITARY JUDGE ABUSED HER DISCRETION IN GRANTING THE GOVERNMENT'S CHALLENGE OF SSGT [S] FOR CAUSE.

the appellant's reply, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant, a staff sergeant of Marines, was an instructor at the Motor Transport School on board Fort Leonard Wood, Missouri. The maltreatment, cruelty, and assault involved Lance Corporal (LCpl) W, U.S. Marine Corps, LCpl L, U.S. Marine Corps, and Mr. W, formerly an active duty Marine, all of whom were students at the school during April through July of 2000.

LCpl L

The appellant told LCpl L to go up to another staff non-commissioned (NCO) and ask, "What's up, homeboy?" When LCpl L complied, he was called into the shed with the appellant and other Staff NCOs. They made him do pushups, and while he was doing so, the appellant struck LCpl L on the back and legs with a broom handle and fists. Similar incidents occurred on other occasions. The appellant also conducted "tailgate PT" on LCpl L, striking him with a broomstick while LCpl L was required to repeatedly pick up and put down a tailgate from a 5-ton truck.

LCpl W

On several occasions, the appellant tried to loosen the cuff on the sleeve of LCpl W's cammie blouse. On one of the occasions, the appellant began pulling on the cuff sleeve of LCpl W's cammie sleeve to loosen it and, while doing so, asked her if it was "pissing her off." The appellant then punched her in the arm where her sleeve was folded. The punch was hard enough to move her body. The appellant asked, "Did it hurt?" When LCpl W said no, the appellant punched her in the arm below the sleeve.

III. THE MILITARY JUDGE ABUSED HER DISCRETION IN NOT GRANTING THE DEFENSE COUNSEL'S CHALLENGE OF MAJOR [H] FOR CAUSE AND THE TRIAL DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT PRESERVING THE ERROR FOR APPELLATE REVIEW.

IV. THE MILITARY JUDGE ABUSED HER DISCRETION IN NOT GRANTING THE DEFENSE COUNSEL'S CHALLENGE OF GUNNERY SERGEANT [S] FOR CAUSE.

V. THE MILITARY JUDGE COMMITTED PLAIN ERROR IN NOT SUA SPONTE EXCUSING CAPTAIN [H] FOR CAUSE.

VI. THE EVIDENCE ADDUCED AT TRIAL IS BOTH FACTUALLY AND LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION BEYOND A REASONABLE DOUBT.

VII. A BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE FOR APPELLANT, A STAFF SERGEANT WHO HAD SERVED HONORABLY FOR 11 YEARS.

VIII. APPELLANT HAS BEEN DENIED SPEEDY POST-TRIAL REVIEW OF HIS COURT-MARTIAL IN THAT 457 DAYS PASSED BEFORE THE RECORD OF TRIAL WAS DOCKETED AT THE NAVY-MARINE COURT [sic] OF CRIMINAL APPEALS FOR APPELLATE REVIEW.

He then asked, “Did it hurt, then?” Another Staff NCO came up and began to punch LCpl W in the other arm, in full view of the appellant. The appellant punched LCpl W about ten times. The punches could be heard, and they hurt. The appellant punched LCpl W in the right thigh, causing her knee to cave in.

Mr. W

The appellant and another Staff NCO called the entire class to form a tight circle around a toolbox. The shoulder-to-shoulder formation blocked the view of others in the area. The appellant was inside the circle and called out LCpl L. LCpl L was instructed to grasp the desk-high toolbox and was then struck by the appellant and the other Staff NCO multiple times on the back and legs with a broom handle. The broom handle was about one inch thick and about five feet long. After they were through with LCpl L, the appellant instructed Mr. W to come forward and grab the toolbox. The appellant struck Mr. W with the broomstick on the back of the legs.

Restricting the Content of the Unsworn Statement

In his first assignment of error, the appellant asserts that the military judge erred to his substantial prejudice when she prohibited him from maintaining his innocence in his unsworn statement on sentencing. We disagree.

“[W]e review the military judge's decision to restrict the unsworn statement under an abuse of discretion standard, just as we would for any other ruling admitting or excluding evidence. *United States v. Sullivan,* 42 M.J. 360, 363 (C.A.A.F. 1995). However, we must do so with full regard for the largely unfettered nature of an accused’s right to make an unsworn statement.” *United States v. Sowell,* 59 M.J. 954, 955 (N.M.Ct.Crim.App. 2004), *rev. granted*, 60 M.J. 394 (C.A.A.F. 2004).

