IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. JOHN C. RIESBECK, Boatswain's Mate Second Class (E-5) U.S. Coast Guard Appellant	BRIEF ON BEHALF OF THE APPELLEE USCA Dkt. No. 17-0208/CG Crim. App. No. 1374

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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Issues Presented

I. WHETHER THE MEMBERS OF APPELLANT'S COURT-MARTIAL WERE PROPERLY SELECTED

II. WHETHER APPELLANT WAS DEPRIVED OF A FAIR TRIAL, OR THE APPEARANCE OF A FAIR TRIAL, WHERE A MAJORITY OF THE PANEL MEMBERS WERE FORMER VICTIM ADVOCATES AND THE MILITARY JUDGE DENIED A CHALLENGE FOR CAUSE AGAINST ONE OF THEM.

Statement of Statutory Jurisdiction

This Court has jurisdiction over Appellant's case under Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3), because it is a case reviewed by the Coast Guard Court of Criminal Appeals (CGCCA) in which this Court granted Appellant's petition for review. The CGCCA had jurisdiction over this case under Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1) because the approved sentence included a punitive discharge.

Statement of the Case

Contrary to his pleas, Appellant was found guilty by a panel of members of one specification of rape by force (Article 120, UCMJ, 10 U.S.C. § 920 (2008)), two specifications of making false official statements (Article 107, UCMJ, 10 U.S.C. § 907), and one specification of communicating indecent language (Article 134, UCMJ, 10 U.S.C. § 934). J.A. at 260. He was sentenced to confinement for three months, reduction to pay grade E-2, and a bad-conduct discharge. J.A. at 268.

The Convening Authority approved the adjudged sentence. J.A. at 33. The CGCCA affirmed the findings and sentence. J.A. at 25. This Court granted Appellant's petition for review, set aside the lower court's decision, and returned the record to the CGCCA for further action. J.A. at 26. Following a post-trial hearing ordered by the CGCCA, Appellant filed supplemental assignments of error. J.A. at 2. The CGCCA affirmed the findings and sentence once again. J.A. at 13. Appellant's case is before this Court again pursuant to a grant of Appellant's petition for review.

Statement of Facts

A. All convening orders and amendments in this case were signed by the Convening Authority, the Commander of Coast Guard Pacific Area.

Appellant's case was referred to a general court-martial convened on March 14, 2012 by VADM Brown. J.A. at 34. Prior to convening the general court-martial, the SJA provided VADM Brown, the Commander of Coast Guard Pacific Area (PACAREA), with written advice (labeled a "digest") and a roster of officers in the local area. J.A. at 510. The SJA advised VADM Brown to select ten officers, which he did. *Id.* The SJA's office drafted Convening Order 1-12 listing the ten officers VADM Brown selected. He signed it on March 14, 2012, and subsequently referred Appellant's case to the court-martial. J. A. at 512.

Because Appellant requested enlisted representation, the SJA provided additional written advice, recommending selection of ten enlisted members from

the enclosed roster of enlisted members in the area. J.A. at 514. The deputy PACAREA commander, RADM Colvin received the package, and pursuant to the instructions, identified ten enlisted members from the roster by initialing next to their names. J.A. at 486-509, 514. He did not sign a convening order amendment.

The SJA's office contacted the members identified to determine their availability and to request that they complete court-martial member questionnaires. J.A. at 371. Learning that some of the enlisted members identified by RADM Colvin were unavailable, the SJA provided a similar package, recommending selection of additional enlisted members. J.A. at 511, 516. RADM[1] Ryan, the PACAREA Chief of Staff, received the package, and pursuant to the instructions, identified eight enlisted members from the roster provided. RADM Ryan never signed a convening order amendment.

On June 8, 2012, the SJA prepared a draft amendment to Convening Order 1-12 for the Convening Authority to sign based on the members identified by RADM Colvin and RADM Ryan, and their availability. J.A. at 518. The summary of actions taken with regard to the Convening Order for Appellant's trial in the written advice was drafted as if a single person had convened and referred the case, and stated that eighteen enlisted members had been selected. *Id*. However, the

[1] RADM Ryan was then Captain Ryan. For clarity, and consistent with Appellant's Brief, she is referred to in this brief by her current rank of Rear Admiral.

written advice also recommended that the unavailable members be "released from consideration for the currently scheduled trial." *Id*. ADM[2] Zukunft, the newly arrived PACAREA Commander, acted on this request, signing the draft convening order amendment. J.A. at 517-18.

