IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| UNITED STATES,<br><br>Appellee<br><br>v.<br><br>Emmanuel Q. BARTEE<br>Lance Corporal (E-3)<br>U.S. Marine Corps,<br><br>Appellant | BRIEF ON BEHALF OF APPELLANT<br><br>USCA Dkt. No. 16-0391/MC<br><br>Crim.App. Dkt. No. 201500037 |

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

M. BRIAN MAGEE
Major, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris Street, SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
(202) 685-8502
brian.magee@navy.mil
Bar No. 36441

BENJAMIN A. ROBLES
Major, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
(202) 685-7087
benjamin.robles@navy.mil
Bar No. 36638

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THE SYSTEMATIC EXCLUSION OF INDIVIDUALS BY RANK FROM THE MEMBER-SELECTION PROCESS IS PROHIBITED. HERE, THE MILITARY JUDGE DISMISSED THE PANEL FOR VIOLATING ARTICLE 25, UCMJ, BUT THE CONVENING AUTHORITY RECONVENED THE EXACT SAME PANEL THE SAME DAY. IS THIS SYSTEMATIC EXCLUSION BASED ON RANK REVERSIBLE ERROR?

## Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that included twenty months' confinement and a dishonorable discharge, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1] This Court, therefore, has jurisdiction under Article 67, UCMJ.[2]

## Statement of the Case

A military judge sitting as a general court-martial convicted Lance Corporal (LCpl) Bartee, contrary to his pleas, of conspiracy, making a false official statement, and six specifications of larceny in violation of Articles 81, 107, and 121, UCMJ, respectively.[3] The court-martial acquitted him of four specifications

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[1] 10 U.S.C. §866 (b)(1).
[2] *Id.* §867.
[3] *Id.* §§ 881, 907, 921.

of larceny. The military judge sentenced LCpl Bartee to twenty months' confinement and a dishonorable discharge.

The convening authority (CA) approved the sentence as adjudged and, with the exception of the punitive discharge, ordered it executed. On January 12, 2016, the NMCCA affirmed the findings and sentence.[4]

On May 16, 2016, this Court granted LCpl Bartee's petition for review.

## Statement of Facts

### 1. The staff judge advocate and convening authority exclude court-martial members based on rank.

LCpl Bartee's trial was scheduled to begin September 22, 2014.[5] A few weeks before trial, on August 26, the staff judge advocate (SJA) solicited members for the court-martial via e-mail on behalf of the CA.[6] The SJA's message directed subordinate commands to submit questionnaires for "all your O-4s and above, and all E-8s and above" to the SJA's staff.[7] The record does not indicate how many questionnaires were provided to the SJA. But on September 11, the SJA provided the CA—at that time, Colonel (Col) J. M. Schultz—a list of sixteen officer and enlisted members in a "selection worksheet" wherein members were pre-selected

[4] *See United States v. Bartee*, No. 201500037, 2016 CCA LEXIS 11 (N-M. Ct. Crim. App. Jan. 12, 2016).
[5] J.A. at 11.
[6] J.A. at 24.
[7] J.A. at 25.

and required only the CA's signature.[8] A memorandum comprised of boilerplate recitations of Article 25 selection criteria accompanied the worksheet.[9] Col Schultz signed the selection worksheet the same day without modification.[10] Col Schultz also signed Convening Order #1a-13 the same day, reflecting the members from the selection worksheet.[11]

**2. A sergeant major explains that exclusion of most ranks is necessary to prevent acquittals and light sentences.**

On September 18, 2014, a sergeant major sent an email to several other senior enlisted Marines to explain why his command was requesting only E-8s and above for an upcoming court-martial. He explained:

-----Original Message-----
From: Cochran SgtMaj Veney
Sent: Thursday, September 18, 2014 12:01 PM
To: Fowler GySgt Shawn W.; Fuller 1stSgt Claudia A; Breland 1stSgt James L.; Perez 1stSgt Laureano
Cc: Daily MGySgt Charles D; Wooden MGySgt Lewis R; Wertman MGySgt Kenneth L
Subject: Courts Martials