We will reverse for an abuse of discretion if the military judge’s findings of fact are clearly erroneous or if her decision is influenced by an erroneous view of the law. *Sullivan,* 42 M.J. at 363 (citing S. Childress & M. Davis, 2 Federal Standards of Review § 11.10 at 11-41 (2d ed. 1992)).

The right to make an unsworn statement is a valuable right, and one that is not to be undercut or eroded. *United States v. Partyka,* 30 M.J. 242, 246 (C.M.A. 1990). Although this right is broadly construed, it is not wholly unconstrained. *United States v. Grill,* 48 M.J. 131, 133 (C.A.A.F. 1998).

On findings, regarding the toolbox incident, defense counsel argued the failure of the Government to present witnesses, specifically saying, “Where are the other students who were in

that class? We heard that they were all gathered around in a circle. Where are they at?" Record at 225.

The following exchange occurred during the appellant's unsworn statement:

> [ACC:] As you have seen, at this court-martial, you had three actual Marines come in and say that I did this, that, and the other and you voted against me. The only thing I ask is that, you voted against me, but the information was that -- Mr. [W] said that I put a class in a circle and then I put him in the middle and commenced to beat him on his butt and [LCpl L] on his butt. Now, I ask you generally, why wasn't [sic] those students here to actually testify against that? Because if that did happen, you would have had 20 students sitting there taking the stand right there or you would have seen statements written from those students right there.
>
> Also, there were students that wanted to make fricking ----
>
> MJ: -- excuse me for one minute. I don't mean to interrupt you, but the members have already found you guilty of the offenses that they found you guilty of.
>
> ACC: Yes, ma'am.
>
> MJ: So you need to move on. They are not going to redeliberate and decide those incidents. So you need to move on.
>
> ACC: Yes, ma'am. That's it. Thank you.

Record at 250. The appellant offered nothing further as an unsworn statement.

The only logical consequence of the appellant's statements regarding the failure of the Government to present certain witnesses is to tell the members that their findings are wrong, improperly implying that they should reconsider their verdict. *United States v. Teeter,* 16 M.J. 68, 73 (C.M.A. 1983); *Sowell,* 59 M.J. at 957. Indeed, the appellant characterizes the statements as "maintaining his innocence." However, an accused may not continue to contest adjudged guilt during the sentencing phase of trial.

A general court-martial convicted Teeter of premeditated murder, murder while perpetrating the offense of rape, and rape. He did not testify on the merits, but after he was convicted, he made a sworn statement in extenuation and mitigation. During this testimony, he attempted to resurrect his alibi defense, which had been presented on his behalf on the merits. Pursuant to Government objection, the military judge instructed the

members to disregard that portion of his testimony. The appellant in that case asserted that the military judge erred by instructing the members to disregard those portions of his sworn testimony. The court held that:

> The record discloses that appellant was afforded a full and fair opportunity to present his defenses during the findings phase of the trial, and that he exercised that right extensively. We are aware of no obligation, either under the Constitution or elsewhere, to provide an accused two chances to defend on the merits. In our opinion, the procedures established by the Uniform Code of Military Justice, as implemented by the Manual for Courts-Martial, are generally sufficient to satisfy due-process requirements. As appellant's alibi testimony did not even marginally relate to matters in extenuation or mitigation, the military judge did not err in excluding such irrelevant testimony.

Teeter, 16 M.J. at 73 (citing *United States v. Tobita,* 12 C.M.R. 23 (C.M.A. 1953).

Teeter involved an accused's sworn testimony rather than an unsworn statement; but, as in *Sowell*, it is controlling in this case, 59 M.J. at 958. We note here, as we did in *Sowell*, that it is inappropriate to include matter in an unsworn statement that is "'gratuitously disrespectful toward superiors or the court [or] a form of insubordination or defiance of authority.'" *Grill,* 48 M.J. at 132 (quoting *United States v. Rosato,* 32 M.J. 93, 96 (C.M.A. 1991)). We view the appellant's challenge to the court's decision on findings as reasonably constituting a form of defiance of authority -- a long-recognized restriction on the right of allocution, and one that was specifically identified as such in both *Grill* and *Rosato*.

