9 July 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant,*	)	GOVERNMENT'S REPLY TO APPELLEE'S ANSWER
v.	)	
	)	USCA No. 12-5002/AF
Staff Sergeant (E-5), RAY A. VAZQUEZ, USAF, *Appellee.*	)	Crim. App. Dkt. 37563

GOVERNMENT'S REPLY TO APPELLEE'S ANSWER

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

Introduction

Pursuant to Rule 22(b)(3) of this Court's Rules of Practice and Procedure, the United States hereby submits its reply to Appellee's answer.

The United States responds to Appellee's legal analysis of the issues certified for review by The Judge Advocate General of the United States Air Force (TJAG) by emphasizing to this Honorable Court that: (1) this case presents a justiciable legal controversy ripe for adjudication; (2) Congress and the President promulgated Article 29, UCMJ, and R.C.M. 805(d)(1) intending to implement different procedural protections for trial by members due to military necessity; (3) Appellee has failed to satisfy his burden to demonstrate that the application of Article 29(b), UCMJ, and R.C.M. 805(d)(1) constituted a due process violation under the Fifth Amendment; (4) the application of Article 29(b), UCMJ, and R.C.M. 805(d)(1) did not deprive

Appellee of his Sixth Amendment right to confrontation; (5) the Air Force Court of Criminal Appeals (AFCCA) is required by Congress to test all alleged trial errors for prejudice under Article 59(a), UCMJ, or declare the alleged error was structural; (6) if this Court finds error, it should apply the plain error analysis set forth in United States v. Humphries, No. 10-5004/AF (C.A.A.F. 2012) and test for prejudice under Article 59(a), UCMJ; and (7) if this Court finds the application of Article 29(b), UCMJ, and R.C.M. 805(d)(1) resulted in error, this Court should decline to remedy the alleged error because Appellee cannot demonstrate material prejudice to his substantial rights and the alleged error will not seriously affect the fairness, integrity or public reputation of the judicial proceedings. Puckett v. United States, 556 U.S. 129, 134 (2009); *see also* Humphries, slip op. at 2-10 (Stucky, J. dissenting).

Law and Analysis

1. This case presents a justiciable legal controversy ripe for adjudication under Article 67(a)(2), UCMJ.

Appellee asserts that "neither party appealed the Air Force Court's ruling that 'under the facts of the case, the military judge had a *sua sponte* duty to declare a mistrial,'" and concludes that this Court would render an advisory opinion if it decides the certified issues. (App. Br. at 13.) Appellee

ignores the distinction between appealing the "substantive legal error" of the lower Court's decision, vice the "procedural vehicle" to cure the alleged error.[1] The clear import of AFCCA's decision was that the violation of Appellee's "military due process"[2] rights served as the substantive error giving rise to the military judge's *sua sponte* duty to declare a mistrial. This is plainly stated in the majority's opinion when the Court declared, "[t]he appellant's trial implicates several aspects of military due process, including the right to confrontation, the right to a properly instructed panel, the right for each panel member to evaluate the evidence, and the right to a fair and impartial panel," which collectively denied Appellee the right to a fundamentally fair trial. (J.A. at 20.) The lower Court found these individual errors cumulatively constituted a violation of "military due process." Thus, the duty to declare a mistrial was not derived from a distinct legal basis independent from the military due process violation. (App. Br. at 13.) Determining whether a "military due process" violation occurred is a necessary predicate to whether the military judge

[1] Although the United State's appeal focuses on the underlying substantive issue of whether Appellee's due process rights were violated, the United States' brief in support of the certified issues did contest AFCCA's determination that the military judge had a *sua sponte* duty to declare a mistrial. (*See* Gov. Br. at 33-34.)

[2] To the extent that AFCCA created a new legal concept under the Fifth Amendment called "military due process," the government contends no such notion exists. The appropriate due process analysis under the Fifth Amendment is derived from Weiss v. United States, 510 U.S. 163 (1994). The government asserts this Court should jettison any perceived existence of the concept of "military due process" in modern military jurisprudence.

should have granted a mistrial. Because these two findings by AFCCA are inextricably intertwined, TJAG appropriately appealed the substantive legal error in this case.[3] Therefore, the issues certified for review constitute a justiciable legal controversy not requiring an advisory opinion from this Court.

2. Congress and the President intended to implement different procedural protections for trial by members due to military necessity.

