IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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Issue Presented

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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge and more than one year of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of conspiracy to commit larceny, making a false official statement, and larceny, in violation of Articles 81, 107, and 121, UCMJ, 10 U.S.C. §§ 881, 907, and 921 (2012). The Military Judge sentenced Appellant to twenty months of confinement and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

On January 12, 2016, the lower court affirmed the findings and sentence. On May 16, 2016, this Court granted Appellant's petition for review.

Statement of Facts

A. Appellant and his coconspirators stole thousands of dollars' worth of merchandise from Navy and Marine Exchanges using fraudulent credit cards.

Appellant confessed to purchasing a credit card from an unknown man in San Diego. (J.A. 106-108, 110, 113.) After Appellant told his "buddies" about the credit card scheme, they gave Appellant money to purchase several more credit cards from the same unknown man. (J.A. 106-108, 110, 113, 124.) Appellant provided the credit cards to his coconspirators. (J.A. 113, 124.)

Appellant and his coconspirators then traveled to multiple Marine and Navy Exchanges and purchased thousands of dollars' worth of electronics and gift cards using the fraudulent credit cards. (J.A. 87-92, 97-104, 114-16, 129-137.) Appellant confessed to making some of these fraudulent purchases, including the purchase of five iPad Minis and five gift cards. (J.A. 114-18.) Appellant intended to sell the electronics. (J.A. 120, 124.)

Appellant lied to Investigators and told them he had only made fraudulent purchases at the Navy Exchange on the day he was apprehended. (J.A. 128.)

B. The Convening Authority selected Members of senior rank because he knew them and believed they were qualified under Article 25, UCMJ.

1. The Staff Judge Advocate solicited members' questionnaires for O-4 and above and E-8 and above; the Convening Authority chose the Members in accordance with the Article 25, UCMJ, criteria.

Prior to trial, the Staff Judge Advocate "solicited updated members questionnaires from commands within the MLG . . . for officers in paygrade O-4 and above and enlisted personnel in paygrade E-8 and above." (J.A. 22.) The Staff Judge Advocate solicited the senior Marines because, in his experience, those members "possess[] the requisite qualifications"—age, education, training, experience, length of service and judicial temperament. (J.A. 22, 26-27.) He explained:

> I start by looking members [sic] for possessing the requisite qualifications—this typically turns out to be a more senior personnel. In the event I cannot find individuals within the senior ranks that do not [sic] meet the Article 25, UCMJ criteria, I then begin to look towards the junior ranks. My office maintains a copy of the MLG alpha roster and previously submitted questionnaires available for the Commander's consideration as well.

(J.A. 22.)

He then "personally reviewed the questionnaires and prioritized 16 personnel that, in [his] opinion, met the criteria of Article 25, UCMJ." (J.A. 21-22, 26-27.) He presented the list to the Convening Authority. (J.A. 22.) He also advised the Convening Authority that (1) he "could select any member of the

MLG,” (2) if he disagreed with a proposed member, he could select another, and (3) “he [was] required to apply the Article 25, UCMJ criteria.” (J.A. 22.)

The Convening Authority reviewed the list and “personally concurred with the recommended selections.” (J.A. 8, 22.) The Convening Authority selected the recommended members without alteration. (J.A. 8-9, 14-17.)

Prior to trial, the Staff Judge Advocate met with the Convening Authority to discuss replacing two members with two others, both of which met the Article 25, UCMJ, criteria. (J.A. 21.) The Convening Authority “personally directed” the replacements, which were added by the Staff Judge Advocate to the amended Convening Order. (J.A. 8, 21.)

2. The Military Judge found the originally convened panel was improperly selected.

Appellant objected to the panel, claiming it was a product of a violation of Article 25, UCMJ. (J.A. 37.) The Military Judge acknowledged that the Convening Authority “didn’t feel constrained by the short list that he was given” by the Staff Judge Advocate because he had rejected a recommended member and selected one of his own choosing. (J.A. 50.) Nevertheless, the Military Judge found that the originally convened panel was improperly selected, stating: “there appears to be a criteria of E-8 and above and O-4 and above because that’s all he was supplied with in terms of questionnaires and that’s what he picked.” (J.A. 41.) He further stated that this exclusion “could be easily rectified by . . . providing [the

Convening Authority] an entire alpha roster, telling him [']Hey, you pick.[']" (J.A. 40-41.) The Military Judge then allowed the United States time to remedy the improper selection. (J.A. 52-53.)

