IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Darron WARD Jr. Culinary Specialist Seaman Apprentice (E-2) United States Navy, Appellant	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 15-0059/NA Crim. App. Dkt. No. 201400021

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

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Issue Presented

THE CONVENING AUTHORITY ISSUED AN INSTRUCTION LIMITING COURT-MARTIAL MEMBER NOMINATIONS TO PERSONNEL ONLY IN THE PAY-GRADES BETWEEN E-7 AND O-5. THE LOWER COURT FOUND THIS SYSTEMATIC EXCLUSION OF PERSONNEL TO BE ERROR, BUT HARMLESS. SHOULD THIS COURT SET ASIDE CSSA WARD'S CONVICTIONS BASED ON THE RATIONALE OF *UNITED STATES V. KIRKLAND* DUE TO THE UNRESOLVED APPEARANCE OF UNFAIRNESS?

Statement of Statutory Jurisdiction

Culinary Specialist Seaman Apprentice (CSSA) Darron Ward, United States Navy, received a court-martial sentence that included a punitive discharge and confinement for over one year. Accordingly, his case fell within the lower court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866(b)(1). He now invokes this Court's jurisdiction under Article 67, UCMJ. 10 U.S.C. § 867.

Statement of the Case

A members panel with enlisted representation, sitting as a general court-martial, convicted CSSA Ward, contrary to his pleas, of fleeing apprehension, rape, and communicating a threat, in violation of Articles 95, 120, and 134, UCMJ, 10 U.S.C. §§ 895, 920, and 934 (2012). (J.A. at 173-74.) The members found CSSA Ward not guilty of assaulting a commissioned officer, in violation of Article 128, UCMJ, 10 U.S.C. § 928. (J.A. at 174.) The members sentenced CSSA Ward to confinement

for 933 days and a dishonorable discharge. (J.A. at 174.) The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed. (J.A. at 174.)

On July 31, 2014, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence in this case. *United States v. Ward*, No. 201400021, 2014 LEXIS 550 (N-M. Ct. Crim. App. Jul. 31, 2014.) On September 25, 2014, CSSA Ward filed a Petition for Grant of Review with this Court. On December 8, 2014, this Court granted review and ordered briefing.

Statement of the Facts

On July 29, 2008, Commander, Naval Air Force Atlantic (COMNAVAIRLANT), issued a written instruction to his subordinate units to "publish procedures for submission of nominations for prospective courts-martial members." COMNAVAIRLANTINST 5813.1H [hereinafter Instruction]; (JA at 146-48). Paragraph five of the Instruction required each subordinate unit to provide a certain amount of personnel from pay-grades E-7 through O-5, and did not provide the opportunity to nominate individuals below the pay-grade of E-7, or in the pay-grade of O-6. (J.A. at 147.)

COMNAVAIRLANT referred the charges against CSSA Ward on May 17, 2013. (J.A. at 11-12.) The Instruction was in effect

during the time the members panel was selected in this case. In accordance with the instruction, none of the members named in the three Convening Orders for this court-martial were below the rank of Chief Petty Officer (E-7) or in the rank of Captain (O-6). (J.A. at 149-53.) No one in the excluded ranks served on CSSA Ward's panel. (J.A. at 66-67.)

The defense team did not know about the Instruction's systematic exclusion of members until nearly four months after trial. (J.A. at 163.) Trial defense counsel immediately submitted a supplemental clemency request, asking for either the findings and sentence to be set aside and a rehearing or for a post-trial Article 39(a) session to litigate this issue. (J.A. at 141-45.)

The fleet judge advocate (FJA) responded to the defense's allegation in an addendum the next day, giving no legal analysis and merely stating the issue was waived. (J.A. at 171-72.) COMNAVAIRLANT acted on the sentence the same day as the addendum. He awarded no clemency and did not direct a post-trial Article 39(a) hearing to examine the issue. (J.A. 173-75.)

Before the NMCCA, CSSA Ward again raised the improper members selection issue. The lower court granted the Government's motion to attach three affidavits to the record: one from the FJA who served before CSSA Ward's court-martial,

one from the FJA who served during and after the court-martial, and one from the Convening Authority.[1] The affidavits of the Convening Authority and the second FJA were created for a separate court-martial, *United States v. AT1 Lesley*, where the same issue was raised.

Both FJAs stated they advised COMNAVAIRLANT he could select any person within his "claimancy" to sit on the court-martial panel. (J.A. at 179, 181.) The second FJA also stated he advised COMNAVAIRLANT to apply the Article 25, UCMJ, criteria while selecting members. (J.A. at 181.)