As appropriately recognized by Appellee, the Supreme Court has established a strong presumption of validity regarding Acts of Congress. (App. Br. at 23.) Article 29(b), UCMJ, and R.C.M. 805(d)(1) expressly manifest Congress' and the President's intent in constructing the framework for trial by members under the UCMJ.

The fundamental function of the armed forces is "to fight or be ready to fight wars." Toth v. Quarles, 350 U.S. 11, 17 (1955). Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. Curry v. Secretary of the Army, 595 F.2d 873, 877 (D.C. Cir. 1979.) The military justice system must respond to the unique needs of

[3] Additionally, this Court is required under Article 67(a)(2), UCMJ, to review certified issues presented by TJAG. Article 67(a)(2), UCMJ, provides, "[t]he Court of Appeals for the Armed Forces shall review the record in . . . all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review . . . ." As such, Congress unequivocally established jurisdiction under Article 67(a)(2) for this Court to review the certified issues presented to this Court.

the armed forces, at home and abroad, in time of peace and in time of war. Id. It must be practical, efficient, and flexible. Id.

The promulgation of Article 29(b), UCMJ, and R.C.M. 805(d)(1) represent the delicate balance struck by Congress and the President between command functions and the administration of military justice. The necessity of having a practical UCMJ was discussed during Congressional debates before passing the first Code. Representative Brooks underscored the importance of ensuring the Code promoted flexibility in times of war and peace to meet the unique demands of military operations:

> We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations.

Congressional Floor Debate on the Uniform Code of Military Justice, 95 Cong. Rec. 5721-22 (1949).

Although our military justice system has consistently evolved since the enactment of the UCMJ to more closely resemble the federal court system, there are certain procedural rights that were specifically designed to coexist with operational needs. Congress has by design kept the procedural protections

found in Article 29(b), UCMJ, intact over the last 60 years.[4] This deliberate action evinces the legislative intent behind the construct of trial by members in military courts-martial.

This Honorable Court recently explained the structure and purpose of Article 29, UCMJ, in United States v. Easton, No. 12-0053/AF, slip op. at 19 (C.A.A.F. 2012), stating:

> Article 29, UCMJ, illustrates that, due to the unique nature of the military, an accused's chosen panel will not necessarily remain intact throughout trial. By enacting Article 29, UCMJ, as it did, Congress evinced the intent that, in light of the nature of the military, an accused does not have the same right to have a trial completed by a particular court panel as a defendant in a civilian jury trial does.

Id.

Article 29(b), UCMJ, authorizes the convening authority to appoint replacement members after the court-martial has been reduced below quorum to respond to unique military needs. In order for the command to function effectively, the convening authority must be assured that capable personnel are available to perform various tasks. Curry, 595 F.2d at 878. The duties the commanding officer's troops will be called upon to carry out may be difficult, if not impossible, to predict in advance. Id. (citing Hearings on H.R. 2498 Before Subcomm. of House Comm. on Armed Services, 81st Cong., 1st Sess. 1114 (1949) (Prof. Edmund

[4] *See* Gov. Br. at 22-26 describing the legislative amendments to Article 29(b) since the enactment of the UCMJ.

M. Morgan: "absolutely impossible in wartime for a commander to determine in advance what men he could spare for a panel.")). If the convening authority was required to select alternate members similar to the civilian justice system every time he or she convened a court-martial, servicemembers trained to perform specialized military functions would be immobilized and effectively removed from the direct control of the commanding officer pending completion of the court-martial. Furthermore, if a military judge was required to declare a mistrial every time the panel was reduced below quorum during trial, the convening authority would suffer an enormous drain on operational resources that were diverted from the mission for purposes of conducting the court-martial only to repeat the same process and redirect more resources away from the mission. The practical effect of this procedure would jeopardize operational success. Accordingly, Article 29(b), UCMJ, and R.C.M. 805(d)(1) were constitutionally applied in this case, and AFCCA's decision should be overturned.

3. Appellee has failed to satisfy ***his*** burden to demonstrate that the application of Article 29(b), UCMJ, and R.C.M. 805(d)(1) constituted a due process violation under the Fifth Amendment.

In United States v. Easton, this Court recently articulated that "[c]onstitutional rights identified by the Supreme Court generally apply to members of the military unless by text or

scope they are plainly inapplicable." Easton, slip op. at 16 (citing United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004)). Thus, this Court reinforced that the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule. Id. at 17.