All,

I wanted to give you a little background on why the specific request for a MSgt or above for the upcoming Courts Martial. During the recent Commanders conference, it was bought to our attention that of the last 13 Courts Martials that TCOM has had, Marines clearly guilty have been found not guilty or given b=very light sentences by the members of the jury. For the most part, the members have been very junior SNCO's and officers, specifically the last General Courts Martial was for a MSGT and the senior member was a 6 yr Capt. Our Capts, Gunnies and SSgts, do not necessarily have the same expectations or understand the same impacts as our Senior SNCOS. That is not always the case but the last 13 Courts Martial say different. Understand that a Courts Martial, evidence is only part of what you need. Unlike the civilian trials, we can have all the evidence we need but if the members just feels that the incident wasn't that bad, he can vote not guilty or not agree to a stiff punishment, hence where the experience and time in comes into play. This will not be the norm(requiring MSGT and above) but it was implied that we need to for this one.

S/F
SgtMaj

[8] J.A. at 16.
[9] J.A. at 14-15.
[10] J.A. at 16.
[11] J.A. at 17.

The record is unclear on what level of command the conference was for, how widely it was attended, how widely the above email was distributed, or whether similar guidance was given at other commanders' conferences or through other communication channels.

### 3. LCpl Bartee objects to the panel and the trial counsel explains how he usually skirts Article 25.

As the result of a continuance, two of the members became unavailable for the court-martial. Consistent with the SJA's initial email directive regarding ranks of members, the CA detailed a Navy Captain and a Sergeant Major as replacements.[12]

The trial defense counsel objected to the panel-selection process because it violated Article 25, UCMJ.[13] In response, the trial counsel acknowledged this was a recurring issue within this command, stating:

> And we'll just note for whatever it's worth that in prior situations where this came up, we ended up with the same exact panel that was originally selected after going through the reconfirming. I -- Yes, I understand I can pick whoever I want to, this is still the panel that I want to go forward with.[14]

[12] J.A. at 21.
[13] J.A. at 37.
[14] J.A. at 39.

**4. The military judge dismisses the panel for violating Article 25.**

The military judge agreed that the resulting panel convened under Convening Order #1a-13 on September 11, 2014 was improperly selected due to the exclusion of certain ranks from the selection process.[15] The military judge ordered the Government to select a new panel with a proper selection process: "And so, based on that, I'm striking this panel and directing the CA to go back and convene a new court-martial that comports with Article 25 of the UCMJ."[16] The military judge recessed the proceeding at 1431 on September 29, 2014.[17]

**5. The CA whitewashes his Article 25 violation.**

The court reconvened at 0809 the following morning with General Court-Martial Convening Order 1c-13.[18] There was no change in the panel from the day before. During the previous afternoon, the Government produced a new convening order that

1. deleted all the members,
2. added the same members it had just deleted, and
3. finalized the list of now-deleted and re-added members.[19]

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[15] J.A. at 52.
[16] *Id.*
[17] J.A. at 53.
[18] J.A. at 54.
[19] J.A. at 7.

The CA—by this time, Major General (MajGen) Coglianese—did not receive or review any additional questionnaires, but did receive an alpha roster containing the names of roughly 8,000 personnel under his command.[20] With the new convening order, MajGen Coglianese signed a memo to communicate that he understood the Article 25 criteria, understood that he could pick whomever he wanted, and affirmed that this was the panel he wanted.[21]

MajGen Coglianese's memo proffered, "To be clear, like previous selections in this case, I personally selected these members only on the basis of their age, education, training, experience, length of service and judicial temperament."[22] But MajGen Coglianese did not select the original panel; Col Schultz did.[23] Nor did MajGen Coglianese originate the memo. The memo was drafted by the SJA's office and "proposed to [the CA] as something for his signature."[24] There were no modifications made to the memo by the CA.[25]

In light of the above actions, the military judge found that the members panel was "correctly selected via the Article 25 criteria[.]"[26]

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[20] J.A. at 26, 28, 66.
[21] J.A. at 28.
[22] *Id.*
[23] *See supra* pp. 2-3.
[24] J.A. at 66.
[25] *Id.*
[26] J.A. at 70.