In addition, the second FJA stated he became aware of the existence of the problematic instruction on August 6, 2013, which was over a month before CSSA Wards' trial on September 11-13, 2013. (J.A. at 181.) In January 2014, after a defense challenge in another court-martial, the FJA recommended empaneling new members to remedy the issue in that case. (J.A. at 181-82.) Thus, even though the second FJA was aware of the instruction prior to CSSA Ward's court-martial, he took no action to correct the problem.

[1] The FJA who served before CSSA Ward's court-martial and advised COMNAVAIRLANT on empaneling the members was Captain (CAPT) Frederick Mitchell, JAGC, USN. CAPT Mitchell was the Chief Judge of the NMCCA at the time of the opinion in this case and a Senior Judge when he submitted his affidavit. He remains the Chief Judge of the NMCCA at the time of this filing.

Lastly, the Convening Authority's affidavit stated he selected members based on Article 25, UCMJ, criteria. (J.A. at 184-85.) Both FJAs stated the Convening Authority had "constructive knowledge" of the instruction, but did not review it prior to selecting members. (J.A. at 179, 181.)

The lower court considered these affidavits and found the systematic exclusion of members to be error, but found it was harmless.

Summary of Argument

This Court's precedent makes it clear that systematic exclusion by rank in the member-selection process is prohibited. The enforcement of this prohibition is less clear, however. Here, the lower court found it was error to systematically exclude members below E-7 and above O-5 from CSSA Ward's panel. But the NMCCA applied the prejudice analysis from *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008), to find the error was harmless.

The lower court should have instead followed *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000). This controlling precedent dealt with members improperly excluded by rank and found there was an unresolved appearance of unfairness. *Kirkland* has not specifically been overruled and this Court should reaffirm that it is still good law. To hold otherwise would allow convening authorities to continue to ignore the

limitations Congress has placed on their discretion in selecting members. If a convening authority does not have to follow the controlling statute--Article 25, USMJ--then it undermines the entire military justice system. This Court should reverse the lower court's opinion in order to ensure CSSA Ward's court-martial is free from the appearance of unfairness and to enforce the requirements of Article 25, UCMJ.

Argument

THE CONVENING AUTHORITY ISSUED AN INSTRUCTION LIMITING COURT-MARTIAL MEMBER NOMINATIONS TO PERSONNEL ONLY IN THE PAY-GRADES BETWEEN E-7 AND O-5. THE LOWER COURT FOUND THIS SYSTEMATIC EXCLUSION OF PERSONNEL TO BE ERROR, BUT HARMLESS. THIS COURT SHOULD APPLY THE RATIONALE OF *UNITED STATES V. KIRKLAND* AND REVERSE DUE TO THE UNRESOLVED APPEARANCE OF UNFAIRNESS CAUSED BY THE EXCLUSION OF POTENTIALLY QUALIFIED MEMBERS.

Standard of Review

This Court reviews *de novo* whether a court-martial panel was "selected free from systematic exclusion" of members based on rank. *Kirkland*, 53 M.J. at 24 (citing *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986)).

Discussion

The Sixth Amendment does not provide a constitutional right to trial by a jury in the military. *United States v. Kemp*, 46 C.M.R. 152, 154 (C.M.A. 1973). At the same time, a military accused has a right to a fair and impartial members panel.

United States v. Roland, 50 M.J. 66, 68 (C.A.A.F. 1999). This right "is the cornerstone of the military justice system." *United States v. Hilow*, 32 M.J. 439, 442 (C.M.A. 1991). The selection of the members panel is governed by Article 25(d)(2), UCMJ, which provides:

> When convening a court-martial, the convening authority *shall* detail as members thereof such members of the armed forces as, in his opinion, are *best qualified* for the duty by *reason of age, education, training, experience, length of service, and judicial temperament.*

(emphasis added.) Thus, a convening authority must select members using the Article 25, UCMJ, criteria.

To ensure a convening authority makes an appropriate selection under Article 25, UCMJ, this Court's precedent is clear: it is impermissible to categorically exclude individuals from the member selection process by rank.[2] Therefore, "[b]lanket exclusion of qualified officers or enlisted members