B. ADM Zukunft was afforded the opportunity to exercise his own discretion in selecting members.

The written advice provided to ADM Zukunft stated four times that it was a "recommendation." J.A. at 518. It also included a block that could be marked "Concur," or "Non-Concur," and the following advice: "If you desire to take an action other than those I've recommended, I will prepare additional documents accordingly." *Id*. Finally, the written advice indicated that the 18 members listed were under "consideration," not that they were final selections. *Id*. ADM Zukunft signed Amendment No. 1 to Convening Order 1-12. J.A. at 517.

On June 11, 2012, the SJA requested another amendment, this time replacing an enlisted member that had been excused under delegated authority[3] with another enlisted member. J.A. at 522. This particular member had been identified by RADM Ryan. J.A. at 496. The request included written advice and a draft Amendment 2 to Convening Order 1-12. *Id.* The written advice explained the

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[2]ADM Zukunft was then VADM Zukunft. For clarity, and consistent with Appellant's Brief, he is referred to in this brief by his current rank of Admiral.

[3] On March 14, 2012, RADM Colvin delegated excusal authority to the SJA under R.C.M. 505(c)(1)(B). J.A. at 513.

recommended course of action, again stating several times that the draft was a "recommendation," inviting questions, and stating, "If you desire to take an action other than those I've recommended, I will prepare additional documents accordingly." *Id.* ADM Zukunft signed the Amendment No. 2 to Convening Order 1-12. J.A. at 523.

C. Materials used to select and identify members aligned with Article 25, UCMJ criteria.

The titles of the written advice provided on March 6, May 22 and June 6, 2012 each called for selection of "best qualified" members. J.A. at 511, 514, and 516. The SJA further explained in writing that the selections should be made "using the roster, and the following criteria—age, education, training, experience, length of service and judicial temperament." *Id.* The SJA testified during post-trial proceedings that it was his typical practice to include a copy of Article 25, UCMJ, in folders calling for member selection. J.A. at 318. The rosters provided listed the members' name, rank, age, education level, time in service, and current duty station and assignment. J.A. at 473, 486. The officer roster also listed commissioning date and identified individuals who had been selected for a court-martial panel within the past six months. J.A. at 473, 510.

D. The victim advocate training and experience of some members was not discovered until after the court-martial was assembled, at which time defense had an opportunity to voir dire and challenge the members.

The personnel rosters used for selecting and identifying members did not state whether the listed persons had experience or training as victim advocates. J.A. at 473, 486. The questionnaires called for information about assignments, university education, and whether the individual or someone close to them had been a crime victim. J.A. at 412-471. However, it did not ask whether the member had ever trained or served as a victim advocate, and there was no question calling for "C" schools or specialized training. *Id.* As a result, none of the members indicated training or experience as victim advocates on their questionnaires. J.A. at 412-471.

During voir dire, HS1 LS, HSCS BH, YNC TD, LT AH, and LT KM indicated that they had served as victim advocates, and LCDR KO and CWO RC stated that they had provided "counseling, support or mentorship to persons who have been sexually assaulted or raped." J.A. at 63. The Military Judge permitted individual voir dire questions about these experiences. The Military Judge granted a defense challenge for cause of LT KM and CWO RC. J.A. at 125, 228. LT KM was challenged because she had been a sexual assault victim herself under circumstances similar to Appellant's case, had a close friend who had also been raped, and had served as a victim advocate. J.A. at 113, 125. CWO RC was challenged because only weeks prior, he had served as a victim advocate in a rape

case, and indicated it would be difficult to set aside his feelings of anger. J.A. at 228.

Trial Defense Counsel also challenged LCDR KO, articulating three implied bias grounds for challenging LCDR KO (1) her lack of candor for failing to state she had been a victim of a crime on the member questionnaire, despite having experienced an incident where a co-worker's pornographic story depicting her was discovered in the workplace, *see* J.A. at 229-230; (2) the fact the member had experienced this workplace incident, *see* J.A. at 229; and (3) her one-time service as a victim advocate in 1989, *see* J.A. at 230. Trial Defense Counsel also implied that the Military Judge should remove LCDR KO for a fourth reason: to reduce the number of victim advocates on the panel. J.A. at 230, 234. However, defense counsel explicitly stated he would not challenge the panel composition. J.A. at 234 ("we're not asking [your honor] to knock everybody out"). He also articulated a strategic decision not to challenge any of the other victim advocates. J.A. at 224. ("She is the only one out of them that the defense has serious concerns with based on the way she's answering her questions").[4]

[4] This Court previously ruled that the issue of improper member selection was not waived because of the exception contained in R.C.M. 912(b)(3) to the timeliness requirement of R.C.M. 912(b)(2) because there is an exception to waiver when the objection is made on the basis of an allegation that the convening authority selected members in violation of R.C.M. 502(a). J.A. at 26.