### 6. LCpl Bartee faces a Hobson's choice to proceed with a tainted panel or no panel at all.

Following the military judge's determination that the CA properly convened the panel, LCpl Bartee had to decide between proceeding with a panel he reasonably perceived to be stacked or, despite his desire to be tried by a members panel, elect trial by military judge alone. He reluctantly chose trial by military judge alone:

> Sir, in light of the Court's ruling, it is the defense's position at this time, that because we still believe there to be a defect of the panel, that we are forced to abandon our request for trial by members with enlisted representation, and we are requesting, and Lance Corporal Bartee is requesting, trial by military judge alone.[27]

## Summary of Argument

Systematic exclusion of members based solely on rank is prohibited. On the first scheduled day of trial, the military judge first found that the CA improperly excluded members based solely on rank, and then ordered the Government to convene a new panel. Instead, the CA reconvened the same panel the same day and signed a memo stating that he had now properly considered the Article 25 criteria. But far from curing the taint of improper selection, to any accused or casual observer, the new "selection process" gainsaid the sincerity of the

[27] J.A. at 70-71; *see also Bartee*, 2016 CCA LEXIS 11, *12-13 ("In this case, [LCpl Bartee] elected trial by military judge alone, in part, because he believed the panel was defective.").

Government's efforts to provide LCpl Bartee's court-martial with an impartial pool of members.

## Argument

THE SYSTEMATIC EXCLUSION OF INDIVIDUALS BY RANK FROM THE MEMBER-SELECTION PROCESS IS PROHIBITED. HERE, THE MILITARY JUDGE DISMISSED THE PANEL FOR VIOLATING ARTICLE 25, UCMJ, AND THE CONVENING AUTHORITY RECONVENED THE SAME PANEL THE SAME DAY. THIS SYSTEMATIC EXCLUSION IS REVERSIBLE ERROR.

## Standard of Review

This Court reviews *de novo* whether a court-martial panel was "selected free from systematic exclusion" of members based on rank.[28]

## Discussion

A military accused has a right to a fair and impartial members panel.[29] This right "is the cornerstone of the military justice system."[30] Article 25(d)(2), UCMJ, governs selection of the members panel:

> 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.

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[28] *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000).
[29] *United States v. Roland*, 50 M.J. 66, 68 (C.A.A.F. 1999).
[30] *United States v. Hilow*, 32 M.J. 439, 442 (C.M.A. 1991) (citing *United States v. Smith*, 27 M.J. 242, 252 (C.M.A. 1988)).

Thus, the CA must apply the criteria from Article 25, UCMJ, when selecting a members panel.

The only personnel prohibited from serving on a members panel are accusers, Government witnesses, the investigating officer, counsel on the case, and those junior in rank (when it can be avoided) to the accused.[31] In this case, because the accused was a lance corporal, any pay-grade of E-3 (with a senior date of rank to LCpl Bartee) or higher would qualify.

This Court has identified three non-exhaustive factors to evaluate whether there was an impermissible member-selection process:

> First, we will not tolerate an improper motive to pack the member pool. Second, systemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank is improper. Third, this Court will be deferential to good faith attempts to be inclusive and to require representativeness so that court-martial service is open to all segments of the military community.[32]

The first factor is implicated by the timing and circumstances of the CA's "reconfirming" the tainted panel, the sergeant major's email, and the trial counsel's prediction to the military judge. These facts raise at least the specter of an improper motive. As for the third factor, the record is devoid of any evidence that the CA and his staff made any good faith attempt to be inclusive and require representativeness.

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[31] Art. 25(d), UCMJ.
[32] *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004) (internal citations omitted).