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[2] *See Kirkland*, 53 M.J. at 25 (reversing when potentially qualified members below rank of E-7 excluded from nominating process); *McClain*, 22 M.J. at 131 (reversible error to systematically exclude junior officers and enlisted members below E-7 to avoid light sentences); *United States v. Daigle*, 1 M.J. 139, 141 (C.M.A. 1975) (reversing where rank was "used as a device for deliberate exclusion and systematic exclusion of qualified persons"); *United States v. Greene*, 43 C.M.R. 72, 78-79 (C.M.A. 1970) (reversible error due to systematic exclusion of junior officers); *cf. United States v. Yager*, 7 M.J. 171, 173 (C.M.A. 1979) (finding it permissible to exclude members below grade E-3 because of demonstrated relationship to Article 25, UCMJ, criteria); *United States v. Nixon*, 33 M.J. 433, 435 (C.M.A. 1991) (permissible for convening authority to select only high ranking NCOs because his testimony showed he complied with Article 25, UCMJ, criteria).

in the lower grades is at odds with congressional intent and cannot be sustained." *Roland*, 50 M.J. at 69 (quoting *Nixon*, 33 M.J. at 434).

Almost all enlisted personnel in the rank of E-2 and above, excluding those from his own unit, and all officers were eligible to serve on CSSA Ward's court-martial panel. The lower court properly found it was error for the Convening Authority to systematically exclude members by rank because it violated the criteria of Article 25, UCMJ. However, it found this error to be harmless, relying on six prejudice factors from *Bartlett*. 66 M.J. at 431. The lower court found there was no evidence of improper motive; that the Convening Authority was advised of his Article 25, UCMJ, responsibilities; and the members met the criteria in Article 25, UCMJ.

While in *Bartlett* members were excluded based on their military designators, *Kirkland* is more directly on point because it addresses systematic exclusion by rank. Further, *Bartlett* did not explicitly overrule *Kirkland*. Therefore *Kirkland* controls in this case, and the lower court erred by relying on *Bartlett*.

This Court has three reasons to reverse the lower court. First, *Kirkland* is the correct and controlling precedent. Second, the importance of the appearance of fairness in the member selection process is seminal to the military justice

system. Lastly, despite a half-century of case law to the contrary, convening authorities continue to improperly exclude members by rank. This Court needs to send a message that this practice will not be tolerated. When convening authorities ignore this congressional mandate, it appears to the public that they are not fair arbiters in the military justice system.

a. *United States v. Kirkland's* holding is controlling.

The facts of the flawed member selection in this case are nearly identical to the facts from *Kirkland*. Despite this similarity, the lower court did not discuss *Kirkland*'s holding in relation to the remedy for the improper selection. This Court should now apply the holding in *Kirkland* and reverse.

In *Kirkland*, the legal office sent a quarterly letter to Commanders, asking for nominees for a member-selection pool. 53 M.J. at 23. The letter told them to nominate senior enlisted members using an attached chart. *Id.* However, the chart did not provide any place to nominate court members below the grade of E-7. *Id.* The staff judge advocate (SJA) testified that he informed the convening authority on "his duties and his ability to select other military members, assuming they met Article 25 criteria." *Id.*

This Court ruled the exclusion of potentially qualified members below the grade of E-7 in *Kirkland* was improper. *Id.* at 25. This Court held "reversal of the appellant's sentence is

appropriate to uphold the essential fairness and integrity of the military justice system." *Id.* (citing *McClain*, 22 M.J. at 133 (Cox, J., concurring in the result)). Specifically, this Court found that there was an "unresolved *appearance*" that "potentially qualified court members below the grade of E-7 were excluded," so it was appropriate to set aside and dismiss the sentence.[3] *Id.* (emphasis added).

Here, the nomination instruction was in substantially the same form as in *Kirkland*--it directed a nomination of a specific number of personnel from each rank and did not provide the opportunity to nominate members below the pay-grade of E-7 or above O-5. Further, the evidence presented to support the selection process was also similar--the FJAs and the Convening Authority here stated in their affidavits the Convening Authority knew of his duties under Article 25, UCMJ, and was aware he could choose members outside of the provided nomination list. With these identical facts in *Kirkland*, this Court found reversal was necessary due to an "unresolved appearance" of improper exclusion in order to "uphold the essential fairness and integrity" of our system. *Id.*

[3] The appellant in *Kirkland* pled guilty in front of a military judge but was sentenced by members, so the improper selection of members had no impact on the findings. *Id.* Thus, this Court only reversed the sentence in that case.

The facts in these two cases are too similar to disregard. Unless this Court decides to directly overrule *Kirkland*, its holding should be controlling.

b. This Court should reaffirm *Kirkland* to ensure the members-selection process is free from even the appearance of unfairness.

