IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Emmanuel Q. BARTEE Lance Corporal (E-3) U.S. Marine Corps, Appellant	APPELLANT'S REPLY BRIEF USCA Dkt. No. 16-0391/MC 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

SUBJECT INDEX

TABLE OF AUTHORITIES

Introduction

Before replying to the Government's argument, it is necessary to correct its statement of facts. The Government states as fact that LCpl Bartee "confessed to making some of these fraudulent purchases[,]" and told investigators "he had only made fraudulent purchases on the day he was apprehended."[1] LCpl Bartee made no confession at all. To the contrary, during the interrogation, he contested the Government's assertion that he did anything fraudulent. The fraudulent nature of the cards and purchases was the central issue litigated at trial. The Government's assertion is incorrect and contrary to the meaning of confession as defined in Military Rule of Evidence 304.[2]

Issue Granted

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?

[1] Appellee's Br. at 2.
[2] Mil. R. Evid. 304(a)(1)(B) defines confession as "an acknowledgement of guilt."

Discussion

1. The Staff Judge Advocate's system for exclusion by rank: a "top-down approach."

The Government argues that the Staff Judge Advocate (SJA) did not systematically exclude lower ranks from the court-martial convening process, but simply "used a 'top down' approach" beginning with senior ranks "and would proceed to junior officers and enlisted members if unable to locate suitable members among those[.]"[3] In fact, the SJA's explanations amount to an admission of systematic exclusion of lower ranks.

"Systematic" is defined as "having, showing, or involving a system, method, or plan."[4] The SJA's approach can't be described as anything other than a system. His explanation that he only departs from this system and turns to lower ranks "[i]n the event I cannot find individuals within the senior ranks,"[5] further demonstrates the systematic exclusion.

A brief analogy also reveals the absurdity of the Government's argument. Suppose an employer advertises a new job opening and lists the qualifications for applicants, ending with a note, "Only males may apply for this position. In the event we cannot fill the position with a qualified male, then we will open the

---

[3] Appellee's Br. at 11-12.
[4] *Systematic Definition*, Dictionary.com, http://dictionary.reference.com/browse/systematic (last visited Aug. 11, 2016).
[5] J.A. at 22.

position to female applicants." Under the Government's argument, females are not excluded, and the "approach" is not systematic. This conclusion is as absurd in the analogy as it is in this case.

2. The Government incorrectly asserts LCpl Bartee's forum selection was primarily motivated by other concerns.

The Government argues that any error "is harmless because Appellant chose to be tried by a Military Judge alone for unrelated reasons."[6] The implication that LCpl Bartee's primary motivation in changing forum was something unrelated to the Article 25 violation is speculative at best, and is unsupported by the record.

The lower court's factual finding that LCpl Bartee's "decision was predicated on the panel issue"[7] is correct and is amply supported by the record. When LCpl Bartee made his forum-change request, he gave a single reason:

> 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.

Only in response to the military judge's threat to deny his request and after giving him more time to consult with counsel, did the trial defense counsel provide a vague notion that there was an additional reason that factored into the decision.

---

[6] Appellee's Br. at 15.
[7] *United States v. Bartee*, No. 201500037, 2016 CCA LEXIS 11, *13 (N-M. Ct. Crim. App. Jan. 12, 2016).

The trial defense counsel never stated that it was an "unrelated" reason as the Government suggests.

After LCpl Bartee requested the forum-change, the military judge made clear that he would not accept LCpl Bartee's request if he told the judge it rested on the improper member selection.

> He can request to be tried by the military judge, but that request has to be approved by me. It is in my discretion under 903(c)(2)(B) to grant or deny that request. And I have to find that he knowingly, intelligently, and voluntarily waives his right to a trial by members, because that is his right. And so, if the accused says to me, as was potentially proffered by defense counsel, that he is only foregoing his right to members or abandoning it because he feels the selection was improper – the selection of the panel was improper. . . . I doubt very much that I will find his foregoing of his right to a trial by members to be knowing, intelligent, and voluntarily; particularly voluntarily, if he is going to tell me he is doing it because he feels like he is forced to by the panel that he has here.
>
> Now, there are many other reasons why you might decide to go military judge alone, which would be, certainly, proper reasons to do so. But I have to find it's a knowing, intelligent, and voluntary waiver of his right. So I told -- I gave the defense counsel time to speak to their client in that regard, and I let the government know that it would behoove them to put the members, basically, on alert, so that they could return to the courtroom. If, in fact, he does not request that or I do not approve his request to be tried by the military judge alone.[8]

Only then did the trial defense counsel state that there was some *additional* reason to change forum. This reason may very well have been related to the improper selection process. For example, it may have been that LCpl Bartee felt

[8] J.A. at 72.

the panel contained no one who could relate to a lance corporal. This reason would be independent of the selection *process* but not *unrelated.*