3. The Convening Authority followed the Article 25, UCMJ, criteria, had access to the Alpha Roster, and after selecting the same Members, he explained that he personally knew them and that the Members met the Article 25, UCMJ criteria.

After the ruling, the Staff Judge Advocate again advised the Convening Authority that "he could select any member of the MLG, [and] that he [was] required to apply the Article 25, UCMJ criteria . . . ." (J.A. 21-23, 28.) For his consideration, the Convening Authority had the "MLG Alpha Roster" containing the names of over 8,000 members of the MLG, from which to choose. (J.A. 26, 28.)

Prior to the selection of members, the Convening Authority "specifically considered the requirements of Article 25, UCMJ." (J.A. 28.) He confirmed that he considered the criteria in his selections. (J.A. 28.) He stated:

> I understand that, at any time during the process of selection of members for this court-martial, 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 panel in this case.
>
> I have roughly 8,000 Marines and sailors under my command at any moment in time. I could have selected any of them that possess the qualifications in the reference, but I know these individuals personally and selected them specifically because I am convinced they meet the qualifications for membership.

(J.A. 28.) The Convening Authority then replaced the original Convening Order, (J.A. 8), with the new Convening Order, which contained the same Members. (J.A. 7.)

4. After receiving further evidence from the Staff Judge Advocate and Convening Authority, the Military Judge found no systematic exclusion.

After the creation of the new Convening Order, Trial Defense Counsel again objected to the panel. (J.A. 55.)

Trial Counsel submitted additional evidence, including statements from the Convening Authority, (J.A. 28), and the Staff Judge Advocate. (J.A. 22-23, 26-27.) The evidence established that the Convening Authority had access to the Alpha Roster when selecting the Members and selected the Members using the Article 25, UCMJ, criteria. (J.A. 26, 28.)

The Defense introduced an email from the Sergeant Major of TECOM, an unrelated command on the other side of the United States, wherein the Sergeant Major addressed the need for stiff punishments in courts-martial. (J.A. 32, 58-59.) As there was no nexus to the MLG, and no evidence that a member of the MLG viewed the email, the Military Judge found it "irrelevant," because "it's got nothing to do with MLG." (J.A. 59-60.)

Based on the new evidence from the Convening Authority, the Military Judge found no systematic exclusion of the members or other improper selection and allowed the court-martial to proceed. (J.A. 70.)

C. Appellant elected to be tried by Military Judge alone.

After the Military Judge's ruling, Appellant elected to be tried by military judge alone. (J.A. 70-78.) Trial Defense Counsel informed the Military Judge that in addition to their view of the member selection process, there were other reasons for Appellant's election to be tried by Military Judge alone. (J.A. 73.) He did not articulate those reasons because he asserted that they were confidential. (J.A. 73.)

Appellant confirmed that he understood his right to be tried by members, (J.A. 75), and stated that the panel selection process did not force his decision. (J.A. 76.) The Military Judge then approved his request. (J.A. 77.)

Summary of Argument

Although there was a solicitation of higher ranking members in the nomination process, the panel was properly selected because the Convening Authority knew he could select any member from his command, had access to the Alpha Roster when making his decision, followed the Article 25, UCMJ, criteria, and selected those Members that he knew personally and knew met the Article 25, UCMJ, criteria.

Regardless, there is no material prejudice here because Appellant elected to be tried by Military Judge alone, for reasons other than the selection process. Additionally, none of the factors laid out in *Bartlett* and *Ward* indicate prejudice.