Unlike Easton, the government does not bear the burden to establish that military conditions require a different rule than that prevailing in the civilian community. Appellee correctly acknowledges in his brief that the burden of persuasion rests with him. (App. Br. at 24.) The reason for the difference, as confirmed by this Court in Easton, is that no Sixth Amendment right to trial by jury exists in military courts-martial. Id. (citing Ex parte Quirin, 317 U.S. 1, 39 (1942); United States v. Wiesen, 57 M.J. 48, 50 (C.A.A.F. 2002). Thus, AFCCA erred by not applying the appropriate legal standard when evaluating the specified issues under the Fifth Amendment in the court-martial context. When a servicemember challenges court-martial procedures under due process concerns, and no other constitutional provision applies, the appropriate test is "whether the factors militating in favor of [the proposed rule] are so extraordinarily weighty as to overcome the balance struck by Congress." Sanford v. United States, 586 F.3d 28, 33 (D.C. Cir. 2009) (citing Weiss, 510 U.S. at 177-78). To the extent

Appellee seeks to rely on AFCAA's decision that Article 29(b), UCMJ, and R.C.M. 805(d)(1) violated his due process rights, it is incumbent upon him to show that considerations underlying AFCAA's holding undermined his right to a fair trial under the standard established in Weiss, 510 U.S. at 177-78. *See also* Sanford, 586 F.3d at 37. Applying the appropriate legal standard and assigning the proper burden of persuasion, Appellee has failed to show that factors militating in favor of 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(b), UCMJ, and the President in R.C.M. 805(d)(1).

4. The application of Article 29(b), UCMJ, and R.C.M. 805(d)(1) did not deprive Appellee of his Sixth Amendment right to confrontation.

Appellee alleges that reading the verbatim transcript to the replacement members violated the Confrontation Clause. (App. Br. at 25-38.) The government's initial brief thoroughly describes why the application of Article 29(b), UCMJ, and R.C.M. 805(d)(1) did not deprive Appellee of his right to confrontation; however, the United States provides a pointed response to certain assertions by Appellee regarding the impact of the replacement members' inability to observe the witnesses in-court demeanor.

First, AM's testimony was not the "linchpin" of the government's case against Appellee. It is undeniable that AM provided probative testimony to explain some of the details of the criminal act committed by Appellee. Specifically, AM testified that Appellee made her "lick his body," she identified the groin area where she was forced to lick, she described the appearance of the part of Appellee's body that she licked, and confirmed that she did not like licking his body. (J.A. 54-57.) This was the only substantive evidence presented by AM regarding the sexual assault. Other probative evidence also existed to establish Appellee's guilt.

AM's mother, SSgt Garcia, testified in greater detail as to AM's disclosure of the sexual assault. (J.A. 238-48.) Additionally, Dr. Hollander explained the sexual assault examination that he performed on AM and the statements that she made during the examination regarding the incident. (J.A. 80-87.) Special Agent Ferguson testified regarding statements made by Appellee during a pretext phone call where Appellee offered an explanation for why AM may have accused him of sexually assaulting her. Although Appellee generally denied sexually assaulting AM, he stated that he did take a bath or a shower with AM. (J.A. 98.) Finally, Dr. Benedek testified in an expert capacity as to the scientific indicators whether a child has been coached to falsely accuse another person of sexual

assault. (J.A. 130-44.) This evidence significantly contributed to the government's case against Appellee. Although AM's testimony served a role in proving the charges against Appellee, the totality and weight of this other evidence suggests that AM's testimony was not the linchpin of the government's case. She certainly was not the linchpin of Appellee's defense strategy given that trial defense counsel only asked her one question on cross-examination, which was not remotely relevant to the charge.

Appellee also asserts that the most important question asked of AM "concerned whether she knew the difference between the truth and a lie." (App. Br. at 27-28.) Appellee mistakenly concludes that because the replacement members were unable to witness AM's in-court demeanor, they were incapable of evaluating whether she understood the difference between the truth and a lie. (App. Br. at 28.) Appellee's rationale for this conclusion is flawed. The government agrees that AM's ability to distinguish between the truth and a lie weighed directly on her credibility; however, Appellee has not offered any reasonable explanation for how reading the verbatim transcript deprived the replacement members from independently assessing whether AM understood the difference between the truth and a lie. AM's ability or inability to comprehend the truth was established through the content of her verbal answers.