In the decade since *Kirkland*, this Court has reviewed several other cases involving member selection. In determining prejudice, this Court recently stated it looks at whether the failure to comply with Article 25, UCMJ, "materially prejudiced the substantial rights of the accused." Article 59(a), UCMJ; *United States v. Gooch*, 69 M.J. 353, 360 (C.A.A.F. 2011). When a preliminary screening of panel members improperly excludes by rank, the Government has the burden to "demonstrate lack of harm." *Bartlett*, 66 M.J. at 430 (citing *United States v. Dowty*, 60 M.J. 163, 175-75 (C.A.A.F. 2004)).

In *Bartlett*, this Court listed six factors to determine whether the appellant suffered prejudice when officers with certain designators were categorically excluded from court-martial service by an Army regulation. 66 M.J. at 427. This Court stated the error was harmless under the circumstances because: (1) there was no evidence the regulation was issued with an improper motive; (2) there was no evidence the convening authority's motivation in detailing the members was not benign; (3) the convening authority was a person authorized to convene a

general court-martial; (4) the convening authority personally choose the members from a pool of eligible officers; (5) the members met the criteria in Article 25, UCMJ; and, (6) the panel was "well-balanced across gender, racial, staff, command, and branch lines." 66 M.J. at 431.

Under this standard, however, there is no practical way for an appellant to ever show prejudice from an improperly selected panel. Appellants are essentially left without any recourse for a convening authority's violation of the UCMJ. This result undermines the fairness of the members selection process and eviscerates Article 25, UCMJ.

The lower court's decision allows a convening authority to easily "fix" any improperly selected members panel after the fact with corrective affidavits that reference Article 25, UCMJ, as seen here. This situation creates a fundamental flaw in the selection process even before the Article 25, UCMJ, consideration transpires. If an impermissible criterion limited the members pool before the convening authority even saw the list of candidates, SJAs and convening authorities merely need to show that the convening authority considered Article 25, UCMJ, at some point during the selection process. That does not cure the problem because the nominations were still originally improperly restricted.

Absent a smoking gun in the form of inculpatory testimony from an offending convening authority, an appellant can never demonstrate prejudice under this member-selection framework. This result both appears to be, and actually is, unjust.

In order to rectify this issue, this Court should reemphasize an appearance standard for member-selection issues. In the past, this Court has repeatedly shown concern about the appearance of unfairness in an improperly selected members panel. In *United States v. McClain*, this Court focused on an appearance standard, stating

> . . . because "[d]iscrimination in the selection of court members on the basis of improper criteria threatens the integrity of the military justice system and violates the Uniform Code," *see United States v. Daigle*, 1 M.J. at 140 – this Court is *especially concerned to avoid either the appearance or reality of improper selection*.

22 M.J. at 132 (emphasis added).

In *Hilow*, this Court also warned against the danger of an appearance of unfairness in the members selection process:

> The right to trial by fair and impartial members or a professional military judge is the cornerstone of the military justice system. *Denial of a full and fair opportunity to exercise this right creates an appearance of injustice which permeates the remainder of the court-martial.* When such a perception is fostered or perpetuated by military authorities through ignorance or deceit, it substantially undermines the public's confidence in the integrity of the court-martial proceedings.

32 M.J. at 442-43 (emphasis added). More recently, in *United States v. Dowty*, this Court also conducted a brief appearance analysis, observing there was "no *appearance* of unfairness arising from the service of any of the volunteer members." 60 M.J. at 175 (emphasis added). Lastly, this Court held in *Kirkland* there was an "unresolved appearance" of improperly selected members. 53 M.J. at 25.

Taken together, these cases show that this Court is concerned with both the appearance of fairness in the court-martial process and the public's perception of the process.

This Court should now reaffirm the importance of the appearance of fairness in members selection. The outcome in *Bartlett* undermines the holding in *Kirkland* about the importance of a fair appearance in this process. This principle of impartiality is fundamental to the legitimacy of our military justice system. A basic tenant of military justice is that it not only be a fair system, but that it also be perceived as fair. In general, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

This concept is especially true in light of the fact that we do not have juries in our system. Rather, the same person who refers charges against an accused hand-selects the members who will sit in judgment of the accused. This process is a departure from the Constitutional rights afforded to everyone

else prosecuted by the United States. Because it is a departure from the norm of our country's basic legal tenets, this process must be beyond reproach to remain a legitimate system of justice.[4] Thus, this Court has recognized it should be "especially concerned to avoid either the appearance or reality of improper selection." *McClain*, 22 M.J. at 132.

