30 May 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant,*	)	APPELLANT'S BRIEF IN SUPPORT OF ISSUES PRESENTED
v.	)	
	)	USCA Dkt. No. 12-5002/AF
Staff Sergeant (E-5), RAY A. VAZQUEZ, USAF, *Appellee.*	)	Crim. App. Dkt. 37563

APPELLANT'S BRIEF IN SUPPORT OF ISSUES PRESENTED

TYSON D. KINDNESS, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 33631

SCOTT C. JANSEN, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 33338

LINELL A. LETENDRE, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 35346

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 27428

DON M. CHRISTENSEN, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
Court Bar No. 35093

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant,*	)	APPELLANT'S BRIEF IN SUPPORT OF ISSUES PRESENTED
v.	)	
	)	USCA Dkt. No. 12-5002/AF
Staff Sergeant (E-5), RAY A. VAZQUEZ, USAF, *Appellee.*	)	Crim. App. Dkt. 37563

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT APPELLEE WAS NOT AFFORDED A FUNDAMENTALLY FAIR TRIAL, AS GUARANTEED BY MILITARY DUE PROCESS AND THE UCMJ, WHEN TWO REPLACEMENT COURT MEMBERS DETAILED AFTER TRIAL ON THE MERITS HAD BEGUN WERE PRESENTED RECORDED EVIDENCE PREVIOUSLY INTRODUCED BEFORE THE MEMBERS OF THE COURT IN COMPLIANCE WITH ARTICLE 29, UCMJ, AND R.C.M. 805(d)(1).

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FAILING TO FIND WAIVER OR BY FAILING TO CONDUCT A PLAIN ERROR ANALYSIS; INSTEAD, THE COURT INCONGRUOUSLY FOUND THE ALLEGED VIOLATION OF APPELLEE'S RIGHT TO MILITARY DUE PROCESS WAS PER SE PREJUDICIAL DESPITE DECLARING THAT THE ERROR WAS NOT STRUCTURAL.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has

jurisdiction to review this case under Article 67(a)(2), Uniform Code of Military Justice (UCMJ).

Statement of the Case

On 1-8 June 2009, Appellee was tried by general court-martial comprised of officer members. Contrary to his plea, Appellee was convicted of aggravated sexual contact with a child in violation of Article 120, UCMJ. (J.A. 40.) The court-martial panel sentenced Appellee to a reprimand, reduction to the grade of E-1, total forfeitures, eight years confinement, and a dishonorable discharge. (J.A. 41.) On 30 September 2009, the convening authority approved the sentence and, except for the dishonorable discharge, ordered execution of the sentence. (J.A. 42.)

On 11 February 2011, Appellee raised the following assignments of error to AFCCA:

I.

> APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN THE MILITARY JUDGE ADMITTED THE ALLEGED VICTIM'S STATEMENTS TO HER MOTHER AS RESIDUAL HEARSAY.

II.

> THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED THE ALLEGED VICTIM'S STATEMENTS TO DR. HOLLANDER PURSUANT TO MIL. R. EVID. 803(4) WHERE THERE WAS NO EVIDENCE OF A MEDICAL DIAGNOSIS AND NO EXPECTATION OF A MEDICAL BENEFIT.

III.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDING OF GUILTY FOR AGGRAVATED SEXUAL CONTACT WITH A CHILD WHERE THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT ENGAGED IN SEXUAL CONTACT WITH THE ALLEGED VICTIM.

On 11 October 2011, AFCCA specified the following issues:

I.

WHETHER THE APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TESTIMONY OF THE MAJORITY OF THE GOVERNMENT'S WITNESSES, TO INCLUDE THE PURPORTED VICTIM, AMM, WAS READ TO TWO OF THE COURT-MARTIAL PANEL MEMBERS IN ACCORDANCE WITH R.C.M. 805(d)(1) WHILE THE OTHER FOUR MEMBERS WERE ABLE TO OBSERVE THE IN-COURT DEMEANOR OF THE SAME WITNESSES.

II.

DID THE MILITARY JUDGE ERR TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT BY NOT SUA SPONTE DECLARING A MISTRIAL IN ACCORDANCE WITH R.C.M. 915(a) WHEN A COURT MEMBER WAS DISMISSED AND TWO NEW MEMBERS WERE ADDED AFTER THE GOVERNMENT HAD PRESENTED THE MAJORITY OF ITS CASE.

III.

DID THE MILITARY JUDGE ERR TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE BY NOT INQUIRING OF THE PARTIES, IN ACCORDINACE WITH R.C.M. 915(b), WHETHER A MISTRIAL SHOULD BE GRANTED WHEN A COURT MEMBER WAS DISMISSED AND TWO MEMBERS WERE ADDED AFTER THE GOVERNMENT HAD PRESENTED THE MAJORITY OF ITS CASE.

On 19 March 2012, AFCCA issued a decision finding that Appellee "was not afforded a fundamentally fair trial, as guaranteed by military due process and the UCMJ, when two of the six court members were added to the panel after five of the Government's six witnesses had already testified and thus did not receive a substantial portion of the Government's evidence in the same manner as the other four panel members."[1] United States v. Vazquez, __ M.J. __, ACM 37563, slip op. at 6 (A.F. Ct. Crim. App. 19 March 2012) (Vazquez I). AFCCA concluded that, as applied in this case, the application of R.C.M. 805(d)(1) resulted in a structural error, which was per se prejudicial and mandated reversal of Appellee's conviction. Id. at 14. Accordingly, AFCCA set aside the findings and sentence and dismissed the charge.

On 18 April 2012, the United States filed a motion for reconsideration en banc with AFCCA. On 27 April 2012, AFCCA issued an order denying reconsideration en banc, but granting reconsideration before the original panel. After reconsidering, AFCCA's withdrew its original decision dated 19 March 2012 and published a new decision dated 27 April 2012. United States v. Vazquez, __ M.J. __, ACM 37563 (A.F. Ct. Crim. App. 27 April 2012) (Vazquez II). The new opinion explained the Court did not intend to find the error constituted structural error, but instead found that the error was per se prejudicial to Appellee's rights without

[1] Given its ruling, AFCCA concluded it was unnecessary to consider the remaining assignments of error. Vazquez, slip op. at 3, n.3.

conducting a prejudice analysis.[2] On __ May 2012, The Judge Advocate General of the United States Air Force certified the two issues contained herein for consideration by this Court under Article 67(a)(2).

Statement of Facts

Appellee elected to be tried by officer members. (J.A. 38.) Appellee's panel at the time of opening statements consisted of five officer members, satisfying the statutory requirement to constitute quorum. (J.A. 43.)

After opening statements and testimony from five government witnesses, to include the victim, one of the court members advised the military judge that he suddenly realized he had a working relationship with the victim's mother and that she was within his rating chain.[3] (J.A. 144-49.) After the court member's disclosure, the military judge inquired whether the defense wanted to challenge the member. (J.A. 148-49.) After a brief recess, trial defense counsel challenged the court member for cause, which was granted by the military judge and resulted in the court-martial panel falling below quorum. (J.A. 150-51.) The military judge informed the panel of the member's excusal,

[2] As will be explained more thoroughly in the analysis of the second certified issue, the government contends the Court's finding of per se prejudice is the functional equivalent of and virtually indistinguishable from a finding of structural error.