Similar to most of AM's testimony, questioning concerning her ability to tell the truth was cumbersome, which was accurately portrayed in the verbatim transcript. The content of AM's answers regarding the importance of telling the truth provided the replacement members a sufficient opportunity to independently assess the weight and credibility of her testimony.

Furthermore, Appellee challenges the tenor of AM's direct examination by suggesting that trial counsel inappropriately asked leading questions to elicit desired responses. (App. Br. at 28.) During AM's testimony, trial defense counsel did not object to the manner of trial counsel's questioning of AM, but then challenged the manner of questioning during closing argument. Even if there was a dispute regarding the nature of AM's direct examination, Appellee has not shown how the verbatim transcript failed to provide sufficient detail for the replacement members to independently evaluate whether AM's testimony was contrived. In contrast, the record clearly demonstrates that trial counsel had trouble negotiating AM's examination due to her confusion and occasional inattentiveness. This feature of confrontation was preserved by the record even though the replacement members did not observe AM's conduct in court.

Finally, Appellee raises concerns regarding AM's "attention span" due to the artwork she created while testifying. (App. Br. at 29.) Appellee was not deprived the opportunity from exposing AM's perceived inattentiveness to challenge the sincerity of her testimony. In fact, the record contains substantial discussion between trial counsel and AM regarding the drawings she was creating while testifying, including AM's statement that she is "painting all the sparkles on Sponge Bob Squarepants," AM requesting another piece of paper to draw on, discussions that AM was drawing a mouse, a couch with pillows, a house, a table, flowers, a rainbow, and discussions that AM's paper ripped from possibly using too much glue. (J.A. at 50, 52-53, 55.) In fact, much of the examination involved discussions between trial counsel and AM regarding her artwork. AM's struggle with maintaining her attention span is patently obvious in the record. Therefore, Appellee cannot reasonably claim he was deprived of the opportunity to challenge the credibility of AM's testimony based on her "inattentiveness" because the record clearly reflects this possible concern.

The application of Article 29(b), UCMJ, and R.C.M. 805(d)(1) in this case satisfied Appellee's right to confrontation. The fact that the replacement members were unable to visually observe AM's "outward appearance or behavior, her facial expressions, her tone of voice, and the hesitation or

readiness to answer the TC's questions," does not result in a per se violation of the Sixth Amendment. (App. Br. at 30.) These testimonial features are routinely absent in hearsay statements admitted during criminal trials. Depositions, stipulations of expected testimony, stipulations of fact, and various other hearsay statements lack these visual cues, but are nonetheless constitutional despite the members' inability to view the declarant's demeanor while making the statements. As such, Appellant was not deprived of his Sixth Amendment right to confrontation.

5. AFCCA is required to test all alleged trial errors for prejudice under Article 59(a), UCMJ, or declare the alleged error was structural.

Whether an error is preserved or forfeited, under Mil. R. Evid. 103(a) or (d), appellate relief is subject to the mandates of Article 59(a), UCMJ, which require a finding that the error materially prejudiced a substantial right of the accused. Specifically, the "plain error doctrine [ ] in military appellate practice [is] defined in Article 59(a), [and] Mil. R. Evid. 103 . . . ." United States v. Powell, 49 M.J. 460, 464 (C.A.A.F. 1998). There are no provisions under mil. R. Evid. 103 or within the UCMJ that would allow AFCCA to avoid this Congressional mandate. United States v. McCoy, 31 M.J. 323, 327 (C.M.A. 1992) ("Article 59(a), UCMJ . . . requires a showing of prejudice before convictions can be set aside for legal

error."); United States v. Lucas, 1 C.M.R. 19, 25 (C.M.A. 1951) ("[w]e are unable to escape the express mandate from Congress that we should not review except for an error materially prejudicing the substantial rights of the accused."). This was made unmistakably clear in Powell:

> While Courts of Criminal Appeals are not constrained from taking notice of otherwise forfeited errors, they are constrained by Article 59(a), because they may not reverse unless the error "materially prejudices the substantial rights of the accused." Articles 59(a) and 66(c) serve to bracket their authority. Article 59(a) constrains their authority to reverse; Article 66(c) constrains their authority to affirm.

Powell, 49 M.J. at 464.