3. The *Bartlett* factors fail to establish harmlessness.

The Government argues, "None of the factors laid out in *Bartlett* and *Ward* indicate any prejudice."[9] This argument attempts to shift the burden to LCpl Bartee to show how these factors establish prejudice. In cases like this one, where "a convening authority has intentionally included or excluded certain classes of individuals from membership . . . [this Court has] placed the burden on the government to demonstrate lack of harm."[10] The *Bartlett* factors, too, are used "to determine whether the ***government [has] met its burden*** of demonstrating the error was harmless."[11]

Although the Government summarily asserts that each of these factors weighs in its favor, an analysis of the factors shows otherwise. The six *Bartlett* factors are whether:

> (1) the convening authority enacted or used the instruction with a proper motive;
>
> (2) the convening authority's motivation in detailing the members he assigned to the court-martial panel was benign;

---

[9] Appellee's Br. at 16.
[10] *United States v. Ward*, 74 M.J. 225, 228 (C.A.A.F. 2015) (quoting *United States v. Bartlett*, 66 M.J. 426, 430 (C.A.A.F. 2008)).
[11] *Ward*, 74 M.J. at 228 (emphasis added).

(3) the convening authority who referred the "case to trial was a person authorized to convene" the court-martial;

(4) the appellant "was sentenced by court members personally chosen by the convening authority from a pool of eligible" members;

(5) the court members "all met the criteria in Article 25, UCMJ;" and

(6) "the panel was well-balanced across gender, racial, staff, command, and branch lines."[12]

Here, the member selection issue was litigated prior to *voir dire* and the record does not contain the member questionnaires. Thus, a full analysis of factors (4) through (6) cannot be conducted, and these factors cannot show harmlessness in this case. Appellant concedes factor (3), that the convening authority was a person authorized to convene the court-martial.

For factors (1) and (2), the Government points only to *post hoc* declarations by the Convening Authority (CA) and SJA that their motives were good and proper.[13] This Court should give these declarations very little weight. The SJA's original memorandum consisted of boilerplate recitations and contained a selection worksheet ***that was already filled out*** and required only the CA's signature.[14] After the military judge dismissed this panel, the CA reconvened the exact same panel under circumstances that draw into question the sincerity of his affidavit.

[12] *Id*. (quoting *Bartlett*, 66 M.J. at 431).
[13] Appellee's Br. at 16-17.
[14] J.A. at 14-16, 38.

First, this Court should acknowledge the likely existence of the CA's motive to keep the original panel unless forced to do otherwise. Trial was set for Monday, September 29, 2014.[15] Presumably, the Government was prepared for trial that day with witnesses, members, baliff, etc. Well into this first day of the scheduled trial, the military judge found that Article 25 was violated and dismissed the panel at 1431 on September 29.[16] To select new members would be inconvenient, assuming these members had already rearranged their work schedules to be available for trial. Additionally, any new members would have to be solicited, made available, and the schedule for their work week tossed aside. Alternatively, delay caused by a proper selection process would likely cost the Government additional resources of time and money. It is therefore no surprise the new convening order reconvening the same members was signed that afternoon on September 29. These circumstances alone draw into question the CA's motive.

Second, the CA's affidavit made in conjunction with the reconstituted panel convening order belies its trustworthiness. In his affidavit, Major General (MajGen) Coglianese stated in paragraph 3, "I could have selected any member of my command senior to the accused who I felt possessed the qualifications outlined by the reference irrespective of rank, group or class ***and did so in the previous***

[15] R. at 236.
[16] J.A. at 53.

panel in this case."[17] However, MajGen Coglianese did not select the previous panel in this case. That panel was selected by Colonel J. M. Schultz.[18] The facial inconsistency of the CA's affidavit with the documents in the record should caution against simply accepting the CA's post hoc incantation of the Article 25 language.

Third, the SJA's affidavit established that this is his regular practice for selecting members. The SJA's explanation should be read in light of the trial counsel's dismissive comment to the military judge:

> 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.[19]

Taken together, the statements of the trial counsel and the SJA reveal a well-established system to circumvent the protections of Article 25, thereby solidifying "an unresolved appearance that potentially qualified court members . . . were excluded."[20]

---

[17] J.A. at 28 (emphasis added).
[18] J.A. at 17.
[19] J.A. at 39.
[20] *Ward*, 74 M.J. at 228 (quoting *United States v. Kirkland*, 53 M.J. 22, 25 (C.A.A.F. 2000)).

Finally, the Government declined to address the clearest suggestion that senior Marine leaders systematically game Article 25, UCMJ—the email disseminated by Sergeant Major Cochran:

> 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 []very light sentences by the members of the jury. . . . 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 . . ."[21]

Conclusion

As this Court stated in its most recent decision on this issue, "Simply put, an accused must be provided both a fair panel (*Bartlett*) and the appearance of a fair panel (*Kirkland*)."[22] In this case, the Government failed in both respects, and this Court should set aside the findings and sentence.

M. BRIAN MAGEE
Major, U.S. Marine Corps
Appellate Defense Counsel
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
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
(202) 685-7087
benjamin.robles@navy.mil
Bar No. 36638

[21] J.A. at 32.
[22] *Ward*, 74 M.J. at 228.

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 August 11, 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.

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