With that in mind, Appellant's argument concerns primarily the second factor. For this issue, precedent is clear: it is impermissible to categorically exclude individuals from the member-selection process by rank.[33] "Blanket exclusion of qualified officers or enlisted members in the lower grades is at odds with congressional intent and cannot be sustained."[34]

**A. Systematic Exclusion of Members in this Case.**

This case is similar to *United States v. Greene*.[35] There, the SJA initially demanded the nomination of a panel comprised of senior officers (O-5 to O-6) to try a junior enlisted (E-1) airman. Here, the SJA demanded nominations of only

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[33] *See Kirkland*, 53 M.J. at 25 (reversing when potentially qualified members below pay-grade E-7 were excluded from nominating process); *United States v. McClain*, 22 M.J. 124, 131 (C.M.A. 1986) (reversible error to systematically exclude junior officers and enlisted members below pay-grade E-7 to avoid light sentences); *United States v. Daigle*, 1 M.J. 139, 141 (C.M.A. 1975) (reversible error where rank was "used as a device for deliberate exclusion and systematic exclusion of qualified persons"); *United States v. Greene*, 20 C.M.A. 232, 238 (C.M.A. 1970) (systematic exclusion of junior officers reversible error); *United States v. Morrison*, 66 M.J. 508, 510 (N-M. Ct. Crim. App. 2008) ("A court-martial may not be purposefully 'stacked' to achieve a desired result and officers, otherwise eligible to serve, may not be excluded from service based solely on their rank."); *cf. United States v. Yager*, 7 M.J. 171, 173 (C.M.A. 1979) (finding it permissible to exclude members below pay-grade E-3 because of the 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).

[34] *Roland*, 50 M.J. at 69 (quoting *United States v. Nixon*, 33 M.J. 433, 434 (C.M.A. 1991)).

[35] 20 C.M.A. 232 (C.M.A. 1970).

senior officers (O-4 and above) or the most senior enlisted personnel (E-8 and above) to try a junior enlisted Marine.

Like this case, Greene objected to the composition of the panel and the systematic exclusion of young officers from the court-martial. The military judge granted the defense motion and ordered the "trial counsel to inform the convening authority that he 'consider the appointment of officers of other grades than strictly colonels and lieutenant colonels to this court.'"[36]

Like this case, the *Greene* trial counsel did as directed and then returned with the same panel, explaining to the military judge:

> In that light, the convening authority has reconsidered the matter, and in accordance with Article 25 of the Uniform Code of Military Justice has decided that the officers who are mentioned on [the original convening order] are most qualified under [Article 25], and deems it unnecessary in his judgment to make any change and appoint additional members[.][37]

Like Bartee, based on the selection process and resulting panel, Greene elected trial by military judge alone.[38] The military judge convicted Greene of most offenses as charged, made modifications to one, and dismissed another.[39] The Air Force Court of Military Review affirmed Greene's convictions.[40]

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[36] *Greene*, 20 C.M.A. at 235-36.
[37] *Id.* at 235.
[38] *Id.* at 236.
[39] *United States v. Greene*, 42 C.M.R. 953, 954 (A.F.C.M.R. 1970).
[40] *Id.* at 960.

This Court disagreed with the lower court's opinion that found the CA's selection procedures were proper, stating, "we are not convinced that an improper standard was not used for the selection of the members of this court."[41] Based on the selection procedures used by the CA, this Court possessed "at least a reasonable doubt as to whether the hurried decision to remain with this court was an unfettered one. Such doubt must be resolved in favor of the accused."[42]

This case is also similar to the more recent *United States v. Kirkland*. There, the legal office sent a quarterly letter to commanders, asking for nominees for a member-selection pool.[43] The letter instructed them to nominate senior enlisted members using an attached chart.[44] However, the chart did not provide any place to nominate court members below the grade of E-7.[45] Here, the nomination instruction was in the form of an email from the SJA specifically calling for personnel in the grades of O-4 and above or E-8 and above.[46] Additionally, the SJA pre-selected the members on the "selection worksheet," which required only the CA's signature.

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[41] *Greene*, 20 C.M.A. at 238.
[42] *Id.* at 18.
[43] 53 M.J. at 23.
[44] *Id*. at 24-25.
[45] *Id*. at 25.
[46] J.A. at 24-25.

In *Kirkland*, this Court ruled the exclusion of potentially qualified members below the pay-grade of E-7 was improper.[47] Even though the accused pleaded guilty at court-martial, "reversal of the appellant's sentence is appropriate to uphold the essential fairness and integrity of the military justice system."[48]

In this case, too, the CA improperly selected members by categorically excluding enlisted pay-grades below E-8, all warrant and chief warrant officers, and all company grade officers.