[3] During a recess, the court member passed the victim's mother in the hallway and she asked him if he was "on this trial," to which he responded affirmatively. (J.A. 147-48.) This was the first time the court member realized the identity of the victim's mother.

advised the panel that new court members must be detailed, and that a prolonged recess was necessary to finalize the replacement procedure. (J.A. 152-53.) The court-martial adjourned for the day for the convening authority to detail new members. (J.A. 153.)

Two days later, the convening authority detailed five additional military members to the court-martial. (J.A. 154.) The military judge inquired whether trial defense counsel objected to the appointment of new members, to which the defense did not. (Id.) Before conducting voir dire, the military judge explained the procedural posture of the case to the new members and provided general background information describing the purpose for detailing them mid-trial. (J.A. 155.) After voir dire, two members were added to the existing panel. (J.A. 156-57.) The military judge explained to the replacement members the procedure that would be followed for them to receive the previously introduced evidence. (J.A. 157-58.)

During an Article 39(a) session, the military judge noted that during an R.C.M. 802 conference the parties discussed proceeding with the court-martial in compliance with R.C.M. 805(d). (J.A. 160.) Based on discussions with the parties, the military judge announced that the government would have an opportunity to make opening remarks to the new court members, as well as the defense, if it chose to do so. (Id.) The military

judge announced that both sides had reviewed the verbatim transcripts of the previous testimony and that counsel for both parties had agreed upon a procedure for narrating the transcripts to the new members. (Id.) The military judge then asked, "do counsel for either side object to our proceeding in that manner or have anything else they wish to place on the record in this regard?" (J.A. 161.) Neither counsel objected or supplemented the record. (Id.)

Trial counsel provided the new members opening remarks, (Id.), trial defense counsel reserved opening statement, (J.A. 164), and the prior testimony was narrated to the new members by both counsel. (J.A. 165-236.) The new members joined the existing panel after the testimony from the five witnesses was read to them. (J.A. 238.) The victim's mother then testified before the entire panel and the government rested its case. (J.A. 238-75.)

Trial defense counsel presented opening statement and Appellee then testified in his own defense. (J.A. 276-308.) The defense then introduced a stipulation of expected testimony from the victim's grandmother, (J.A. 309-10), published several affidavits attesting to Appellee's good military character and character for truthfulness, (J.A. 310, 312), admitted a receipt from McDonald's, (J.A. 312-13), offered testimony from the victim's aunt, (J.A. 314-44), and testimony from a special agent

from the Air Force Office of Special Investigations. (J.A. 347-57.)

At the close of evidence, the military judge held an Article 39(a) session to discuss findings instructions, whereby he stated that he intended to give the standard instruction on credibility of witnesses. (J.A. 360.) The defense did not object to the military judge giving the standard instruction. (Id.) After the parties had time to review the written findings instructions, the military judge inquired whether either side objected to any findings instructions before calling the members, to which the defense stated there were none. (J.A. 361.) The military judge then provided the members the standard instruction regarding witness credibility:

> You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court, prejudices and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with each side; and how each witness might be affected by the verdict.

(J.A. 362.)

At the close of arguments by counsel, the military judge again inquired whether the defense objected to the findings instructions, and counsel confirmed he did not. (J.A. 363.) The

military judge also confirmed the members had no questions regarding the findings instructions. (J.A. 364.) At no time in the trial did the defense object to the military judge's compliance with Article 29, UCMJ, and R.C.M. 805(d)(1). In fact, the defense expressly and repeatedly consented to the procedure. Furthermore, the defense never requested a mistrial.

Until the issue was specified by AFCCA, Appellee did not allege a violation of his military due process rights in his original assignments of error. Appellee also has not asserted his counsel were ineffective for agreeing to proceed with trial in accordance with Article 29, UCMJ, and R.C.M. 805(d)(1).

Summary of Argument

First, AFCCA erred by finding Article 29(b), UCMJ, and R.C.M. 805(d)(1) facially unconstitutional when holding that Appellee was not afforded a fundamentally fair trial, as guaranteed by military due process and the UCMJ, when two replacement court members detailed after trial on the merits had begun were presented recorded evidence previously introduced before the members of the Court in compliance with Article 29, UCMJ, and R.C.M. 805(d)(1). The Sixth Amendment right to a jury trial has no application in the military justice system. A servicemember's right to be tried by court-martial panel is a statutory and regulatory right afforded by Congress and the President. As such, Congress and the President have fairly and expressly determined the appropriate due

process protections afforded to servicemembers when a court-martial panel is reduced below quorum after evidence has been introduced on the merits. When applying the appropriate analytical framework, this Court should conclude that Appellee's interest in having the same panel receive evidence in the same manner is not such an extraordinarily weighty factor as to overcome the careful balance struck by Congress in Article 29, UCMJ, and the President in R.C.M. 805(d)(1). Therefore, Appellee's right to military due process was not violated.

Second, AFCCA erroneously concluded that the application of Article 29, UCMJ, and R.C.M. 805(d)(1), as applied in this case, resulted in per se prejudice, which mandated reversal of Appellee's conviction. Although upon reconsideration AFCCA disclaimed a finding of structural error, the Court concluded that the alleged violation of Appellee's right to military due process was per se prejudicial. AFCCA erred by not finding Appellee voluntarily waived a known right. Moreover, AFCCA's finding of per se prejudice without conducting a plain error analysis, including testing for prejudice, is the functional equivalent of a finding of structural error. This Court, as well as the Supreme Court of the United States, has routinely held that structural error is reserved for a very limited class of cases. In this case, the application of Article 29, UCMJ, and R.C.M. 805(d)(1) did not affect the structural framework within

which the entire trial proceeded. Thus, because Appellee failed to object to proceeding with trial pursuant to Article 29, UCMJ, and R.C.M. 805(d)(1), AFCCA should have concluded Appellee waived the error or applied a traditional plain error analysis and tested for prejudice instead of presuming prejudice. When evaluating the facts of this case, any error caused by following the questioned statutory and regulatory provisions was harmless beyond a reasonable doubt. Therefore, the United States respectfully requests this Honorable Court reverse AFCCA's decision and remand this case to the lower Court for further Article 66, UCMJ, review of Appellee's unresolved assignments of error.

Argument

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT APPELLEE WAS NOT AFFORDED A FUNDAMENTALLY FAIR TRIAL, AS GUARANTEED BY MILITARY DUE PROCESS AND THE UCMJ, WHEN TWO REPLACEMENT COURT MEMBERS DETAILED AFTER TRIAL ON THE MERITS HAD BEGUN WERE PRESENTED RECORDED EVIDENCE PREVIOUSLY INTRODUCED BEFORE THE MEMBERS OF THE COURT IN COMPLIANCE WITH ARTICLE 29, UCMJ, AND R.C.M. 805(d)(1).