In our system, an accused may be convicted of an offense by vote of two-thirds of the members. That means that up to one-third of the members might believe that the accused is not guilty, or at least that the Government has not proven its case beyond a reasonable doubt. In addition, those members voting guilty need be convinced beyond a reasonable doubt, not to an absolute certainty, thereby leaving room for residual doubt. "Residual doubt" has been defined as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *Franklin v. Lynaugh,* 487 U.S. 164, 188 (1988)(O'Connor, J., concurring).

In *Franklin*, the Supreme Court held that an accused in a capital case has no constitutional right to raise residual doubt before the sentencing authority.

> Our edict that, in a capital case, "'the sentencer ... (may) not be precluded from considering, as a

> mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense,'" in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. . . . This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Franklin, 487 U.S. at 174 (citations omitted).

In a concurring opinion, Justice O'Connor met the constitutional claim directly:

> Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt. We have recognized that some States have adopted capital sentencing procedures that permit defendants in some cases to enjoy the benefit of doubts that linger from the guilt phase of the trial, see *Lockhart v. McCree*, 476 U.S. 162, 181 (1986), but we have never indicated that the Eighth Amendment requires States to adopt such procedures. To the contrary, as the plurality points out, we have approved capital procedures that preclude consideration by the body of "residual doubts" about guilt.

Franklin, 487 U.S. at 187-188 (citing *Lockhart*, 476 U.S. at 173 n.6).

In *United States v. Thomas,* 43 M.J. 550, 583-84 (N.M.Ct.Crim.App. 1995) *rev'd in part on other grounds*, 46 M.J. 311 (C.A.A.F. 1997), also a capital case, this court, citing *Franklin*, held that failure to instruct on residual doubt was not plain error. Since it is not a constitutional right, even in capital cases, jurisdictions may adopt rules and procedures that allow or preclude consideration of "residual doubt" by the sentencing authority. The rules and procedures adopted for use in courts-martial do not allow it.

Prior to the 1995 edition of the RULES FOR COURTS-MARTIAL 924, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 924 allowed members to reconsider their findings until sentence was announced in open court. Since then, members' reconsideration of findings is allowed only up to the time such findings are announced in open court. Since findings had already been announced in open session, the members in the appellant's case could not reconsider their verdict. R.C.M. 924, MCM (2000 ed.).

At sentencing, the basis in law for the appellant's right to make an unsworn statement is R.C.M. 1001(c)(2)(A), which states, in pertinent part that "[t]he accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings."

We hold that the plain language of the rule specifically limits the scope of the appellant's statement, whether sworn or unsworn. Matters in extenuation and mitigation, though broad concepts, are clearly defined in R.C.M. 1001(c)(1), and by definition pose some kind of limitation on the relevant subject matter of the unsworn statement. *Sowell,* 59 M.J. at 958.

R.C.M. 1001(c)(1) states, in pertinent part:

> (A) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense, which do not constitute a legal justification or excuse.
>
> (B) *Matter in mitigation*. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency.

We need not attempt to probe the outer limits of relevance or the specific restrictions that apply to an appellant's unsworn statement beyond those already established by existing precedent. It is sufficient for our purpose to point out that the military judge narrowly limited the appellant's unsworn statement in this case, forbidding only reference to factual matters directly challenging the verdict. The logical consequence of the appellant's statements was to suggest that the members had no legal right to sentence the appellant at all. The information excluded was thus neither matter in extenuation or mitigation, nor rebuttal under R.C.M. 1001(c), and could not have assisted the members in their task of determining a just sentence. *Sowell*, 59 M.J. at 958.

Even though the appellant stopped and said nothing further when interrupted by the military judge, there is nothing in the record to suggest that he would not have been allowed to present other matter relevant to extenuation and mitigation. Indeed, the appellant submitted documentary evidence in the form of his service record book as well as the testimony of his mother and father.

We conclude that the appellant's mention of the absence of Government witnesses was rightly excluded because: (1) it challenged, during the presentencing hearing, the correctness of the members' decision on the issue of guilt; and, (2) it "did not even marginally relate to" those matters within the relevant

scope of inquiry during the sentencing stage of trial, as defined by R.C.M. 1001(c)(1). For both of these reasons, the military judge's ruling is supported by *Teeter* and R.C.M. 1001(c)(1). With this legal support for her ruling, we cannot find that the military judge abused her discretion by restricting the content of the appellant's unsworn statement.