Argument

THE PANEL WAS PROPERLY SELECTED BY THE CONVENING AUTHORITY BECAUSE HE CONSIDERED AND THE MEMBERS DEMONSTRATED THE ARTICLE 25, UCMJ, CRITERIA. FURTHER, ANY ERROR IN THE MEMBER SELECTION PROCESS WAS HARMLESS BECAUSE APPELLANT CHOSE TO BE TRIED BY THE MILITARY JUDGE. MOREOVER, AN ANALYSIS OF THE BARTLETT FACTORS ESTABLISHES NO MATERIAL PREJUDICE.

A. Whether a panel is properly selected is a question of law reviewed *de novo*.

Whether a panel has been properly selected is a question of law reviewed *de novo*. *United States v. Gooch*, 69 M.J. 353, 358 (C.A.A.F. 2011) (citing *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004)). This Court is bound by the military judge's findings of fact unless they are "clearly erroneous." *Id*.

Similarly, the legitimacy of forum selection, specifically the election of military judge alone, is a question of law reviewed *de novo*. *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012). An accused may waive trial by members in favor of trial by military judge alone. Article 16(1)(B), UCMJ.

Article 16(1)(B), UCMJ, requires that he make his selection of military judge alone "orally on the record or in writing."

B. The Venire was properly selected because the Staff Judge Advocate's "top-down" approach did not cause a systematic exclusion, and the Convening Authority followed the Article 25, UCMJ, criteria and selected the Members because he knew them and trusted their qualifications.

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *Gooch*, 69 M.J. at 357 (quoting *United States v. Downing*, 56 M.J. 419, 421 (C.A.A.F. 2002)). These rights are upheld through application of selection criteria contained in Article 25, UCMJ, as well as the use of peremptory and causal challenges during *voir dire*. *Id.*

Article 25(a), UCMJ, generally provides that "[a]ny commissioned officer on active duty is eligible to serve on all courts-martial." *Id*. Section 25(d), however, delimits this eligibility. *Id*. From among officers eligible to serve on a court-martial panel, "the convening authority shall detail as members thereof such members . . . as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id.*

Although the Convening Authority must personally select the court-martial members, he or she may rely on staff and subordinate commanders to compile a list of eligible members. *Id*. (citing *Dowty*, 60 M.J. at 169-70).

If "the request for nominations does improperly include or exclude certain members," the court must "ensure that those actions do not taint the selection by the convening authority." *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999). The Court of Appeals for the Armed Forces has identified three principles that inform the screening of servicemembers for court-martial service: (1) "we will not tolerate an improper motive to pack the member pool"; (2) "systemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank[, race, or gender] is improper"; and (3) "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." *Id*. (quoting *Dowty*, 60 M.J. at 171) (internal quotation marks omitted).

In a case of systematic exclusion of members by rank, it is the responsibility of the defense to establish the improper exclusion. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). If the improper exclusion has been established, the burden is placed on the Government to demonstrate that the error did not materially prejudice the substantial rights of the accused. *Dowty*, 60 M.J. at 173 (citation omitted).

1. There was no systematic exclusion—the Convening Authority had access to the Alpha Roster and selected those Members that he knew exemplified the Article 25 criteria.

Contrary to Appellant's assertion, (Appellant's Br. at 11), there was no

systemic exclusion of members based on rank. Indeed, after receiving the Convening Authority's statement, the Military Judge found no systematic exclusion because the Convening Authority (1) had access to the Alpha Roster containing all 8,000 members of his command when he made his selections, and (2) selected the Members because he knew them personally and they met the Article 25, UCMJ, criteria.[1] (J.A. 22, 26, 28, 54, 70.)

This case is unlike *Kirkland*, where the Convening Authority only considered members nominated by their commands using a chart with spaces to nominate only those enlisted members in pay grades E-7 through E-9. 53 M.J. at 23. Nor is it similar to *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986), where junior officers and enlisted members were systemically excluded in order to prevent lenient sentences.