Standard of Review

Whether Appellee was afforded constitutional due process under Article 29, UCMJ, and R.C.M. 805(d)(1) is a question of law reviewed de novo. *See* United States v. Wright, 53 M.J. 476, 478

(C.A.A.F. 2000) (describing the constitutionality of a statute is a question of law reviewed de novo).

Law and Analysis

The Sixth Amendment right to a jury trial has not been extended to servicemembers.[4] The right to a fair and impartial court-martial panel is a statutory and regulatory right afforded by Congress and the President. In this context, Congress and the President have expressly defined the procedural due process protections afforded to servicemembers when a court-martial panel is reduced below quorum after evidence has been introduced on the merits. The following discussion demonstrates that Article 29, UCMJ, and R.C.M. 805(d)(1) satisfy due process requirements and provide servicemembers a fair trial. Congress did not intend to provide servicemembers the right to have the same panel receive evidence in the same manner when the panel is reduced below quorum because military necessity requires greater flexibility to ensure that the military justice system does not overburden the effective execution of the military mission. Furthermore, the procedural

[4] AFCCA's decision failed to recognize this distinction and improperly relies on federal case law regarding the fundamental purpose of a jury; however, when evaluating whether error occurred, these cases are irrelevant to military justice practice. *See* Vazquez II, slip op. at 10 (citing Williams v. Florida, 399 U.S. 78, 100 (1970) and United States v. Olano, 62 F.3d 1180 (9th. Cir. 1995) (Reinhardt, J., dissenting)). These cases were examined under the Sixth Amendment right to trial by jury, which has not been extended to servicemembers, and the procedural protections in Fed. R. Crim. P. 23 and 24, which are inapplicable in a military context. *See also* United States v. Dease, No. 12-6001, slip op. at 22 (C.A.A.F. 1 May 2012) (Erdmann, J., concurring) (opining that decisions from the Circuit Courts of Appeals do not inform the Court's analysis regarding military specific regulations).

requirements in Article 29, UCMJ, and R.C.M. 805(d)(1) provide adequate safeguards to protect Appellee's right to confrontation and do not create a biased panel. Therefore, Appellee's right to military due process was not violated.

1. Congress and the President are entitled to establish procedural due process rights for trial by court-martial panel.

Article I, Section 8, Clause 14, of the United States Constitution authorizes the Congress "[t]o make Rules for the Government and Regulation of the land and naval forces[.]" United States v. Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004). Congress has relied upon this congressional provision to establish the court-martial as the institution to provide military justice to servicemembers. Id. This Court has consistently stated "the Sixth Amendment right to trial by jury with accompanying consideration of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial." Id. (citing United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973)); United States v. Witham, 47 M.J. 297, 301 (C.A.A.F. 1997). A servicemember has no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen. Dowty, 60 M.J. at 163 (citations omitted).

A servicemember's rights when electing to be tried by court-martial panel has been expressly defined by Congress in Articles

16, 25, 29, and 41, UCMJ, and by the President utilizing his delegated powers through Article 36, UCMJ, in Rules for Courts-Martial (R.C.M.) 502, 503, 505, 805, and 912. When a panel is reduced below quorum during a general court-martial, Congress has outlined the procedural due process protections afforded to servicemembers for going forward when evidence has been presented on the merits:

> Whenever a general court-martial . . . is reduced below the applicable minimum number of members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than the applicable minimum number of members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

10 U.S.C. § 829(b)(1).[5]

Consistent with this legislative provision, the President has promulgated R.C.M. 805(d)(1) providing:

> When after presentation of evidence on the merits has begun, a new member is detailed under R.C.M. 505(c)(2)(B), trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to the new

[5] A discrepancy exists in the language of 10 U.S.C. § 829(b)(1) and Article 29, UCMJ, in the 2005, 2008, and 2012 editions of the Manual for Courts-Martial (MCM). Article 29, UCMJ, in the MCM has not incorporated the 2001 amendments striking out the words "five members" and inserting the words "the applicable minimum number of members" in two places within subsection (b)(1). Article 29, UCMJ, also does not contain the creation of subsection (b)(2) by the same amendment. As such, the government relies on the statutory language of 10 U.S.C. § 829(b)(1) when referring to the procedural due process protections afforded by Congress in Article 29, UCMJ.

> member, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

Congress and the President have clearly and unambiguously defined the procedural due process protections afforded to servicemembers in the realm of trial by court-martial panel. These rights arise from statute and regulation, vice the Sixth Amendment. There is a strong presumption of constitutional validity when interpreting congressional acts in the regulation of the armed forces. United States v. Morrison, 529 U.S. 598, 607 (2000) (discussing that due respect for the decisions of a coordinate branch of government demands that courts invalidate congressional enactments only upon a plain showing that Congress exceeded its constitutional bounds); *see also* Parker v. Levy, 417 U.S. 733, 756 (1974) (describing the "strong presumptive validity" that attaches to an Act of Congress and stating that our highest Court consistently seeks an interpretation which supports the constitutionality of legislation).

In this case, Appellee was afforded all due process protections guaranteed in Article 29, UCMJ, and R.C.M. 805(d)(1). Therefore, AFCAA erred by affording Appellee greater procedural due process protections than established by Congress and the President.

2. Servicemembers are entitled to a fair and impartial court-martial panel through the Due Process Clause of the Constitution and the statutory and regulatory provisions established by Congress and the President.

Although a military accused has no right to a trial by jury under the Sixth Amendment, he does have a statutory right to trial by members and a right to due process of law under the Fifth Amendment. Witham, 47 M.J. at 301. Included in an accused's right to due process of law is the constitutional and regulatory right to a fair and impartial panel. Dowty, 60 M.J. at 169; United States v. Downing, 56 M.J. 419, 421 (C.A.A.F. 2002). In this case, the application of the statutory procedures prescribed by Congress and the regulatory procedures promulgated by the President provided a forum for a fundamentally fair trial.

a. The evolution of due process protections in the military justice system.

AFCCA's opinion rested on the premise that the application of Article 29, UCMJ, and R.C.M. 805 resulted in a violation of Appellee's right to military due process. In reaching its decision, AFCCA relied on the principle advanced in United States v. Clay, 1 C.M.R. 74 (C.M.A. 1951), that there are certain "fundamental rights inherent in the trial of military offenses which must be accorded to an accused before it can be said that he has been fairly convicted." Id. at 77. One of these fundamental rights is the right to due process of law. In Clay, this Court's predecessor examined whether the appellant was denied a fair trial

when the president closed the court-martial to consider the findings without charging the court on the elements of the offense, the presumption of innocence, and the burden of proof, as required by Article 51(c), UCMJ, and 73(b), MCM (1951 ed.). Id. at 76. The Court belabored the importance of the instructions at issue in the case to impress on courts-martial the undesirability of short-cutting the plain mandate of Congress. Id. at 80. The Court noted:

> [t]he only way by which Congress can make certain what it deems important is by saying so in its legislative pronouncement. In this instance, it proclaimed that the giving of instructions was a valuable right, the court-martial crashed through that mandate, and now we are asked to say that right was unsubstantial. It was for congress to set the rules governing military trials. It legislated on the subject and not without adequate consideration.

Id.