The Military Judge addressed each of the three specific grounds for challenge. He did not address the panel composition argument, finding that it was not a basis for challenge. J.A.at 224. The Military Judge articulated the applicable legal standard, *see* J.A. at 122, and directly addressed the three specific grounds for challenge. He found that LCDR KO did not lack candor, but rather was "wholly credible and forthcoming and thoughtful." J.A. at 235. He also summarily dismissed as unsupported the suggestion that LCDR KO was too distraught about the workplace issue to serve, *see* J.A. at 232, and found the fact that LCDR KO had at one point briefly served as a victim's advocate relevant, but not dispositive. J.A. at 235. The Military Judge did not address defense's request to remove LCDR KO in light of the victim advocate experience and training of other remaining members, stating he did not find the defense provided any other bases for challenge. J.A. at 235. The challenge was denied. *Id*. The defense then used its peremptory challenge on LCDR KO, noting they would have used it instead on HS1 LS had the challenge been granted. J.A. at 236.

After individual voir dire, Trial Defense Counsel noted that the panel was comprised of "seven women and three men, five of which are actually victim's advocates or have been victim's advocates" but did not challenge the overall panel composition or the selection process itself. J.A. at 224-225. The defense also did not challenge the remaining three members who had served as victim advocates.

Notably, on general voir dire, all members agreed that they could be fair and impartial. J.A. at 52-54. Of the four remaining members with victim advocate training experience, all agreed that their experience would not influence their ability to pass judgment or interpret the evidence. J.A. at 132, 186, 196, 223.

Summary of Argument

The enlisted members were properly selected by ADM Zukunft, who made an unfettered personal decision to detail the qualified members recommended by his subordinates. The Military Judge did not err in denying a challenge for cause of LCDR KO. Because the panel composition with respect to victim advocates did not result from error in application of Article 25 or unlawful command influence, Appellant is not entitled to relief.

Argument

I. THE CONVENING AUTHORITY PERSONALLY SELECTED MEMBERS WHO WERE BEST-QUALIFIED UNDER ARTICLE 25, UCMJ.

A. Standard of review.

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). The military judge's findings of fact are binding unless they are clearly erroneous. *Id.*

B. As in *Benedict* and *Marsh*, the Convening Authority adhered to his Article 25 obligations when he appointed members recommended by his subordinates because he exercised full and unfettered discretion in his selection.

It is well established that the convening authority may rely on his or her staff to nominate court members to be considered for ultimate appointment to a court. *United States v. Marsh*, 21 M.J. 445, 449 (CMA 1986) (citing *United States v. Kemp*, 22 C.M.A. 152, 155 (C.M.A. 1973)): *see also United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004). Presenting nominations to a convening authority is "a reasonable means of assisting the convening authority, provided it does not improperly exclude eligible servicemembers." *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999). When the freedom of the convening authority's choice is called into question, this Court has found that an SJA advising the convening authority of his option to make a different choice is evidence of a subsequent unfettered decision. *Marsh*, 21 M.J. at 449.

United States v. Benedict, 55 M.J. 451, 456 (C.A.A.F. 2001) provides an example of the extent to which a convening authority may rely on staff. 55 M.J. at 452. In that case, the convening authority's chief of staff selected nine prospective members from a larger pool and had a convening order prepared with those names. *Id.* The chief of staff presented the convening order to the convening authority, but could not recall whether the member questionnaires had already been provided. *Id.* However, the chief of staff also testified that to his impression, it was the convening authority's decision about the composition of the panel. Another officer testified she saw the convening authority going "through the package," although

she did not know whether the package included member questionnaires, and had not heard the convening authority made any comments or changes. This Court noted that the convening authority's signature on the convening order also evidenced his personal selection. *Id.* at 455. Based on these facts, this Court upheld the military judge's finding that the convening authority personally selected the members. *Id.*