As Courts of Criminal Appeals are Article I courts, they have no inherent authority to reverse a conviction contrary to the requirements of Article 59(a), UCMJ. Clinton v. Goldsmith, 526 U.S. 529, 535 (1999) (finding military courts are courts of limited jurisdiction defined by the Constitution and statute). While AFCCA clearly has the authority to disapprove part or all of the findings and sentence that it finds incorrect in law or fact, nothing suggests that Congress intended to provide the Courts of Criminal Appeals with unfettered discretion to do so for any reason, for no reason, or on equitable grounds, which is a function of command prerogative. United States v. Nerad, 69 M.J. 138, 145 (C.A.A.F. 2010).

When evaluating whether it was error to proceed with trial without forty percent of the detailed members who had not been properly relieved, the Court of Military Appeals previously held that deviating from the requirements of Article 29, UCMJ, required a determination of whether prejudice inured to the appellant sufficient to warrant reversal of his conviction. United States v. Colon, 6 M.J. 73, 75 (C.M.A. 1978) (citing Article 59(a), UCMJ).

Because Appellee did not object to proceeding to trial in accordance with Article 29(b), UCMJ, and R.C.M. 805 (d)(1), AFCCA should have conducted a plain error analysis and, as in Colon, tested for prejudice under Article 59(a), UCMJ. *See also* Humphries, slip. op. at 13 (finding "nothing in Article 59(a), UCMJ, mandates reversal even where an error falls within its terms."). Instead, AFCAA erroneously ignored the legislative mandate under Article 59(a), UCMJ, and expressly presumed prejudice without declaring the alleged error structural. In fact, this Court can confidently presume AFCCA knew of its duty to test the alleged error for prejudice because it expressly disclaimed any finding of structural error in its decision dated 27 April 2012. United States v. Vazquez, __ M.J. __, slip. op. at 14, n.15 (A.F. Ct. Crim. App. 2012). AFCCA's ruling is simply an *ipse dixit* recasting of the alleged error as material prejudice of a substantial right. Puckett, 556 U.S. at 142.

This directly contradicts the statutory requirements of Article 59(a), UCMJ.

6. This Court should apply the plain error analysis set forth in United States v. Humphries if this Court finds error and tests for prejudice under Article 59(a), UCMJ.

In United States v. Humphries, slip. op. at 12-13 (citations omitted), this Court clarified the framework for plain error review. When applying a plain error analysis, the appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.[5] *Compare* United States v. Sweeney, 70 M.J. 296, 304 (C.A.A.F. 2011) (explaining under plain error review, where the alleged error is constitutional the government is required to prove that the error was harmless beyond a reasonable doubt). Under this standard, the Court underscored that "it is [the accused's] burden to prove material prejudice to a substantial right," Humphries, slip op. at 21, n.10, thereby, eliminating the burden shift requiring the government to prove the error was harmless beyond a reasonable doubt.

Given the state of the law when the government submitted its brief in support of the certified issues, the United States relied on the plain error analysis described last term in

[5] Humphries involved an error of constitutional dimensions, implicating the Fifth and Sixth Amendment rights to notice of the charges against an accused.

Sweeney. (Gov. Br. at 40-41.) This Court's recent clarification of the plain error test, however, demonstrates that the appropriate analysis removes the "burden shift" to the government to show the constitutional error was harmless beyond a reasonable doubt. Under plain error review, Appellee is required to demonstrate there was error, it was plain or obvious, and that it materially prejudiced his substantial rights. Appellant has failed to satisfy his burden to demonstrate that the application of Article 29(b), UCMJ, and R.C.M. 805(d)(1) constituted error, much less that the error was obvious and materially prejudiced a substantial right.

7. Even if this Court finds the application of Article 29(b), UCMJ, and R.C.M. 805(d)(1) resulted in error, this Court should decline to remedy the alleged error because Appellee did not suffer material prejudice to his substantial rights and the alleged error will not seriously affect the fairness, integrity or public reputation of the judicial proceedings.