Congress was clear in the legislative act at issue in this case. Unlike in Clay where the court-martial failed to follow the congressional mandate, the military judge in this case followed the clear legislative and executive pronouncements in Article 29, UCMJ, and R.C.M. 805.

The concept of trial courts following legislative pronouncements was reinforced in the concurring opinion in United States v. Hughes, 48 M.J. 700, 732 (A.F. Ct. Crim. App. 1998), where the Court stated, "**in the absence of clear guidance from the**

legislature, the judiciary must apply the legislation in a manner consistent with military due process. Ensuring a fair trial is the bedrock of military due process and the *raison d'etre* of the trial judiciary." (emphasis added). The majority in Vazquez selectively quoted this statement of law by omitting the portion of the quote referencing the importance of following clear guidance from the legislature. Vazquez II, slip op. at 5. Here, Congress has deliberately legislated to establish procedural due process governing trial by members in military courts-martial. AFCCA erred when it misapplied notions of military due process inconsistent with Congress' clear guidance and intent.

AFCAA also failed to utilize the appropriate legal test when considering notions of due process as outlined by our highest Court in Weiss v. United States, 510 U.S. 163 (1994). In Weiss, the Supreme Court examined the measures of protection afforded to military defendants in the realm of military due process. The Court confirmed that Congress is subject to the requirements of the Due Process Clause when legislating in the area of military affairs; however, in determining what process is due, courts "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces . . . ." Id. at 176-77 (citations omitted). The Supreme Court recognized that "the tests and limitations [of due process] may differ because of the military context." Id. "The difference arises

from the fact that the Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" Id. (citing Chappell v. Wallace, 462 U.S. 296, 301 (1983)). "Judicial deference thus 'is at its apogee' when reviewing congressional decisionmaking in this area." Id. (citing Rostker v. Goldberg, 453 U.S. 57, 70 (1981)). The Supreme Court's deference extends to rules relating to the rights of servicemembers: "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military . . . . [the Supreme Court] ha[s] adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated." Id. (citing Solorio v. United States, 483 U.S. 435, 447-48 (1987)).

When explaining the appropriate judicial standard to be applied in determining whether the Due Process Clause requires that servicemembers appearing before a summary court-martial be assisted by counsel, the Supreme Court asked "whether the factors militating in favor of counsel at summary court-martial are so extraordinarily weighty as to overcome the balance struck by Congress." Id. at 177-78 (citing Middendorf v. Henry, 425 U.S. 25, 44 (1976)). The Court analyzed the same question in Weiss regarding fixed terms of office for military judges.

b. The appropriate analytical framework in this case.

When analyzing military due process, the Supreme Court has consistently held that the appropriate analytical framework is whether the appellant's alleged right is such an extraordinarily weighty factor as to overcome the balance struck by Congress. Middendorf, *supra*; Weiss, *supra*. This Court has previously recognized that it is "generally not free to 'digress' from applicable Supreme Court precedent applying the Constitution to criminal trials." Witham, 47 M.J. at 300. **Therefore, the appropriate test is whether Appellee's interest in having the same panel receive evidence in the same manner is such an extraordinarily weighty factor as to overcome the careful balance struck by Congress in Article 29, UCMJ, and the President in R.C.M. 805(d)(1).**

i. Congress did not intend and military due process does not require servicemembers to have the same panel receive the evidence in the same manner when the panel is reduced below quorum after trial has begun on the merits.

Although Congress on numerous occasions has revised the procedures governing courts-martial, including revisions to Article 29, UCMJ, it has never required that the same court-martial panel receive evidence in the same manner to provide due process of law to servicemembers. Article 29, UCMJ, 10 U.S.C. § 829, has been amended by Congress three times since its adoption in 1956. The first amendments occurred as part of the Military

Justice Act of 1968. PUB. L. NO. 90-632, §2(11)(A-D). In the 1968 amendments, Congress added language to subsection (b) of Article 29, UCMJ, requiring that only the evidence which has been introduced before the members of the court be read to the court and that all evidence, not merely testimony, be included. Id. The revision resulted in the following language being added to Article 29(b): "The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides." Id. The construction of this sentence is identical to the text of the statute as it currently exists. *See* 10 U.S.C. § 829(b)(1).

Congress has amended Article 29, UCMJ, on two occasions since implementing the foregoing language in 1968 related to reading back testimony to new court members. *See* The Military Justice Act of 1983, PUB. L. NO. 98-209; The National Defense Authorization Act 2002, PUB. L. NO. 107-107, § 582(C). Over the last forty-four years, Congress has not made substantive amendments to the procedure for receiving evidence when new court members are detailed to a panel after trial on the merits has begun. Although "Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice," it is inescapable that Congress has chosen to

allow for recorded evidence to be read back to new court members after trial on the merits has begun consistent with constitutional notions of a fundamentally fair trial. Weiss, 510 U.S. at 762.

ii. A valid military necessity exists for the procedural requirements under Article 29, UCMJ, and R.C.M. 805(d)(1).

"[The Supreme Court] has long recognized that the military is, by necessity, a specialized society separate from civilian society." Levy, 417 U.S. at 743. Similarly, the military has, by necessity, developed laws and traditions of its own during its long history. Id. The demarcation between military and civilian communities is driven by the fact that "it is the primary business of armies and navies to fight or ready to fight wars should the occasion arise." Id. (citing United States ex. Rel. Toth v. Quarles, 350 U.S. 11, 17 (1890)). "Just as military society has been a society apart from civilian society, so '(m)ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. Id. (citing Burns v. Wilson, 346 U.S. 137, 140 (1953)); Witham, 47 M.J. at 300-01 (acknowledging the differences between the military justice system and the various civilian criminal justice systems).

Congress struck an appropriate balance when establishing the procedural rights of servicemembers who elected to be tried by

court-martial panel. This balance included ensuring servicemembers were tried by fair and impartial members by implementing the procedural safeguards in Articles 16, 25, 29, and 41, UCMJ, but at the same time, providing sufficient flexibility in the military justice system for commanders to execute the mission. AFCCA's decision expressly contradicts Congress' intent and ignores military necessities for such a procedure.

Congress created the armed forces to preserve the peace and security, and to provide for the defense of the United States against any nation responsible for aggressive acts that imperil the peace and security of the United States. 10 U.S.C. § 3062(a). To accomplish this end, the armed forces serve two primary functions: to train to defend the United States or to engage in armed conflict in defense of the United States, both of which are equally vital to the success of our national defense. *See generally* 10 U.S.C. § 3062(b). Whether training for or engaging in the prosecution of war, it is essential that military commanders have the maximum resources available to them to accomplish their strategic, operational, and tactical missions. Military officers and senior enlisted members traditionally comprise military courts-martial. Article 25(a)&(c)(1). These military members serve critical functions in planning for, training for, and executing military missions at home and abroad.

Every court member, either officer or enlisted, has received specialized training to fulfill a specific role in protecting our national defense. Regardless of the branch of service, people are the most valuable defense asset. Without military personnel, weaponry and technology are useless.