Granting the Government's Challenge for Cause

In his second assignment of error, the appellant alleges that the military judge abused her discretion in granting the Government's challenge of a member for cause. We disagree.

An accused "'has a constitutional right, as well as a regulatory right, to a fair and impartial panel.'" *United States v. Strand,* 59 M.J. 455, 458 (C.A.A.F. 2004)(quoting *United States v. Wiesen,* 56 M.J. 172, 174 (C.A.A.F. 2001)). A member shall be removed for cause if it is shown that he or she should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). The party that makes the challenge for cause has the burden of proving that grounds for a challenge exist. R.C.M. 912(f)(3).

In evaluating a military judge's ruling on a challenge for cause, it is "appropriate to recognize the military judge's superior position to evaluate the demeanor of court members. A military judge's ruling on a challenge for cause will therefore not be reversed absent a clear abuse of discretion." *United States v. James,* 61 M.J. 132, 138 (C.A.A.F. 2005)(citing *United States v. McLaren,* 38 M.J. 112, 118 (C.M.A. 1993)); *see also United States v. White,* 36 M.J. 284, 287 (C.M.A. 1993).

In the context of challenges brought by a defendant, "military judges must liberally grant challenges for cause." *United States v. Downing,* 56 M.J. 419, 422 (C.A.A.F. 2002)(citing *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996); s*ee also McLaren,* 38 M.J. at 118 (quoting *United States v. Glenn,* 25 M.J. 278, 279 (C.M.A. 1987)). In *James,* our superior court addressed the issue of whether the "liberal grant" policy is applicable when the government brings the challenge.

> Unlike the convening authority, who has the opportunity to provide his input into the makeup of the panel through his power to detail "such members of the armed forces as, in his opinion, are best qualified for the duty," the defendant has only one peremptory challenge at his or her disposal. The liberal grant rule protects the "perception or appearance of fairness of the military justice system." Given the convening authority's broad power to appoint, we find no basis for application of the "liberal grant" policy when a military judge is ruling on the Government's challenges for cause.

James, 61 M.J. at 138 (footnote and citations omitted).

When the military judge asked the panel during general *voir dire* about whether they had formed or expressed an opinion concerning the appellant's guilt or innocence, SSgt S stated, "Yes, ma'am." Record at 51.

When the military judge asked the panel during general *voir dire* about knowledge of witnesses, SSgt S volunteered that he knew the accused. The following exchange took place between the military judge and SSgt S:

> MJ: You know the accused in this case?
>
> MBR: Yes. Less than a year ago, we went to Staff Academy together.
>
> MJ: And were you friends with him or was he just going to the -- what was it?
>
> MBR: The Staff Resident Academy, yes, ma'am.
>
> MJ: Were you just at the Staff Resident Academy together or were you close to him? How well do you know him?
>
> MBR: I would say I know him well enough to formulate an opinion of his character already, ma'am.

Record at 47-48.

When SSgt S was called back for individual *voir dire*, the following exchange took place:

> [Examination by Trial Counsel:]
>
> TC: Staff Sergeant, you indicated that you formed an opinion as to the accused's military character. What's that opinion?
>
> MBR: I have a favorable impression of him, sir.
>
> TC: What does that stem from?
>
> MBR: My time spent with him at Staff Academy.
>
> TC: Were you roommates with the accused?
>
> MBR: No, sir.
>
> TC: What kind of interaction did you have with him at the Academy?

MBR: You have a lot of interaction at the Academy, whether it be PT, we all live in the same barracks, everyone is very close there. I wouldn't say we talked frequently, but you talk a lot. You have a lot of discussions about senior leadership and things like that. I remember a few discussions.

...

TC: If witnesses came on the stand and under oath made allegations against Staff Sergeant Lucas, okay, that he committed an assault upon them and Staff Sergeant Lucas were to take the stand and deny those allegations, the time that you spent with Staff Sergeant Lucas and your opinions that you have with him; is that going to cause you to weigh more favorably his testimony over the testimony of other witnesses?