The Supreme Court has concluded that the plain error test articulated in United States v. Olano, 507 U.S. 725, 736 (1993) involves four steps. *See also* Puckett, 556 U.S. at 135. The fourth prong of the plain error test provides that, if the first three prongs have been satisfied, the court of appeals has the discretion to remedy the error--discretion which ought to be exercised only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceeding.'" Puckett, 556 U.S. at 135. Even though this Court did not

expressly adopt the fourth prong of the plain error test in Humphries, this Court recognized that an error of law materially prejudicing a substantial right may be noticed and remedied by this Court, "keeping in mind the need to encourage timely objections and reduce wasteful reversals . . . ." Humphries, slip op. at 13 (citing United States v. Dominguez-Benitez, 542 U.S. 74, 82 (2004)). Nothing in Article 59(a), UCMJ, mandates reversal even where an error falls within its terms. Id. As pronounced by this Court, Article 59(a), UCMJ, mandates a high discretionary threshold to redress error. Id. This standard necessarily incorporates the careful balance between promoting judicial efficiency and the redress of injustice. Id. Essentially, the fourth prong of the plain error analysis articulated by the Supreme Court is an implied consideration of the statutory text of Article 59(a), UCMJ.

Omitting the considerations outlined in the fourth prong of the plain error analysis elevates a forfeited error nearly to the level of an error that Appellant objected to at trial. This is detrimental to judicial efficiency and should not be endured:

> Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.

Johnson v. United States, 520 U.S. 461, 470 (1997) (citation omitted).

Here, any error did not materially prejudice Appellee's substantial rights or seriously affect the fairness, integrity or public reputation of judicial proceedings. In fact, the fairness, integrity and public reputation of judicial proceedings is best served by upholding the conviction where the members found Appellee guilty beyond a reasonable doubt of committing such an egregious offense of sexually assaulting a four-year-old girl by forcing her to lick his penis.

Appellee has failed to demonstrate a reasonable probability that, but for the error claimed, the result of the proceeding would have been different. Dominguez-Benitez, 542 U.S. at 81-82. No basis exists to believe that requiring the government's five witnesses to testify again would have had any effect on the outcome of the case.

First, the military judge followed the statutory and regulatory procedures outlined by Congress and the President when proceeding with trial after quorum was busted. Considering the careful balance implemented by Congress when establishing the procedure to continue with trial after the panel had been reduced below quorum, the public's confidence concerning the fairness of courts-martial is not jeopardized when the military judge followed the law consistent with Article 29(b), UCMJ, and R.C.M. 805(d)(1).

If Appellee believed that non-verbal aspects of the witnesses' testimony were so important to the replacement members' consideration of the evidence, trial defense counsel could have easily requested that the members be instructed on certain aspects of the witnesses' demeanor or requested that a particular witness testify again. This was not a situation where trial defense counsel was rushed to proceed with trial without sufficient time to consider alternative courses of action, if desired. While waiting for the convening authority to detail replacement members, Appellee had nearly two days to evaluate his options, conduct legal research, and object to the proposed procedure or request changes in the procedure. Appellee was represented by two military defense counsel, one of whom was a senior defense counsel, and each were qualified and certified under Article 27(b), UCMJ, to represent accuseds in general courts-martial.

After the lengthy recess, trial defense counsel did not object to the proposed procedure, did not request special instructions regarding particular aspects of witness testimony, and willingly participated in narrating the witnesses' testimony to the replacement members. Additionally, Appellee was afforded all statutory and regulatory rights provided by the Manual for Courts-Martial when selecting which replacement members should serve, including having only the best qualified replacement

members selected for court-martial duty by the convening authority, having an opportunity to collectively and individually voir dire the replacement members to ascertain whether any of the members should not serve in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality, and exercising challenges for cause and another peremptory challenge to ensure that the replacement members were fair and impartial.

Finally, the replacement members received the same evidence -- absent observing the visual cues exhibited by the five witnesses -- that the original members received. The entire panel relied on the same substantive evidence while deliberating on Appellee's guilt or innocence.

For the first time on appeal, and only after the issue was specified by AFCCA, Appellee now challenges the constitutionality of the application of Article 29(b), UCMJ, and R.C.M. 805(d)(1) even though he expressly agreed to proceed with trial in this manner after Lt Conn was excused for cause. As such, it is difficult to comprehend how he could have been prejudiced or how the alleged error could undermine the fairness or public confidence in the military justice system when the Appellee expressly desired to continue with trial in this manner, presumably for some strategic advantage.

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.

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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 9 July 2012.

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COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

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/s/
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Attorney for USAF, Government Trial and Appellate Counsel Division
Date: 9 July 2012