Article 29, UCMJ, and R.C.M. 805(d)(1) reflect this critical distinction in establishing the framework for jury trials in the military. This legislative and regulatory system was designed to provide military commanders sufficient flexibility to effectively execute the mission with as many personnel available while also providing the means for a fundamentally fair trial. By military necessity, "the rights of [servicemembers] in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." Levy, 417 U.S. at 744 (citing Burns, 346 U.S. at 140).

Declaring a mistrial every time a court-martial panel reduces below quorum would impose grave consequences on the military mission. Detailing an entirely new court-martial panel would unduly burden limited military resources and delay the disposition of swift justice. As discussed in the Drafter's Analysis, MCM, A21-58 (2012 ed.), Article 29, UCMJ, "recognizes that military exigencies or other unusual circumstances may cause a member to be unavailable at any stage in the court-martial," as well as the "special need of the military to dispose of offenses

swiftly, without necessary diversion of personnel and other resources." The procedure established by Congress provides servicemembers a fair opportunity to have their case presented to an impartial court-martial panel, but also provides a procedural mechanism to conclude the court-martial proceeding without declaring a mistrial and reconvening the court-martial with an entirely new panel.[6]

AFCCA's decision usurps the legislative and executive allocation of military resources and purports to result in two options: (1) mistrial; and (2) re-introduction of all evidence to the new court members. In reality, however, AFCCA's rationale only provides for one option -- mistrial. The following explanation demonstrates why re-introduction of the evidence would also lead to an unfair result if this Court strictly applied AFCCA's logic. If the four existing members observed five of the government's witnesses testify before the court-martial was reduced below quorum, but then had an opportunity to

[6] This framework also saves military commanders from the undue burden of appointing alternate court members similar to federal civilian practice. *See* Fed. R. Crim. P. 24(c). The Federal Rules of Criminal Procedure were adopted by order of the Supreme Court on 26 December 1944, transmitted to Congress on 3 January 1945, and became effective on 21 March 1946, to include a procedural mechanism authorizing the selection of alternate jurors. Fed. R. Crim. P. 24(c). In accordance with 28 U.S.C. § 2074, the Federal Rules of Criminal Procedure must be transmitted to Congress, providing the legislature a statutory waiting period to act if a proposed rule is disfavored. Congress has been aware of the differences between the procedural rights afforded to defendants for trial by jury in the civilian criminal justice system and in the military justice system since the enactment of the UCMJ in 1950. If Congress intended different procedural protections to apply, such as detailing alternate court members to courts-martial, it has had over 60 years to promulgate such legislation.

observe the same five witnesses testify again, the four existing members still would have received evidence in a different manner than the two new court members. Following AFCCA's logic, the "first round" of witness testimony inevitably would have varied in presentation, demeanor, and substance from the "second round" of testimony, resulting in the same purported due process implications. Consequently, AFCCA's decision functionally declares Article 29, UCMJ, and R.C.M. 805(d)(1) facially unconstitutional and requires a mistrial every time when the panel is reduced below quorum after evidence has been presented on the merits.

The procedures in Article 29, UCMJ, and R.C.M. 805(d)(1) were designed to accomodate military necessity. Although servicemembers are not excluded from the protections granted by the Due Process Clause of the Fifth Amendment, the different character of the military community and of the military missions can and should require a different application of those protections. Levy, 417 U.S. at 759.

iii. The procedural requirements of Article 29, UCMJ, and R.C.M. 805(d)(1) have been validated by military case law.

AFCCA's decision results in a division in jurisprudence across military courts of criminal appeals. Other service appellate courts have examined the application of Article 29, UCMJ, and R.C.M. 805(d)(1) and have reached a different

conclusion as to the propriety of the procedural mechanisms for adding new members after trial has begun.

In United States v. Camacho, 58 M.J. 624 (N.M. Ct. Crim. App. 2003), the court-martial panel fell below quorum after nearly all the evidence had been admitted in findings. Id. at 631-32. New court members were detailed, the prior recorded evidence was introduced to the new members, and the new members joined the existing panel. Id. Two witnesses were recalled to provide supplemental testimony and trial continued in customary fashion, including arguments, instructions, and findings. Id. The defense counsel did not object to trial proceeding in this manner, nor raise a motion for mistrial. Id. at 632-33. On appeal, the appellant asserted that R.C.M. 805(d)(1) was unconstitutional because it violated his right to: "(1) a fair trial; (2) substantive due process; and (3) equal protection." Id. at 632.

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) recognized the presentation of the previously recorded evidence resulted in two different panels receiving evidence in different ways and identified that the new members were unable to observe the demeanor of the witnesses whose testimony had been read to them. Id. at 632-33.

NMCCA analyzed the issue under Confrontation Clause concerns and held that the appellant's rights were not violated when the

trial continued in accordance with R.C.M. 805(d)(1). Id. at 633. Of great importance to NMCCA was the fact that the appellant did not object to the trial continuing consistent with R.C.M. 805(d)(1), such that the failure to object was construed as a *de facto* waiver of the issue. Id. The Court also did not find prejudice based on the appellant's agreement to proceed with trial and failure to request a mistrial. Id.

Similarly, in United States v. McGeeney, 41 M.J. 544 (N.M. Ct. Crim. App. 1994), the court-martial panel fell below quorum after two of the three witnesses for the government testified. Id. at 551. After new members were detailed, the opening statements of counsel and the testimony of the two witnesses were read to the court. Id. The appellant objected to the reading of the testimony, asserting that his confrontation rights were violated and that the reading constituted an impermissible reinforcement of the witnesses' testimony, and moved for a mistrial. Id. NMCCA found that the military judge properly complied with R.C.M. 805(d)(1) and Article 29, UCMJ, and held that the appellant's Sixth Amendment rights were not violated. Id. at 552.

Other military cases discussing R.C.M. 805(d)(1) and Article 29, UCMJ, exist, but involve procedural errors in presenting the recorded evidence to the new members, vice constitutional challenges as to the propriety of the legislative and regulatory

mechanisms themselves. *See* United States v. Matthews, 55 M.J. 600, 605-06 (C.G. Ct. Crim. App. 2001); United States v. Freeman, 12 M.J. 542 (A.C.M.R. 1981).

Prior military precedent supports the constitutionality of Article 29, UCMJ, and R.C.M. 805(d)(1).[7] Based on the rationale submitted in this brief, AFCCA erred in finding these provisions resulted in a violation of Appellee's military due process rights. As such, AFCCA's opinion has created a split between the military services regarding the appropriate disposition of this legal issue.

iv. The procedural requirements of Article 29, UCMJ, and R.C.M. 805(d)(1) satisfy the right to confrontation and, therefore, do not result in a due process violation.

The Confrontation Clause "reflects a preference for face-to-face confrontation at trial." United States v. Anderson, 51 M.J. 145, 149 (C.A.A.F. 1999) (citations omitted). "Normally, the Confrontation Clause requires the defendant's presence and ability to see the accusatory witness . . . [a] second aspect of the Confrontation Clause is that the witnesses are under oath. A third is that the defendant has the right to have the finders of fact evaluate the demeanor of the witnesses. Fourth, the Confrontation Clause included the right to cross-examine these witnesses." Id. (citing California v. Green, 399 U.S. 149, 158

[7] The government acknowledges these cases did not examine whether these provisions satisfy military due process under the Fifth Amendment.

