IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

On December 8, 2014, this Honorable Court granted Culinary Specialist Seaman Apprentice (CSSA) Darron Ward's petition for review and ordered briefing. On January 7, 2014, CSSA Ward filed his brief with this Court. The Government responded on February 6, 2015, arguing the lower court's holding that there was a systematic exclusion of members was incorrect. The Government also argued there was no prejudice to CSSA Ward. CSSA Ward replies herein.

Argument

1. The law of the case doctrine prevents the Government from challenging the lower court's holding that there was a systematic exclusion of members.

"Under the 'law of the case' doctrine, an unchallenged ruling 'constitutes the law of the case and binds the parties.'" *United States v. Morris*, 49 M.J. 227, 230 (C.A.A.F. 1998) (quoting *United States v. Grooters*, 39 M.J. 269, 273 (C.M.A. 1994)). Under this principle, this Court will not review a

subordinate court's ruling on an unchallenged issue unless it was "clearly erroneous and would work a manifest injustice." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002).

Here, the law of the case doctrine precludes the Government from challenging the lower court's ruling on whether there was a systematic exclusion of members. Neither side sought review of that issue to this Court. Further, the lower court's ruling was not clearly erroneous.

a. *The law of the case doctrine applies because neither side challenged the lower court's error holding.*

United States v. Grooters is controlling in determining whether the law of the case doctrine applies here. 39 M.J. at 273. There, the appellant petitioned for review of the lower court's prejudice determination on an evidentiary ruling, but not the correctness of the evidentiary ruling itself. *Id.* at 272. The Government did not separately certify the correctness of the evidentiary ruling; rather it only tried to argue it was error in its Answer. *Id.* The Court of Military Appeals found the law of the case doctrine applied: it declined to review the correctness of the evidentiary ruling because neither party originally challenged it through petition or certification. *Id.* at 272-73.

Here, CSSA Ward did not challenge the correctness of the lower court's finding on whether there was error.[1] Further, the Government did not certify this issue after this Court granted review in this case. *See United States v. Clifton*, 71 M.J. 489, 495 (C.A.A.F. 2013) (Erdmann, J., concurring) (". . . once an issue has been granted by this court, the government should certify any issue upon which it did not prevail at the CCA and which it deems necessary to litigate before this court."). Thus, the law of the case doctrine applies and this Court should only review the lower court's prejudice determination.

b. *The lower court's holding was not clearly erroneous such that it would result in a manifest injustice.*

The lower court's finding that, "the record is clear that service members were impermissibly excluded from the member selection process by virtue of their rank" is not clearly erroneous. *United States v. Ward*, No. 201400021, 2014 CCA LEXIS 535, *6-7 (N-M. Ct. Crim. App. Jul. 31, 2014). In fact, it was correct.

Not to belabor the point, but the underlying facts of the quota nomination process in COMNAVAIRLANTINST 5813.1H [hereinafter Instruction] (J.A. at 146-48), are the same as the process in *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F.

[1] In the Issue Presented, CSSA Ward specifically referenced the lower court's finding of error and only challenged the prejudice prong. In granting review, this Court did not modify CSSA Ward's Issue Presented.

2000). There, the legal office sent out a quarterly letter to commanders, asking for nominees for a member-selection pool. *Id.* at 23. The letter told them to nominate senior enlisted members using an attached chart. *Id.* at 24-25. However, the chart did not provide any place to nominate court members below the grade of E-7. *Id.* at 25.

Here, the nomination instruction was in basically the same form—it listed required amounts of personnel from each rank and did not provide the opportunity to nominate members below the grade of E-7. (J.A. at 147.) This case is even more egregious, however, because personnel in the rank of O-6 were also excluded from the nomination process. This Court in *Kirkland* ruled the systematic exclusion of potentially qualified members below the grade of E-7 was improper. *Id.* Thus, the holding of systematic exclusion from *Kirkland* should be controlling here.