The Convening Authority here understood that he could select any of the members of his command "irrespective of rank, group or class," (J.A. 28), and had access to the Alpha Roster throughout the selection process. (J.A. 22, 26.) While the Staff Judge Advocate did request nominations of more senior members while preparing his recommendations, this is simply where he began his consideration—

[1] Originally, the Military Judge did not have the Convening Authority's statements regarding his access to the Alpha Roster and why he chose the members, and therefore, he found a systematic exclusion in the selection of the original members' pool. (J.A. 40-41.) After the reconfirmation, and based on additional evidence, the Military Judge found no systematic exclusion based on rank. (J.A. 70.)

he used a "top down" approach and would proceed to junior officers and enlisted members if unable to locate suitable members among those he considered more likely to exemplify the Article 25 criteria. (J.A. 22.) This is not a systematic exclusion of junior members, but an effort to efficiently identify the most qualified members by starting with the oldest and most experienced candidates. With the knowledge that he could select any member of his Command, the Convening Authority then selected the Members because he knew them personally and believed they possessed the Article 25 criteria. (J.A. 28.) As such, the resulting Convening Order did not represent an improper exclusion of members based on rank.

2. There was no motive to pack the members pool; the Convening Authority acted in good faith, relying on the Article 25 criteria.

Appellant's argument—that the timing of the reconfirmation of the original members is suspect, (Appellant's Br. at 9)—assumes, with no basis, that the Convening Authority had a motive to pack the members pool. He relies heavily on an unrelated and irrelevant email sent by a Sergeant Major connected to a separate command located on the other side of the United States. (J.A. 32, 58-59.) He inexplicably assumes that the Sergeant Major's email is evidence of the Convening Authority's improper motive. (Appellant's Br. at 9.) But his argument is belied by the Convening Authority's statements, the fact that the email is not from the Convening Authority or his Staff, and the statement does not allege an improper

motive by the Convening Authority. (J.A. 32, 58-59.) Indeed, the Military Judge properly found the email "irrelevant," because "it's got nothing to do with MLG." (J.A. 59-60.)

Further, the Record establishes the opposite—the Convening Authority articulated that he selected[3] the Members because he knew them personally and believed they possessed the Article 25 criteria.[4] (J.A. 28.) Therefore, he acted in good faith by following Article 25, UCMJ.

C. Even if the panel selection was defective, Appellant suffered no prejudice because he chose to be tried by the Military Judge and because the Members were personally selected by the Convening Authority based on their Article 25 qualifications.

Where there is a nonconstitutional error in the application of Article 25, UCMJ, this Court must determine if the error materially prejudiced the substantial rights of the accused under Article 59(a), UCMJ. *United States v. Ward*, 74 M.J. 225, 227 (C.A.A.F. 2015) (citing *Gooch*, 69 M.J. at 360).

Contrary to Appellant's assertion, (Appellant's Br. at 13), any error here was not structural. Ignoring the "strong presumption that an error is not structural,"

[3] Because the Convening Authority followed the Article 25 criteria in the original selection, there was reason for Trial Counsel to believe that he would select the same members again by following the same proper procedures. (J.A. 39.)

[4] The Convening Authority's statement was not originally before the Military Judge when the Military Judge found a systematic exclusion of Members. (J.A. 28.) However, the statement was before the Military Judge when he found the new convening order did not systematically exclude members based on rank. (J.A. 28, 55-56.)

United States v. Bartlett, 66 M.J. 426, 430 (C.A.A.F. 2008) (citing *Rose v. Clark*, 478 U.S. 570, 579 (1986)), Appellant relies on the distinguishable case of *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991). However, *Hilow* involved not only an Article 25, UCMJ, violation, but unlawful command influence in violation of Article 37(a), *id*. at 441, which is not present in this case.

In *Hilow*, a subordinate to the convening authority specifically sought nominees who supported "a command policy of hard discipline" which implicated Article 37(a)—unlawful command influence. *Id*. at 441. As there was unlawful command influence, the court applied structural error. *Id*. at 443.

In the two recent and similar cases of *Ward* and *Bartlett*, both of which involved violations of Article 25, UCMJ, with no evidence of unlawful command influence, this Court rejected the appellants' arguments regarding structural error and instead applied Article 59(a)—material prejudice to a substantial right. *Ward*, 74 M.J. at 227; *Bartlett*, 66 M.J. at 429-30.