(1970)). While this right is fundamental, it is not absolute. Id. (citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

Appellee was provided a full and fair opportunity to subject every witness against him to the crucible of cross-examination. Although the two new members were read back testimony from five witnesses, this does not change the fact that the witnesses were subjected to cross-examination, satisfying the right to meaningful confrontation under the Sixth Amendment and traditional notions of military due process under the Fifth Amendment. As noted in Maryland v. Craig, 497 U.S. 836, 847 (1990), "[t]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." Id. (citing Delaware v. Fensterer, 474 U.S. 15, 22 (1985)). Here, the witnesses testified under oath, thus impressing upon them the seriousness of the matter and guarding against lies by the possibility of penalty of perjury. Id. at 845-46. The witnesses were required to physically appear before Appellee,[8] satisfying the symbolic purpose of facing his accusers. Most importantly, the witnesses submitted to cross-examination, the "greatest legal engine ever

[8] Except for the child victim who testified via remote means as authorized pursuant to Mil. R. Evid. 611(d).

invented for the discovery of truth." Id. at 846.

AFCCA's decision erroneously concluded that the replacement members' inability to observe the witnesses' in-court demeanor outweighed the constitutional significance of their ability to evaluate the witnesses' testimonial infirmities through the verbatim record, such as their opportunity and capacity to observe and recall the evidence, their biases, motives to misrepresent, pertinent character traits, prior inconsistent statements, contradiction of events by other evidence, and plausibility of the witnesses' version of the evidence. The only feature of cross-examination the replacement members were not afforded was the ability to observe the witnesses' demeanor. Appellee was unrestrained in testing the credibility of the witnesses, and the replacement members were able to conduct a thorough credibility assessment through the recorded testimony.

The verbatim transcript of the witnesses' testimony substantially satisfied confrontation concerns. The Supreme Court has recognized, "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Chambers, 410 U.S. at 295. As demonstrated above, in-court demeanor is merely one of many methods of determining whether a

witness is worthy of belief.[9] The procedures outlined in Article 29, UCMJ, and R.C.M. 805(d)(1) comply with the requirement of confrontation as applied in the court-martial context. Accordingly, Appellee's interest in having the replacement members observe the demeanor of the witnesses is not so extraordinarily weighty as to overcome the necessity for the rules established by Congress and the President.

> v. Reading the recorded evidence to the replacement members did not create an impermissibly partial court-martial panel and the military judge had no obligation to sua sponte declare a mistrial.

Because the court members were afforded a meaningful opportunity to assess the witnesses' credibility, including the testimony read to the replacement members, the members received and were able to follow the military judge's findings instructions on witness credibility. The panel received and considered substantively the same evidence and was able to faithfully execute their duties. No evidence in the record suggests that the panel was inattentive, confused, or unable to follow the military judge's instructions, nor is there evidence

[9] Commentators have recognized that demeanor evidence will never be an infallible method of determining the veracity of a witness and some believe demeanor credibility is the least reliable form of evidence. "It is inevitable that at times liars will convince juries and judges of their truthfulness, while honest witnesses nervously fail to convince." James P. Timony, Demeanor and Credibility, 49 Cath. U. L. Rev. 903, 920 (2000) (summarizing Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1084-85 (9th Cir. 1977) (Duniway, J., concurring in part and dissenting in part). In fact, some commentators have looked to empirical evidence to conclude that visual observations are generally of little use in determining the witness' credibility. Id. at 930-35.

demonstrating the four original panel members exerted any undue influence during deliberations over the two members that were read back the testimony. AFCCA's presumption that the application of Article 29, UCMJ, and R.C.M. 805(d)(1) rendered the panel impermissibly partial is wholly speculative and not supported by the evidence.

Finally, AFCCA erred in finding the military judge had a sua sponte duty to declare a mistrial under the circumstances of this case. Mistrial is an unusual and disfavored remedy used only to prevent manifest injustice or whenever circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial. United States v. Diaz, 59 M.J. 79, 90 (C.A.A.F. 2003). A military judge has "considerable latitude in determining when to grant a mistrial." United States v. Seward, 49 M.J. 369, 371 (C.A.A.F. 1998). This Court will not reverse the military judge's decision regarding whether a mistrial is required absent clear evidence of abuse of discretion. Diaz, 59 M.J. at 90. No evidence existed before the military judge to cast substantial doubt as to the fairness or impartiality of the trial, especially when considering that trial defense counsel explicitly and repeatedly agreed to proceed with trial pursuant to Article 29, UCMJ, and R.C.M. 805. Appellee's failure to express any hesitation or concern with proceeding with trial should be definitive evidence that a manifest injustice did not occur at

trial. Furthermore, the military judge handled the situation fairly and in accordance with Article 29, UCMJ, and R.C.M. 805(d)(1). As such, this was not a situation where the military judge abused his discretion by not declaring a mistrial. Camacho, 59 M.J. at 633; McGeeney, 41 M.J. at 551-52.

For the foregoing reasons, the government respectfully requests this Court find that Appellee's interest in having the same panel receive evidence in the same manner is not so extraordinarily weighty as to overcome the legal and military necessity of the procedural rules promulgated in Article 29, UCMJ, by Congress and in R.C.M. 805(d)(1) by the President. As such, AFCCA erred in holding that Appellee's rights to military due process were violated. The government respectfully requests this Honorable Court reverse AFCCA's decision and remand this case to the lower Court for further Article 66, UCMJ, review of Appellee's unresolved assignments of error.

II.

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FAILING TO FIND WAIVER AND BY FAILING TO CONDUCT A PLAIN ERROR ANALYSIS; INSTEAD, THE COURT INCONGRUOUSLY FOUND THE ALLEGED VIOLATION OF APPELLEE'S RIGHT TO MILITARY DUE PROCESS WAS PER SE PREJUDICIAL DESPITE DECLARING THAT THE ERROR WAS NOT STRUCTURAL.

Standard of Review

Whether Appellee was deprived military due process resulting from the presentation of recorded evidence to replacement members

after the evidence had been previously introduced during trial on the merits is a question of law reviewed de novo. *See generally* United States v. Camacho, 58 M.J. 624 (N.M. Ct. Crim. App. 2003).

Law and Analysis

AFCCA's original decision, dated 19 March 2012, concluded that the application of Article 29, UCMJ, and R.C.M. 805(d)(1), as applied in this case, resulted in a structural error, constituting per se prejudice and mandating reversal of Appellee's conviction. Vazquez I, slip op. at 14. After reconsidering, AFCCA withdrew its original decision and issued a new decision, dated 27 April 2012. Order on Motion for Reconsideration, dated 27 April 2012. AFCCA's new opinion removed the first paragraph in the "conclusion" section, which stated:

> As applied in this case, R.C.M. 805(d)(1) resulted in a structural error in the trial mechanism such that the "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (quoting Rose v. Clark, 478 U.S. 570, 577-78 (1986)). For the reasons discussed, we find the appellant was not afforded the due process protections guaranteed by Congress.