The Government attempts to distinguish *Kirkland* and other case law on systematic exclusion by arguing: (1) there were no grade restrictions on Naval Air Force Atlantic (AIRLANT) staff; (2) the Instruction requested additional enlisted nominations for enlisted personnel; and (3) the Convening Authority, not a subordinate, created the restriction. Each of these arguments fails.

First, the fact there was no grade restrictions on AIRLANT staff is immaterial. Contrary to the Government's assertion,

CSSA Ward does not concede the Convening Authority "considered all [AIRLANT] staff members." (Gov. Answer at 16.) Rather, there is a lack of evidence—the affidavits from the two FJAs and the convening authority do not discuss the details of the selection process for CSSA Ward's court-martial. (J.A. at 178-85.) The affidavits only speak in generalities. There is no evidence regarding whether AIRLANT staff were even nominated for this specific members panel.

In addition, the Government alleges "Appellant did not litigate this issue at trial or develop facts to support this. . ." (Gov. Answer at 12.) Indeed, Appellant was prevented from litigating this issue at trial due to the Government's discovery violation. *See Ward*, 2014 CCA LEXIS 535, *9 (finding a discovery violation in failure to turn over Instruction to defense, but error was harmless). The Government should not now be able to benefit from their improper withholding by arguing there is no evidence to support CSSA Ward's position.

There are other reasons why the possible inclusion of AIRLANT staff members is not dispositive. To begin, none of the fifteen members detailed to CSSA Ward's court-martial were AIRLANT staff—they all came from subordinate commands. (*See* J.A. at 152-53; Appellant's Motion to Substitute the Joint Appendix, filed contemporaneously with this Reply.) Further, common sense dictates the vast majority of member nominations

would come from subordinate commands, due to their much larger relative size. *See* MC1 Ernest Scott, *Naval Air Force Atlantic Changes Command* (Jan. 9, 2015, 10:47 AM) http://www.navy.mil/submit/display.asp?story_id=85133 ("The command encompasses 80 squadrons, more than 1,000 aircraft and 40,000 personnel . . . .") The population of AIRLANT staff members is a drop in the bucket compared to AIRLANT subordinate commands. Thus, even if all AIRLANT staff were considered, the Convening Authority still systematically excluded a population of tens of thousands of potential members based only on rank. Lastly, it is not prudent for a convening authority to select members of his personal staff. There could be an appearance of unlawful command influence or "packing" a panel with members who work directly for him. For these reasons, the mere possibility of AIRLANT staff being nominated does not cure the systematic exclusion by pay-grade.

Second, the Government overstates the significance of the Instruction's requirement for additional enlisted members in paragraph d. The purpose of paragraph d is to meet another Article 25 condition: enlisted members cannot be from the same unit as an enlisted accused. Article 25(c)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 825 (2012). Paragraph d merely states another AIRLANT unit will need to provide additional enlisted personnel to make up for nominations

excluded by being in the same unit. Paragraph d does not state that the prior pay-grade restrictions in paragraph a, which limit "Enlisted" nominations to "E7/E8/E9," do not apply. The paragraphs of the Instruction should be read together in context. Paragraph d should not be read to supersede paragraph a.

Lastly, the position of the person who created the exclusion in the Instruction is irrelevant. It is error for a lesser-ranking person, in the form of a subordinate commander or an SJA, to exclude all members of certain ranks. It is no less error for a convening authority to take the exact same action. Congress expressly limited the discretion of a convening authority in selecting members and did not include pay-grade as a criteria in Article 25, UCMJ. It is the exclusion of qualified personnel that is the problem, not the identity of who decides to exclude them.

In sum, the Government is prohibited from challenging the lower court's holding on the existence of a systematic exclusion due to the law of the case doctrine. Neither side raised the issue of error to this Court. Further, the lower court's ruling was not clearly erroneous. This Court's should only focus on the granted issue and resolve the prejudice determination.

2. The holding from *United States v. Kirkland* is the correct standard for prejudice.

It is telling that the Government only spends five pages discussing prejudice, the only granted issue, out of their twenty-three page brief. Specifically, the Government concedes *Kirkland* is still good law and has not been overruled by *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008). (Gov. Answer at 18-20.) CSSA Ward cannot agree more. And the facts of *Kirkland* are so similar to the facts in this case that its conclusions on prejudice should apply.