Here, VADM Brown, the PACAREA Commander and lawful convening authority, personally selected the officer members by signing a convening order that detailed officers he had chosen from a roster. J.A. at 510, 512. His successor in command, ADM Zukunft, likewise personally selected members by signing amended court-martial orders that excused some members from the original panel and added others. J. A. at 517, 519. Each Convening Authority's personal review of the proposed list as reflected on draft orders, and eventual signature of those orders is sufficient to demonstrate unfettered decision-making, despite the involvement of subordinates in compiling the list. *Benedict*, 55 M.J. at 455, *Marsh*, 21 M.J. at 449. The record indicates RADM Colvin and RADM Ryan followed instructions to identify members who were best qualified based on the criteria set forth in Article 25, UCMJ and they identified the members that were submitted to ADM Zukunft. J.A. at 511, 514, and 516. The written advice provided by the SJA to ADM Zukunft shows that like in *Marsh*, ADM Zukunft was informed that he

was free to make a different choice. *See* J.A. at 518; *Marsh*, 21 M.J. 450. The written advice specifies it is a "recommendation," refers to members under consideration as "candidates," and recommends that certain candidates be "releas[ed] from consideration." J.A. at 518. The written advice also invites ADM Zukunft to ask questions, choose whether to concur or non-concur, and direct different documentation be prepared if he rejected the recommendations. *Id*. ADM Zukunft also had recent experience convening courts-martial at the time he selected members for appellant's court martial. J.A. at 524. His previous experience, along with the SJA's advice, demonstrate that he made an unfettered choice to detail members when he signed the convening order amendments, even though the list of members was proposed by his subordinates. J.A. at 517, 519.

C. The materials used to select members allowed the Convening Authority and those assisting him to assess the age, education, training, experience, length of service, and judicial temperament of the prospective members.

Neither Congress nor the President prescribed a specific type or amount of information, or a particular methodology required to evaluate qualifications under Article 25(d)(2), UCMJ when selecting court-martial members. Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2) requires only that:

> 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.

Commanders are provided the power to select panel members based on the responsibility and accountability of commanders for the successful conduct of military operations. *See Benedict*, 55 M.J. at 456 (Effron, C. J. dissenting). Article 25(d)(2)'s flexibility in not directing any particular method of selection ensures that courts-martial can be carried out anywhere, under virtually any conditions. Major James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 Mil. L. Rev. 117, 149 (2010) (citing Joint Service Committee on Military Justice, Report on the Methods of Selection of Members of the Armed Forces to Serve on Court-Martial apps. E-I (1999)).

In this case, the materials provided to those detailing or identifying members included a recitation of the criteria in Article 25(d)(2) and a title indicating that the task was to choose "best-qualified" members. J.A. at 511, 514, and 516. The SJA testified that it was his practice to include a copy of Article 25, UCMJ, with correspondence related to member selection. J.A. at 318. The pool of eligible members consisted of persons in the local area and was reflected on personnel rosters containing certain information about each person. J.A. at 473, 486. The information on the rosters either specifically stated each of the Article 25 criteria or allowed conclusions about the criteria to be drawn. Age and length of service were provided. J.A. at 473, 486. Information about education, training and experience

could be deduced from the prospective member's education level, current duty position, length of service, and, as to officers, date of commission. *Id*.

"Judicial temperament" is not listed on the roster as such. It is a term that has not been defined by the President, Congress, or the courts. The common definition of "judicial" means "inclined to make or give judgments; critical, discriminating. . . ." while "temperament" means "usual personal attitude or nature as manifested by peculiarities of feeling, temper, action; see disposition. Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 Mil. L. Rev. 103, 163 n.432 (1992). Even without knowing members personally, a person reviewing data on the personnel rosters in this case could make conclusions about the person's judicial temperament based on their age, time in service, rank, prior enlisted service, current billet, and similar factors.

VADM Brown described doing exactly this in his post trial affidavit, explaining he looked to add warrant officers to panels because, in his experience, they added "reality" to the panel. J.A. at 528. He also said he looked for junior officers with command or prior enlisted experience. *Id*. In other words, based on the roster he was provided, and his own experience-based opinions, VADM Brown was able to select members who he thought could best assess circumstances and events based on their life experience—i.e., judicial temperament. The rosters on their face, along with VADM Brown's specific examples of how he used the

rosters to opine on judicial temperament show the information used to select members in this case was sufficient to evaluate criteria required by Article 25, UCMJ. Thus, the materials provided here allowed the Convening Authority to appropriately evaluate the list of members to determine who was best qualified, in accordance with his duties under Article 25, UCMJ.