MBR: It is possible, sir.

...

[Examination by Defense Counsel:]

[DC:] As a Staff Sergeant of Marines, you were able to discern between personal feelings and official business?

MBR: Yes, sir.

DC: So in this case, you understand your official duty is to hear the evidence and to make the decision solely based on the evidence?

MBR: Yes, sir.

DC: You wouldn't necessarily give more credence to the testimony of a Gunnery Sergeant vice the testimony of a Lance Corporal just because of the fact that one is a Gunnery Sergeant and one is a Lance Corporal; is that correct?

MBR: Yes, sir.

DC: In the same light, you wouldn't necessarily give more credence or believe more the testimony of a Staff Sergeant, Staff Sergeant Lucas, than you would that of a Lance Corporal just because of their rank; is that correct?

MBR: Not just because of his rank, that's correct, sir.

DC: And just to clarify in my mind, you are... able to be here today and hear the evidence and make any

decisions that you are asked to make solely based on the evidence that you hear?

MBR: Yes, sir.

...

[Examination by the Military Judge:]

MJ: So until you showed up today and saw the accused and recognized him from school, you had no idea you were coming to a court-martial with this accused and these charges?

MBR: That's correct, ma'am.

MJ: Okay. At this point do you feel that you have formed any opinion as to the offenses on the charge sheet, whether that means he's guilty or not guilty of these offenses?

MBR: Not a firm opinion, but I am already leaning to one side, yes, ma'am.

MJ: What side are you leaning toward?

MBR: Not guilty, ma'am.

MJ: Okay. So essentially, you are saying that if people got up on the stand and testified, witnesses testified against the accused that he committed certain acts against them, right now you are saying that you [are] less likely to believe that these witnesses are telling the truth?

MBR: Not necessarily that they would not be telling the truth, but because I already have a sort of a preopinion in my mind, I would have to hear something overwhelming, if you know what I am saying, ma'am.

MJ: I see what you are saying. Have some evidence which you think was totally believable to show you that the accused was guilty, in other words?

MBR: Yes, ma'am.

MJ: What if he got on the stand? What if some witnesses got on the stand and in your mind they were very credible, they came off very credible; would you necessarily think well, they were credible but I know Staff Sergeant Lucas and I don't think he did this, even if he didn't take the stand?

MBR: It is possible that I could believe the witnesses.

MJ: But you think there is a good likelihood that you are just going [to] base your opinion on your former relationship with him at the Academy?

MBR: Not solely, ma'am.

MJ: But that that might cloud your ability to?

MBR: Yes, ma'am.

Id. At 70-74.

The military judge then granted the Government's challenge cause stating, "I feel that he has expressed a definite opinion as to guilt or innocence of the accused at this point and I am going to grant that challenge." Record at 75.

The appellant characterizes SSgt S's responses as "exactly what the criminal justice system expects of jurors, that they presume the accused is innocent until the government proves beyond a reasonable doubt that the accused is guilty." Appellant's Brief of 30 Mar 2004 at 6; *see* record at 75. But SSgt S's answers evince not a generalized notion of a presumption of innocence but a predisposition based upon a personal relationship with and favorable opinion of the appellant. The discussion following R.C.M. 912(f)(1)(N) provides that grounds for challenge under this subsection may include that the member "has a decidedly *friendly* or hostile attitude toward a party. . ." (Emphasis added). R.C.M. 912(f)(1)(M) provides a grounds for challenge when the member has informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged. SSgt S stated so. While SSgt S provided appropriate responses to the rehabilitative questions, the questions themselves were not on point. They focused solely on rank and not the relationship. In addition, the military judge not only was able to hear the responses but also able to evaluate SSgt S's demeanor.

The military judge allowed a full inquiry by both sides into SSgt S's knowledge of and relationship with the appellant. She questioned the member thoroughly, even bringing him back into the courtroom for a third round of questions. There is no evidence that the military judge applied the liberal grant policy in making her decision. To the contrary, it appears that she carefully considered all of SSgt S's responses and his demeanor in reaching her decision. We conclude that the military judge did not abuse her discretion in granting the Government's challenge for cause.