Compare Vazquez I, slip op. at 14 *with* Vazquez II, slip op. at 14. AFCCA's new opinion also included an additional footnote explaining the purpose of omitting the first paragraph and attempted to clarify its holding:

> In our original 19 March 2012 opinion, we inadvertently left the impression that our decision was based on a Constitutional structural error analysis as discussed in Arizona v. Fulminante, 499 U.S. 279 (1991). That was neither our intent nor the basis for our holding. For the reasons discussed above, we conclude the appellant's right to military due process was denied and the military judge erred by not declaring a mistrial. As a result, the appellant's court-martial did not reliably serve its function as a vehicle for determination of guilt or innocence.

Vazquez II, slip op. at 14.

Despite declaring that the error was not structural, AFCCA's new decision still held that, "[a] violation of the appellant's military due process rights are per se prejudicial and mandate reversal of the appellant's conviction." Id. Remarkably, the Court found the alleged error required automatic reversal without testing for prejudice even though the Court disclaimed a finding of structural error.

As an initial matter, although Vazquez II was intended to clarify its original holding, AFCCA's explanation actually created greater ambiguity. The new decision further demonstrates the Court's fundamental misunderstanding of the concept of structural error, and more pointedly, the necessity of conducting a prejudice analysis in the event of non-structural error. Notwithstanding that the Court renounced the "inadvertent[] . . . impression" that it relied on a finding of structural error, its new opinion

functionally results in the same finding of structural error. Id. The Court still concluded that the error resulted in per se prejudice without testing for prejudice under a plain error analysis.[10] Consequently, the Court's finding of per se prejudice is incongruous with its declaration that it did not find structural error. Per se prejudice requiring automatic reversal is synonymous with structural error. Because of this incongruity, the government continues to interpret AFCCA's decision as a finding of structural error. Otherwise, the Court would have applied a plain error analysis and tested for prejudice.

Assuming *arguendo* this Court finds the application of Article 29, UCMJ, and R.C.M. 805(d)(1) resulted in error, the error was waived by Appellee or, in the alternative, the error did not create an unfair and impermissibly partial court-martial panel, thereby constituting per se prejudice. Therefore, AFCCA should have concluded Appellee waived his right to appellate review of the alleged error or assessed whether the error was harmless beyond a reasonable doubt. Fulminante, 499 U.S. at 308; *see also* Neder v. United States, 527 U.S. 1 (1999).

[10] In assessing material prejudice under the plain error analysis, the error and conviction alone cannot be the harm: "any trial error can be said to impair substantial rights if the harm is defined as 'being convicted at a trial tainted with [fill-in-the-blank] error.' Nor does the fact that there is a 'protected liberty interest' at stake render this case different . . . ." Puckett v. United States, 556 U.S. 129, 142 (2009).

The Supreme Court has noted that "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." United States v. Mezzanatto, 513 U.S. 196, 201 (1995). Specifically in the context of the Confrontation Clause, the Supreme Court has recognized that "[t]he right to confrontation may of course be waived, including by failure to object to the offending evidence." Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2534 n.3 (2009). Moreover, the Supreme Court has noted that an accused "always has the burden of raising his Confrontation Clause objection." Id. at 2541. In United States v. Harcrow, 66 M.J. 154 (C.A.A.F. 2008), this Court explained:

> [w]aiver is different from forfeitures. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

Id. at 156 (internal citations and quotations omitted).

Furthermore, while the presumption exists against the waiver of constitutional rights, "in certain circumstances, defense counsel may waive constitutional rights on behalf of their clients." Id. at 157 (internal citations and quotations

omitted). One such circumstance is when defense counsel makes a sound trial tactic or strategy decision not to object. Id.; *but see* United States v. Colon, 6 M.J. 73, 75 (C.M.A. 1978) (finding the concept of waiver has not been embraced with much affection by this Court where the evidence clearly demonstrates that a military judge denied military due process to an accused).

In this case, Appellee intentionally chose not to object to the replacement members being added to the court-martial after evidence had been presented on the merits, nor did Appellee object to the replacement members being read the previous testimony. Furthermore, Appellee did not allege the procedure constituted error in his original assignments of error with the Court below until the issue was specified by AFCCA. Thus, Appellee affirmatively waived any alleged due process violation. There are two reasons for this conclusion.

First, Appellee's counsel, one of whom was a senior defense counsel, negotiated the process of how the record would be read to the new members. (J.A. 154, 160-61.) The military judge stated on the record that, "[t]he counsel have worked out a procedure, and we will put that on the record, whereby one counsel will read the questions and another counsel will be respond as they read those transcripts." (J.A. 160.) Further, trial defense counsel was asked by the military judge if he objected to the manner counsel negotiated or wished to place

anything on the record regarding this issue, and defense counsel stated, "[n]o, Sir." (J.A. 161.) As such, Appellee expressly waived this issue.

Second, the record also makes clear that Appellee had two days to think about this issue during the break in trial to appoint new members. (J.A. 153-54). It is clear that this issue was not presented on the fly without sufficient time and opportunity for Appellee to object. The record indicates Appellee had an inordinate amount of time to consider the issue and craft and articulate a reasoned objection. Instead, Appellee made a strategic decision to proceed with replacement members rather than requesting a mistrial or having the five government witnesses testify again. *See* United States v. Campos, 67 M.J. 330, 333 (C.A.A.F. 2009) (holding that advanced notice of an issue, coupled with a "no objection" by defense counsel on the record was evidence that there was an intentional waiver relinquishing appellate review). Thus, the record sufficiently demonstrates Appellee waived appellate review of this issue.

If this Court finds Appellee did not voluntarily waive a known right, this Court should apply the doctrine of forfeiture. Failure to object at trial forfeits appellate review of the issue absent plain error. United States v. Eslinger, 70 M.J. 193, 197-98 (C.A.A.F. 2011). Under plain error review, this Court will grant relief only where: (1) there was error; (2) the error was

plain and obvious; and (3) the error materially prejudiced a substantial right of the accused. United States v. Sweeney, 70 M.J. 296, 304 (C.A.A.F. 2011). Where the alleged error is constitutional, the government is provided an opportunity to show that the error was harmless beyond a reasonable doubt. Id.

Structural error is reserved for a very limited class of cases.[11] For example, the Supreme Court has determined that conviction before a partial adjudicator constitutes structural error. Tumey v. Ohio, *supra* (finding the trial judge who also was the mayor of the village was deemed inherently biased because of the pecuniary and other interests which the mayor had in the result of the trial). Tumey is inapposite to this case because there has been no showing that the court-martial panel in Appellee's case was unable to remain impartial. The only basis for concluding the panel failed to fulfill its charge to remain impartial is derived from AFCCA's utter speculation that the original panel members probably "exerted an inordinate amount of influence" over the replacement members because the original members were able to observe the first five witnesses' demeanor. Vazquez II, slip op. at 11. This wildly speculative conclusion,

[11] Fulminante, 499 U.S. at 310 (citing Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge); Gideon v. Wainwright, 372 U.S. 335 (1963) (the complete denial of counsel); McKaskle v. Wiggins, 465 U.S. 168 (1984) (the denial of self-representation at trial); Waller v. Georgia, 467 U.S. 39 (1984) (the denial of a public trial); Vazquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in the selection of a grand jury); Sullivan v. Louisiana, 508 U.S. 275 (1993) (the administration of a defective reasonable doubt instruction)).

however, is not grounded in fact. *See* United States v. Balboa, 33 M.J. 304, 307-08 (C.M.A. 1991) (Everett, S.J., concurring) (declaring this Court did not need an "appellate crystal ball" to discern the court members' true intent in the adjudged sentence).