Because the materials provided allowed the Convening Authority to evaluate Article 25 criteria, this Court should find the members were properly selected. Article 25, UCMJ already provides the criteria for deciding whether members are best qualified to serve on courts-martial. Further delineating exactly what a convening authority *must* consider in order to reach that conclusion is inconsistent with the principle of a flexible military justice process that can be applied under any conditions. This Court should not impose such requirements.

II. APPELLANT RECEIVED A FAIR TRIAL, AND THE APPEARANCE OF A FAIR TRIAL, DESPITE THE PANEL COMPOSITION, WHERE THE MILITARY JUDGE PROPERLY DENIED ONE CHALLENGE, AND APPELLANT DECLINED TO CHALLENGE REMAINING MEMBERS OR THE PANEL COMPOSITION.

A. The Military Judge did not abuse his discretion in denying the implied bias challenge for cause against LCDR KO because her one 23-year-old victim advocate experience and involvement in a sexually related workplace incident would not cause a member of the public to question the fairness of the proceedings.

1. Standard of Review.

Issues of implied bias are reviewed under a standard less deferential than abuse of discretion, but more deferential than *de novo*. *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015). Military judges must liberally grant challenges for cause, but the burden of persuasion remains with the party making the challenge. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

2. **LCDR KO's service on the panel would not cause a member of the public to question the fairness of the panel, despite her one experience as a victim advocate 23 years prior, and involvement in a workplace incident**.

R.C.M. 912(f)(1)(N) provides that a member shall be excused whenever it appears the member "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." The core of the implied bias test "is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel". *United States v. Rogers*, 75 M.J. 270, 271 (C.A.A.F. 2016).The question before the Court is whether the risk that the public will perceive the accused received something less than a court of fair, impartial members is too high. *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015). To answer this question, this Court reviews the totality of the circumstances, and assumes the public to be familiar with the unique structure of the military justice system. *Id.* Although the court considers a totality of the circumstances, the focus is on the impact of the particular member's presence on the panel on the overall appearance of fairness. *Peters*, 74 M.J. at 35.

This Court has held there is no *per se* rule that a member of the court-martial must be excused because she has been the victim of a similar crime. *See United States v. Castillo*, 74 M.J. 39, 42 (C.A.A.F. 2015). Further, in *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008), this Court stated that excluding qualified member from consideration for court-martial service due to their profession was error.

Even if reviewed *de novo*, this Court would not find that an unfounded allegation of lack of candor, an embarrassing workplace incident, or service as a victim advocate 23 years prior would negatively impact the public's perception of fairness in LCDR KO sitting on the panel. First, the record does not indicate that LCDR KO lacked candor. The military judge correctly found instead that there was a reasonable explanation for why LCDR KO did not indicate on her member questionnaire that she had been a victim of a crime: she thought of herself as subject of an embarrassing workplace incident, not a victim of a crime. J.A. at 230. Second, LCDR KO's description of the workplace incident she was involved in did not indicate that she was traumatized or biased because of it. J.A. at 93. LCDR KO did not indicate that the co-worker who drafted a pornographic story depicting her meant for her to discover it, much less that he meant to harm her. The record did not indicate that LCDR KO was particularly traumatized by the incident. J.A. at 231. Rather, she stated the situation was resolved and she did not feel like she was

a victim. J.A. at 93. Even if one characterized a workplace incident as a "similar crime" to forcible rape—the subject of Appellant's trial—LCDR KO would not be automatically disqualified. *See Castillo*, 74 M.J. at 42. But the type of issue LCDR KO went through is a far cry from the subject of Appellant's case. When viewed objectively, having a court member in a forcible rape case who experienced a non-criminal, though sexually-related workplace incident that she was not distressed about would not create an appearance of unfairness in the public eye.

Finally, LCDR KO's single experience as a victim advocate was so long ago that her service on the panel would not create any appearance of unfairness. She was a victim advocate on only one occasion 23 years prior and recalled very little about the case. J.A. at 80. Unlike CWO RC, who said he was emotional over a very recent and traumatic experience as a victim advocate, *see* J.A. at 151, and was properly excused, *see* J.A. at 228, LCDR KO made no such statements. Where this Court has ruled that no specific profession is disqualifying for service on a court-martial, and where LCDR KO's experience was so far removed in time that she could barely remember it, the Military Judge did not err in denying the challenge based on LCDR KO's victim advocate experience. *See Bartlett*, 66 M.J. at 428.