Denying the Defense Challenges for Cause and Not *Sua Sponte* Excusing a Member

At trial, the appellant challenged for cause two members, Major (Maj) H and Gunnery Sergeant (GySgt) S, pursuant to R.C.M. 912(f)(1)(N). The appellant questioned, but did not challenge, Captain (Capt) H. In his third assignment of error, the appellant asserts that the military judge erred when she denied his challenge for cause to Maj H and that trial defense counsel was ineffective for failing to preserve the issue for appellate review. In his fourth assignment of error, the appellant asserts that the military judge erred when she denied his challenge for cause to GySgt S. In his fifth assignment of error, the appellant asserts that the military judge erred when she failed to excuse Capt H *sua sponte.* We disagree.

While R.C.M. 912(f)(1)(N) applies to both actual and implied bias, the thrust of this rule is implied bias. *United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997). Moreover, "[t]he focus of the rule is on the perception or appearance of fairness of the military justice system[,]" *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995), since "[t]he rule 'reflects the President's concern with avoiding even the perception of bias, predisposition, or partiality.'" *Minyard*, 46 M.J. at 231 (quoting *United States v. Lake*, 36 M.J. 317, 323 (C.M.A 1993)).

A military judge is given "great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member." *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000)(citing *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)). This court, however, gives less deference to the military judge when reviewing a "finding on implied bias because it is objectively 'viewed through the eyes of the public.'" *Napolitano*, 53 M.J. at 166 (quoting *Warden*, 51 M.J. at 81). "Implied bias is viewed through the eyes of the public, focusing on the appearance of fairness." *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)(citing *Dale*, 42 M.J. at 386). As a result, an objective standard is used when reviewing the judge's decision regarding implied bias.

Thus, "'[i]ssues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo.'" *United States v. Miles*, 58 M.J. 192, 195 (quoting *Downing*, 56 M.J. at 422). Furthermore, "when there is no actual bias, 'implied bias should be invoked rarely.'" *Warden*, 51 M.J. at 81-82 (quoting *Rome*, 47 M.J. at 469). "'[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.'" *United States v. Lavender*, 46 M.J. 485, 488 (C.A.A.F. 1997)(quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). Instead, our superior court has observed that "[i]mplied bias exists when, regardless of an individual member's disclaimer of bias, 'most people in the same position would be prejudiced [i.e. biased].'" *Napolitano,* 53

M.J. at 167 (citations omitted). In making judgments regarding implied bias, we look at the totality of the factual circumstances. *Strand*, 59 M.J. at 458-59.

Maj H

Maj H disclosed that in 1984 or 1986 his wife (then his girlfriend), while working as a hostess in a restaurant, had been assaulted and threatened with a knife by two of the kitchen staff. Although he questioned Maj H about family members involved in law enforcement, defense counsel asked no questions about the assaults. The military judge, however, did ask questions concerning the assaults and Maj H's ability to put the incidents out of his mind and judge the facts of the case fairly. Maj H stated that he could look at the facts and sentence issues fairly. When given another opportunity to question Maj H, defense counsel declined.

The appellant challenged Maj H on the grounds that Maj H would not be able to put the incident involving his wife out of his mind during deliberations. In denying the appellant's challenge, the military judge stated:

> [T]he Major stated that he could forget essentially or take it out of his mind the fact that this happened to his spouse. It happened quite a while ago. Obviously, it was a civilian situation, not involving anything regarding military. She worked in a hotel or the kitchen of a hotel, if I recall correctly. It was a chef that took a sushi knife to her. He didn't appear at all to be affected by that and for that reason, I am going to deny that challenge.

Record at 76.

GySgt S

GySgt S disclosed that his daughter had been raped by two men when she was twelve years old and that the case was pending in civilian court. Defense counsel asked about the results of the case, and GySgt S replied that the perpetrators had been found guilty. When defense counsel asked whether the incident would cloud his ability to be impartial, GySgt S replied, "Not at all, sir." *Id.* at 66. Even so, the military judge asked questions concerning the incident and GySgt S's ability to put the incident out of his mind and judge the facts of the case fairly. GySgt S stated that it would not cloud his ability to fairly evaluate the evidence. When given another opportunity to question GySgt S, defense counsel declined.