The Government's own description of *Kirkland* supports this conclusion:

> the military judge in that case erred in denying the defense's request for a new panel based on an appearance of impropriety caused by a nomination process that required subordinate commands to submit quota submissions on a chart that did not provide any place to nominate members below the grade of E-7.[2]

(Gov. Answer at 19.) This is a spot-on summary of the factual similarities between the two cases. The Government then goes on to state: "Essentially, the United States would have been unable to demonstrate the lack of harm as it would have been required under *Bartlett*—the appearance of impropriety was too great under

[2] The Government's statement that the *Kirkland* Court "cit[ed] the clear institutional bias in *McClain*" in determining prejudice is misleading. (Gov. Answer at 19.) While the *Kirkland* Court did cite *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986), it stated the facts in *Kirkland*, "do[] *not* involve the clear institutional bias found in *McClain*." *Kirkland*, 53 M.J. at 25 (emphasis added).

the facts of the case." (Gov. Answer at 20.) But the Government does not even attempt to distinguish how the appearance of impropriety present in *Kirkland* is different compared to the facts of CSSA Ward's court-martial. If there was an appearance of impropriety requiring reversal in *Kirkland*, then the same impropriety is present here.

The six factors from *Bartlett*, 66 M.J. at 431, also are not helpful for the Government to prove lack of harm. To examine each in turn:

(1) Did the individual who enacted the Instruction act with an improper motive? This information is unknown. The Instruction was created on July 29, 2008 by a prior convening authority. (J.A. at 146.) The Government has no evidence whatsoever of the motivation of this prior convening authority in establishing exclusions by pay-grade.

(2) Was there evidence the Convening Authority's motives were anything but benign in detailing the members? While there is not facial evidence that the Convening Authority acted with an improper motive, that should not be required. This factor would be more appropriate for unlawful command influence (UCI) allegations, where the Government would have to prove lack of harm beyond a reasonable doubt. *Bartlett*, 66 M.J. at 430. This factor

can likely never be met for systematic exclusion cases. If there is facial evidence of a non-benign motive, then it goes toward UCI or court-packing, not systematic exclusion.

(3) Was the Convening Authority authorized to convene a general court-martial? This factor is also not relevant. If the Convening Authority here was not authorized to convene a general court-martial, then CSSA Ward would have raised a different, jurisdictional issue. *See* RULE FOR COURTS-MARTIAL 201(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) (stating for a court-martial to have jurisdiction, it "must be convened by an official empower to convene it."). This factor will always be present in a member-selection case and therefore is a nullity.

(4) Was CSSA Ward tried by members personally chosen by the convening authority from a pool of eligible members? While the Convening Authority stated he personally selects members, the problem here is that the pool of nominations was incomplete. Potentially eligible members were excluded from the pool; the available nominations were dwindled and tainted before the Convening Authority even had a chance to make his selections.

(5) Did the members all meet Article 25, UCMJ, criteria? Even if the members met the criteria of Article 25, it is still insufficient. The Convening Authority also excluded countless other members who met the exact same criteria. Pay-grade was used merely as a short-cut to meet the requirements of Article 25, which is impermissible. *See United States v. Nixon*, 33 M.J. 433, 434 (C.M.A. 1991).

(6) Was the panel well-balanced? CSSA Ward does not concede the panel was well-balanced. But even if it was, it still does not negate that the selection process itself was flawed. A defective process that creates a seemingly correct result by happenstance is still indefensible.

Under the Government's framework, there is no way for reversal to occur in a systematic exclusion case, absent some evidence of UCI. This result guts the requirements of Article 25 and turns it into a dead letter. Congress specifically enacted Article 25 to limit the discretion of convening authorities. If the provisions of the statute are given no meaning, then convening authorities will continue to remain unfettered in thwarting Congressional intent.

The Government concedes *Kirkland* is still good law and CSSA Ward asserts it is controlling here. The appearance of improperly selected members is too great to ignore.

Conclusion

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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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 February 13, 2015.

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