**B. This Court should apply structural error in this case.**

The military judge found, as the defense asserted at trial, that the member-selection process was improper, and ordered the Government to select a new panel. Instead, the Government did what had apparently become standard operating procedure within this command. As uncannily predicted by the trial counsel during the Article 39(a), UCMJ hearing, the CA deleted the members, added the same members, and stated that he knew the appropriate criteria and wished to continue with the improperly selected panel.

In *United States v. Hilow*, this Court applied structural error to the improper selection of the members panel.[49] More recently in *United States v. Bartlett*,

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[47] *Kirkland*, 53 M.J. at 23.
[48] *Id*.
[49] Although the majority did not use the term "structural error," it applied the same standard. *See United States v. Hilow*, 32 M.J. 439, 444 (C.M.A. 1991) ("I will agree that improper selection of a court-martial ordinarily would be a 'structural

although this Court declined to apply a structural error approach under the circumstances of that case, it alluded to the fact that some cases may warrant such an approach when evaluating errors in the member-selection process.[50] Then-Judge Erdmann went further in his concurrence and emphasized, "I do not believe [the majority opinion] should be read to foreclose the possible application of structural-error analysis to other member-selection cases."[51]

This Court should apply structural error in this case because this error is "'not amenable' to harmless-error review[.]"[52] This command's systemic,[53] systematic[54] exclusion of members based solely on rank deprived LCpl Bartee of his statutory right to trial by a fair and impartial members panel. Since he was forced into a Hobson's Choice of an improperly and, under the circumstances, highly suspect panel of members or military judge alone, this Court simply cannot speculate what a properly selected members panel would have concluded in this case.

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defect in the constitution of the trial mechanism' and, thus would not be subject to a harmless-error analysis." (Cox, J., dissenting in part) (quoting *Arizona v. Fulminante*, 111 S. Ct. 1246, 1265 (1991))).

[50] *United States v. Bartlett*, 66 M.J. 426, 430 (C.A.A.F. 2008).

[51] *Id.* at 431 (Erdmann, J., concurring).

[52] *Williams v. Pennsylvania*, __ U.S. __, 2016 U.S. LEXIS 3774, *22 (2016).

[53] As described by the trial counsel and demonstrated by the sergeant major's email, the exclusion of members was systemic.

[54] *See supra* pp. 10-12.

## C. The Government cannot show harmless error.

If this Court declines to apply structural error, it must determine whether the failure to comply with Article 25, UCMJ, "materially prejudiced the substantial rights of the accused."[55] When a panel-convening process improperly excludes members by rank, the Government has the burden to "demonstrate lack of harm."[56] In this evaluation, this Court has focused on: (1) "the motive of those involved;" (2) "the nature of the preliminary screening variable;" and (3) "its impact on the selection of the members."[57]

The Government cannot meet its burden to show lack of harm here. For the first factor, no direct evidence of either benign or malignant motive by those involved in the preliminary screening process has come to light. That said, the fact that this method has become a standard practice for this command, has become a widespread issue across numerous commands,[58] and is being specifically taught at

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[55] Art. 59(a), UCMJ, 10 U.S.C. § 859(a) (2012); *United States v. Gooch*, 69 M.J. 353, 360 (C.A.A.F. 2011).
[56] *United States v. Bartlett*, 66 M.J. 426, 430 (C.A.A.F. 2008) (citing *Dowty*, 60 M.J. at 173-75).
[57] *Dowty*, 60 M.J. at 173.
[58] The recent widespread practice of systematically excluding personnel on the basis of rank is also demonstrated outside the record. A panel of the lower court recently set aside the findings and sentence in two similar cases prior to the Government soliciting *pro forma* affidavits from the SJA (who was also the Chief Judge on the lower court at the time of appellate review in those cases). *United States v. Thompson*, No. 201400072 (N-M. Ct. Crim. App. Apr. 21, 2015); *United States v. Hoyes*, No. 201300303 (N-M. Ct. Crim. App. June 4, 2015); s*ee also,* e.g., *United States v. Ward*, 74 M.J. 225 (C.A.A.F. 2016); *United States v. Sullivan*, 74

senior leader conferences by the Service's most senior personnel would suggest to any casual observer the existence of a results-oriented motive. Additionally, the facial absurdity of MajGen Coglianese's memo, which claims that he chose the original panel based solely on the Article 25 criteria when, in fact, the original panel was chosen by the SJA and then adopted by Col Schultz—not MajGen Coglianese—makes the remainder of his boilerplate memo questionable. The timing and the circumstances of the CA's memo and "reconfirming" only magnifies the questionable nature of the memo.