R.C.M. 912(f)(1)(N) provides that a member should be excused in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. *See also* United States v. Foster, 64 M.J. 331, 333 (C.A.A.F. 2007) (explaining that a challenge to a military judge's impartiality is tested for whether, taken as a whole in the context of the trial, the court-martial's legality, fairness, and impartiality is put into doubt by the military judge's action). No evidence in the record indicates that any member of the panel performed their court-martial duty with a biased opinion about the charges against Appellee,[12] that anyone based their verdict on incompetent legal evidence, or that anyone viewed the evidence partially. Thus, AFCCA erred by presuming that the application of Article 29, UCMJ, and R.C.M. 805(d)(1) created an impermissibly partial panel.

The procedures followed in this case also did not create inattentive members. This Court has previously found that it is the obligation of court members to be both attentive and dignified. United States v. Groce, 3 M.J. 369, 370 (C.M.A.

[12] In fact, when a potential bias was recognized by the relieved panel member, the member immediately disclosed his working relationship to the court-martial and the military judge took swift corrective action to remove the member for cause.

1977); *see also* United States v. Brown, 3 M.J. 368 (C.M.A. 1977). In Groce, the Court of Military Appeals concluded that a court member was "inattentive" after the record demonstrated the military judge instructed that the court member be "nudged" during findings instructions, implying the member had nodded off. Id.

Unlike Groce, this is not a situation where the members missed findings instructions because they were absent or fell asleep during testimony or instructions. The evidence actually shows that Appellee's panel was actively engaged by asking four questions of witnesses after the replacement members were added. (App. Exs. XVI, XVII, XIX, XX.) Three of the four questions by members were directed to the victim's mother after the replacement members had been added, highlighting the interest in her testimony. (App. Exs. XVI, XIX, XX.) The record demonstrates that the panel members actively embraced and employed the legal guidelines provided by the military judge. Groce, 3 M.J. at 371.

This Court began to question the application of per se prejudice in the context of inattentive members in United States v. West, 27 M.J. 223, 224 (C.M.A. 1988). This Court acknowledged, "a modern view might compel [this Court] to reject [a] *per se* approach of reversing [a] conviction without testing for prejudice," however, this Court did not answer the question

because it factually resolved the issue by concluding the member was not inattentive. Id. (citing United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986) ("a *per se* approach to plain-error review is flawed."). Similar to West, the factual evidence in this case does not show the replacement members were inattentive or unable to follow the military judge's instructions, therefore, this Court can resolve this case on the basis that no error occurred at all. Should this Court disagree, this Court should apply the commentary in West and Fisher expressing that a per se approach to plain error review is flawed. Indeed, this view is consistent with Supreme Court case law and recent decisions by this Court finding there is a strong presumption against finding per se prejudice. *See* Neder, 527 U.S. at 8; United States v. McMurrin, 70 M.J. 15, 19 (C.A.A.F. 2011); United States v. Bartlett, 66 M.J. 426, 430 (C.A.A.F. 2008); United States v. Rodriguez, 60 M.J. 87, 89-90 (C.A.A.F. 2004) (rejecting a per se prejudice rule when evaluating the harm resulting from racial bias or appeals to race or ethnicity).

If this Court finds that the alleged error was not per se prejudicial, it must evaluate whether the constitutional error resulted in actual prejudice. McMurrin, 70 M.J. at 20. A review of the entire record demonstrates the error was harmless beyond a reasonable doubt. Appellee was tried by a properly selected court-martial panel in accordance with Articles 16 and 25, UCMJ,

by appropriate convening authority. The military judge ensured the panel was comprised of fair and impartial members by complying with Article 41, UCMJ, and R.C.M. 912. When facts were disclosed to the military judge that a member of the panel may have an implied bias, which was not discovered until mid-trial, the military judge promptly inquired into the matter and excused the member for cause. The military judge followed the legal procedures implemented by Congress and the President to re-establish quorum without objection and, in fact, with express agreement by trial defense counsel. The entire panel received substantially the same evidence and was properly advised of the elements of the offenses and all other appropriate findings instructions. The record demonstrates the panel was able to appropriately evaluate the evidence, properly apply the law, and arrive at a fair and impartial verdict.

Furthermore, there has been no showing that the demeanor of the first five witnesses was so dramatic that it was necessary for the replacement members to observe it first-hand. *See* Olano, 62 F.3d at 1188 (discussing the lack of prejudice suffered when a juror missed a half-day of testimony). It is fair to say that the most cumbersome testimony of the five witnesses came from the four-year old victim. Even given the understandably muddled presentation of the child's testimony, the verbatim transcript provided a very clear and comprehensive account of the victim's

testimony sufficient to provide Appellee a fair trial. When given the opportunity, trial defense counsel asked the victim only one question, requested a recess, and then had no further questions for the victim. The record is devoid of any indication that the in-court demeanor of the first five witnesses was so crucial that they needed to present their testimony live to the replacement members.

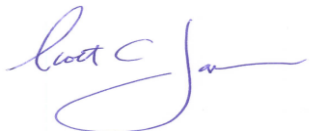
Finally, trial defense counsel made a deliberate and presumably tactical decision to proceed with trial. As Appellee has not accused his trial defense counsel of ineffective assistance of counsel, the government presumes a reasonable explanation exists for the defense's strategic decision to proceed with trial pursuant to Article 29, UCMJ, and R.C.M. 805(d)(1). It should be difficult for this Court to find that Appellee suffered prejudice when he failed to object to, and, in fact, intentionally participated at trial in this manner. Moreover, Appellee did not even raise this as an issue in his assignments of error to AFCCA.

Thus, the government has established that the alleged error in proceeding with replacement members after trial on the merits had begun was waived by Appellee and was not per se prejudicial. When reviewing for plain error, this Court should find that the alleged error was also harmless beyond a reasonable doubt.

Conclusion

WHEREFORE, the United States requests this Honorable Court reverse AFCCA's decision and remand this case to the lower Court for further Article 66, UCMJ, review of Appellee's unresolved assignments of error.

TYSON D. KINDNESS, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4806
Court Bar No. 33631



SCOTT C. JANSEN, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 33338

LINELL A. LETENDRE, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4805
Court Bar No. 35346

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 27428

DON M. CHRISTENSEN, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4815
Court Bar No. 35093

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to the Appellate Defense Division, and to Mr. William Cassara via electronic transmission on 30 May 2012.

TYSON D. KINDNESS, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4806
Court Bar No. 33631

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/s/
TYSON D. KINDNESS, Capt, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division
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