Lastly, it is important to note that an individual member can be challenged and excused for the appearance of impartiality, viewed through the eyes of the public. *See* Rule

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[4] *See generally*, *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988) (Cox, J., concurring) (the selection of members by the CA is "the most vulnerable aspect of the court-martial system; the easiest for critics to attack."); Honorable Walter T. Cox, III et al., *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*, at 7 (2001) ("There is no aspect of the military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence that the antiquated process of panel selection. The current practice is an invitation to mischief."); Colonel James A. Young, III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 107 (2000) ("As long as the person responsible for sending a case to trial is the same person who selects the court members, the perception of unfairness will not abate."); Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three--Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 4 (1998) ("The [panel selection] process naturally breeds unlawful command influence and its mien . . . [court-stacking] is consistently achieved, suspected, or both."); Joint Service Committee On Military Justice, *Report On The Methods Of Selection Of Members Of The Armed Forces To Serve On Courts-Martial*, at 18 (1999) ("To the extent that there is a possibility of abuse in the current system, there will always be a perception that that convening authorities and their subordinates may abandon their responsibilities and improperly attempt to influence the outcome of a court-martial.").

for Courts-Martial 912(f)(1)(N); *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). If one member must be excused due to negative public perception, the same must be true of an entire improperly selected panel.

This Court should reaffirm that when members are systematically excluded by rank, in direct contradiction to Congressional mandate, there is an appearance of unfairness.

c. This Court should reverse to send a message to convening authorities that systematic exclusion by rank is not tolerated.

The prohibition against exclusion by rank is not a new concept. This Court first recognized this principle fifty years ago in *United States v. Crawford*, 35 C.M.R. 3, 10 (C.M.A. 1964). Five years later, this Court made its first reversal on this basis in *United States v. Greene*. 43 C.M.R. at 78-79. This Court more recently addressed additional impermissible variables in the members-selection process of volunteers, designators, and knowledge of the accused in the recent opinions of *Dowty*, *Bartlett*, and *Gooch*. The variables in those cases were "novel" criteria, examined for the first time by this Court.

But here, this Convening Authority had the benefit of a half-century of case law to inform him, and his FJAs, that systematic exclusion by rank is prohibited. Yet convening

authorities continue to do it.[5] This Court should force convening authorities, and the lower court, to follow the constraints Congress placed on them.

As this Court stated in *Dowty*, "this Court sits as a judicial body which must take the law as it finds it . . . [.]" 60 M.J. at 176 (citation omitted). Here, Congress has made a clear and unambiguous law. Yet under this Court's recent jurisprudence, there is no practical way to enforce it. Because appellants have no opportunity to receive meaningful relief under this analysis, Article 25, UCMJ, is basically a dead-letter law. Convening authorities are free to continue to systematically exclude members by rank in the selection process as long as they consider Article 25, UCMJ, at some point in the process. Unless this Court intervenes, this behavior will continue in direct contradiction to Congressional intent without oversight by this Court. As Judge Effron cautioned in *Dowty*:

> In short, we have a flawed process that produced multiple felony convictions. We have a criminal record that not only was imposed without a trial by

[5] Two other Navy general court-martial convening authorities recently have implemented the same impermissible quota system of requiring a certain amount of nominations by rank. *See* COMNAVFORJAPAN Instruction 5817.5S (Oct. 3, 2014); COMNAVREG MIDLANT Instruction 5813.1A (Mar. 22, 2013).

The lower court examined the second instruction in a recent opinion. *United States v. Suazolopez*, No. 201300463, 2014 CCA LEXIS 916 (N-M. Ct. Crim. App. Dec. 23, 2014). The lower court assumed there was a systematic exclusion of members but found the error to be harmless. *Id.* at *9.

> jury, but through a process that failed to apply the procedures in lieu of trial by jury.

Id. at 177 (Effron, J., dissenting). CSSA Ward is not asking this Court to create new law--rather he simply asks that the statute be enforced as written by Congress.

This Court should reverse to prevent convening authorities from continuing this unsanctioned practice and to preserve the appearance of the fairness of the military justice system.

Conclusion

CSSA Ward's court-martial was composed of improperly selected members, all very senior to him in rank and pay-grade. This panel convicted CSSA Ward of several serious crimes and sentenced him to over two and a half years in the brig and a dishonorable discharge. On its face, the composition of members appears to be unfair. This result cannot stand.

As the caretaker of military justice, this Court should apply the holding from *United States v. Kirkland* and revitalize the importance of the appearance of fairness in the members-selection process. This outcome will send a message to all convening authorities that violations of Article 25, UCMJ, are not tolerated. Enforcing Congressional intent will uphold the integrity of our criminal justice system by ensuring the selection of members for courts-martial both appears to be, and is, fair and just.

Therefore, this Court should set aside CSSA Ward's findings and sentence and remand for a rehearing with a properly selected members panel.

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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on January 7, 2015.

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