The appellant then challenged GySgt S on the grounds that he would not be able to put the incident involving his daughter out of his mind during deliberations in denying the challenge, the military judge stated:

> I don't feel that the offenses that were committed against GySgt [S's] daughter are even remotely similar to the offenses listed on the charge sheet. Obviously, there is one offense with regard to potential sexual harassment on a female, but, I think it's not that similar of a case. GySgt [S] did not indicate that he would be [a]ffected by the past experiences and although it was obviously a very traumatic event for him and his family, if it were a different type of situation, indecent assaults, acts of that nature, rape, then I would say perhaps he would be [a]ffected by it. But I don't think he's going to be [a]ffected in this case.

Id. at 76-77.

Capt H

Capt H disclosed that he was trial counsel's neighbor and friend and knew him well enough to hide Christmas presents at his house. Defense counsel asked one question about whether Capt H's relationship with trial counsel would cause him to be more apt to believe the Government's evidence than defense evidence. Capt H replied, "No, not at all." *Id.* at 62. Nevertheless, the military judge questioned Capt H about his relationship with the trial counsel and any potential bias. Capt H stated that he could look at the evidence impartially, that he would not vote guilty just because he knew trial counsel and that, as a Captain in the Marine Corps, he felt the same about trial and defense counsel. When given another opportunity to question Capt H, defense counsel declined.

The appellant did not challenge Capt H. He now asserts that the military judge should have excused him *sua sponte* because of his relationship to the trial counsel.

This is not a case where the salient facts went unnoticed or unexamined on the record. We are satisfied with the transparent nature of the military judge's inquiry with the appellant and his counsel present, and with the deliberate manner of the military judge's *voir dire*. The appellant has not made a showing of actual bias, nor argued that the incidents or relationship, in fact, influenced the panel's deliberations. In addition, each of the questioned members stated that they would not be influenced by the incidents or relationship. A "'member's unequivocal statement of a lack of bias can . . . carry weight' when considering the application of implied bias." *Strand*, 59 M.J. at 460 (quoting *United States v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997).

Based on the totality of these circumstances, we hold that Maj H's, Capt H's, and GySgt S's service as members of the appellant's court-martial did not raise a significant question of legality, fairness, or impartiality, to the public observer

pursuant to the doctrine of implied bias. The military judge did not abuse her discretion and we find no plain error.

The appellant failed to preserve his challenge to Maj H in the manner prescribed by R.C.M. 912(f)(4). Despite this fact, we have fully considered the appellant's assignment of error regarding Maj H. We conclude that since the military judge did not err when she denied the appellant's challenge to Maj H, the appellant suffered no prejudice from trial defense counsel's failure to preserve the issue. Therefore, we decline to grant relief on this ground. We find these three assignments of error lacking in merit.

Post-Trial Delay

In his eighth assignment of error, the appellant asserts that he has been denied speedy post-trial review of his court-martial in that 457 days passed before the record of trial was docketed with this court for appellate review. We disagree.

The salient dates and actions are set out below.

15 JAN 02	Sentenced
7 JUN 02	Record of trial authenticated by Military Judge
30 OCT 02	Staff Judge Advocate's Recommendation (SJAR)
4 NOV 02	SJAR served on defense counsel
18 NOV 02	Defense request for 20 additional days in which to submit clemency matters
6 DEC 02	Defense clemency request submitted
23 DEC 02	Supplemental SJAR submitted
28 JAN 03	Convening Authority's Action / Court-Martial Order
17 APR 03	Case docketed at NAMARA

The appellant does not contend that the delay rises to the level of a due process violation, but rather asserts that setting aside the bad-conduct discharge is appropriate under this court's powers pursuant to Article 66, UCMJ. However, we will also consider whether a due process violation occurred.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal;, and, (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable,

there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id*. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.* (quoting *Toohey*, 60 M.J. at 102).

We conclude that the delay in this case is not unreasonable. In addition, in the record, we find no assertion of the right to a timely appeal, nor do we find any claim or evidence of prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay.

Appellate relief under Article 66(c), UCMJ, should be viewed as a last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). In the absence of any claim or evidence of prejudice, or any other basis for relief due to the post-trial delay, we decline to grant relief on this ground. *Id. at* 224; *see also United States v. Bigelow*, 57 M.J. 64, 69 (2002 C.A.A.F.); *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001); *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993).

Conclusion

We have considered the remaining assignments of error and find them to be without merit. Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court