This designed selection scheme may not show the CA had an improper *stated* motive, but the CA is certainly without clean hands. By allowing such a systematic avoidance of Article 25's obligations, the CA displays at best a reckless indifference for Article 25. This indifference should be held against the Government under this factor.

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M.J. 448 (C.A.A.F. 2015); *United States v. Suazo-Lopez*, 75 M.J. 61 (C.A.A.F. 2015); *United States v. Lesley*, No. 201400271, 2015 CCA LEXIS 61 (N-M. Ct. Crim. App. Feb. 26, 2015); *United States v. Wilt*, No. 201300274, 2015 CCA LEXIS 57 (N-M. Ct. Crim. App. Feb. 19, 2015); *United States v. Tso*, No. 201400379, 2016 CCA LEXIS 114 (N-M. Ct. Crim. App. Feb. 29, 2016); *United States v. Mohead*, No. 201400403, 2015 CCA LEXIS 465 (N-M. Ct. Crim. App. Oct. 29, 2015); *United States v. Sanchez*, No. 201400302, 2015 CCA LEXIS 437 (N-M. Ct. Crim. App. Oct. 20, 2015); *United States v. Sager*, No. 201400356, 2015 CCA LEXIS 571 (N-M. Ct. Crim. App. Dec. 29, 2015).

As for the second factor, the military judge rightly found that members were excluded solely on the basis of rank, an impermissible preliminary screening variable.

Lastly, the impact of the impermissible screening on LCpl Bartee's court-martial was readily apparent—the CA only detailed members between the pay-grades of E-8 and E-9 and O-4 through O-6. Similar to *Kirkland*, the erroneous process left an "unresolved appearance that potentially qualified court members" of certain grades were excluded, which was reversible error.[59]

Recently, the Supreme Court restated the importance of appearances on a justice system like ours when it found structural error after a judge failed to properly recuse himself:

> An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.[60]

This Court should likewise find reversible error here where the CA's practice of "reconfirming"[61] the improperly selected panel deprives an accused of his right to "be provided both a fair panel (Bartlett) *and the appearance of a fair panel*

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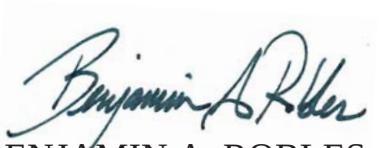
[59] 53 M.J. at 25.
[60] *Williams*, 2016 U.S. LEXIS 3774, *24.
[61] J.A. at 39.

(Kirkland)."[62] Despite the CA's memo, and like in *Greene*, there is "reasonable doubt as to whether the hurried decision to remain with this court was an unfettered one. Such doubt must be resolved in favor of the accused."[63]

**Conclusion**

The CA's ad hoc blessing of a tainted panel does not make it acceptable. This Court should set aside the findings and sentence and remand to a new CA for a rehearing with a properly-selected members panel.

M. BRIAN MAGEE
Major, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris Street, SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
(202) 685-8502
brian.magee@navy.mil
Bar No. 36441



BENJAMIN A. ROBLES
Major, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
(202) 685-7087
benjamin.robles@navy.mil
Bar No. 36638

[62] *Ward*, 74 M.J. at 228 (emphasis added).
[63] *United States v. Greene*, 20 C.M.A. at 238.

## 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 June 30, 2016.

## Certificate of Compliance

This brief complies with the page limitations of Rule 24(b). This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word version 2010 with 14-point Times New Roman font. It contains fewer than 14,000words.

M. BRIAN MAGEE
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Suite 100
Washington, D.C. 20374
P: (202) 685-8502
F: (202) 685-7426
brian.magee@navy.mil
Bar No. 36441