In *Bartlett*, there was a violation of Article 25, UCMJ, because "doctors, dentists, nurses, veterinarians, and chaplains" were excluded from the nomination process. *Bartlett*, 66 M.J. at 427, 429. After finding error, the Court rejected the appellant's argument of structural error and applied Article 59(a)—material prejudice to a substantial right—and found no prejudice. *Id*. at 429-30; *see Ward*, 74 M.J. at 228.

As there is no evidence of unlawful command influence here, nor was it raised by Appellant, this Court should again reject Appellant's structural error argument and determine whether the error materially prejudiced the substantial rights of the accused under Article 59(a), UCMJ.

1. Any error here is harmless because Appellant chose to be tried by a Military Judge alone for unrelated reasons.

In *United States v. Greene*, 20 C.M.A. 232, 239 (C.M.A. 1970), the appellant abandoned his right to be tried by members solely based on an improperly selected panel. The appellant stated "that 'if there were one or more members appointed to this court in the grade of major or lower' he would prefer to be tried by a court of members and not by the judge alone." *Id*. at 236.

Unlike *Greene*, Appellant here decided to be tried by the Military Judge alone in lieu of his right to trial by members based on reasons unrelated to the Military Judge's ruling regarding the selection process or his perception of an improperly selected panel. (J.A. 72-73.) Indeed, Trial Defense Counsel stated that "the *sole basis* for switching to the military judge alone is *not* [their] view of the improper selection process," but rather for reasons that he could not discuss because it was "attorney/client privileged information." (J.A. 73 (emphasis added).) As such, Appellant's election to be tried by Military Judge alone renders any error harmless.

2. <u>None of the factors laid out in *Bartlett* and *Ward* indicate prejudice. Likewise, there is no appearance of an unfair panel</u>.

When analyzing prejudice from an improper exclusion of members, this Court must ask 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; (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." *Ward,* 74 M.J. at 228 (citing *Bartlett*, 66 M.J. at 431).

As to the first factor, discussed *supra* at 9-11, there is no improper motive here—the Convening Authority's only objective was to select members who met the Article 25 criteria, "irrespective of rank, group or class." (J.A. 28.)

As to the second factor, there is no evidence that the Convening Authority's motivation was anything but benign. Contrary to Appellant's assertion, and irrespective of his speculative claims of selection based on "results," (Appellant's Br. at 15), the Convening Authority, from the beginning, chose the members he personally knew and who met the Article 25 criteria. (J.A. 28.) Appellant's

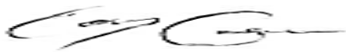
unsupported attempt to impeach the Convening Authority's integrity falls flat. (Appellant's Br. at 16.)

As to the remaining factors, the Convening Authority was authorized to convene courts-martial, he personally selected the members using the recommendations and the Alpha Roster, there is no evidence that any of the selected members failed to meet the Article 25 criteria, and the panel was well-balanced—both officers and enlisted from both the United State Navy and Marine Corps. (J.A. 17, 38.) Indeed, the Convening Authority attested that he chose the Members because they met the Article 25 criteria. (J.A. 28.) And after receiving the Convening Authority's statement explaining his process in the selection of the Members, the Military Judge found no exclusion based on rank. (J.A. 69-70.) Accordingly, the panel that would have heard Appellant's case had he not chosen to be tried by the Military Judge was fair.

Moreover, for the same reasons discussed *supra* at 15-17, there is no appearance of an unfair panel here. As such, any error in the selection process was harmless.

Conclusion

Wherefore, the United States respectfully requests that this Court affirm the decision of the lower court.



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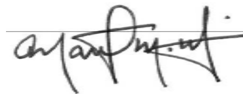

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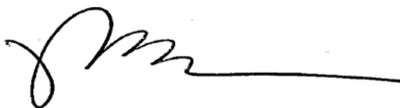

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1. This brief complies with the type-volume limitation of Rule 24(c): This brief contains 3,740 words.

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on August 1, 2016.

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