Members of the public would not perceive Appellant's panel as unfair when a member who had experienced a workplace incident not arising to criminal

conduct, and had once been a victim advocate 23 years prior, sat on the panel. Neither of these circumstances individually, or taken together, would give rise to a public perception of unfairness; on the contrary, LCDR KO appeared to be an experienced and thoughtful service member. Even in light of the liberal grant mandate, the Military Judge did not err in denying the challenge of LCDR KO.

It was also not error for the Military Judge to refuse to consider a request to remove a member solely to change the panel composition as an implied bias challenge, because the implied bias tests concerns the particular member who is being challenged, not panel composition as a whole. In *Peters*, this Court made clear that while totality of the circumstances should be considered, the core of the test is the effect the member's presence would have on the public's perception of whether the trial was fair. 74 M.J. at 35. Thus, absent a finding that this particular member would cause the public to perceive the trial as unfair, it would be contrary to this Court's precedent to use a challenge for cause as vehicle for panel recomposition.

B. There was no error in the application of Article 25 that resulted in the Appellant's panel composition, therefore, any challenge to the panel composition for reasons other than selection of members for reasons other than those in Article 25(d)(2) was waived.

1. Standard of Review.

This court reviews claims of error in the selection of members *de novo* as questions of law. *United States v. Bartlett*, 66 M.J. 226, 227 (C.A.A.F. 2008). The

defense bears the burden of establishing the improper exclusion of qualified personnel from the selection process. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). If the court finds error in member selection, it conducts a *de novo* review to determine whether the error is harmless. *United States v. Ward*, 74 M.J. 225, 227 (C.A.A.F. 2015).

2. The Members were properly selected under Article 25(d)(2).

As discussed in Issue I, *supra*, the Members in this case were properly selected in accordance with Article 25(d)(2), UCMJ. This Court has previously disapproved the exclusion of members in a certain profession from court-martial service. *Bartlett*, 66 M.J. at 428. As this Court pointed out in *Bartlett*, "Congress did not see fit to include in Article 25 any limitations on court-martial service by any branch, corps, or occupational specialty. . . ." 66 M.J. at 428. Appellant may argue that the Convening Authority should have *excluded* members with victim advocate experience as presumptively unqualified (i.e., lacking judicial temperament). But such exclusion would have been error under *Bartlett*.

3. As in *Lewis* and *Bertie*, Appellant fails to raise a claim of improper inclusion of members based on the panel composition alone.

It is also impermissible to improperly include members, or "stack" the panel in order to achieve a particular result. *United States v. Hilow*, 32 M.J. 296, 299 (CMA 1991). Court-stacking is a form of unlawful command influence. *United States v. Ayala*, 43 M.J. 296, 299 (C.A.A.F. 1995). Therefore, defense bears the

burden of raising facts that, if true, would constitute unlawful command influence and has a logical connection to the court-martial in terms of potential to cause unfairness in the proceedings. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). When an issue of unlawful command influence due to court-packing is raised, this Court cannot affirm unless it is convinced beyond a reasonable doubt that the court members were properly selected. *United States v. Lewis*, 46 M.J. 338, 341 (C.A.A.F. 1997).

Panel composition alone does not create a presumption of irregularity. *United States v. Bertie*, 50 M.J. 489, 492 (C.A.A.F. 1999); *Lewis*, 46 M.J. at 342. In *Lewis*, this Court found the appellant failed to raise panel-stacking despite the anomalous proportion of women sitting on his panel. *Id.* "While no one could explain why so many women were detailed to appellant's case, no one could show a pattern of court stacking or improper actions or motives on the part of the Government." *Id.* In *Bertie*, the appellant went beyond the composition of his own panel, which did not include any junior officers, warrant officers, or junior enlisted members, and also demonstrated that no court-martial convened at his installation in the previous year had any junior officers, warrant officers, or junior enlisted members. *Bertie*, 50 M.J. at 492. Still, because there was evidence that the convening authority had intended to follow Article 25 (he was advised to do so by his SJA), and no evidence of improper motives, this Court found that there was no

reasonable doubt that the panel was properly selected. *Id.* at 493. While this Court's recent opinion in *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017), explains that no showing of intent or knowledge on the part of government actors is needed to demonstrate the appearance of unlawful command influence, this does not does not relieve Appellant of the burden to make an initial showing for apparent unlawful commend influence.

Appellant fails the burden of production because he cannot show that anyone involved in member selection even knew that certain members had victim advocate training or experience, much less that they intentionally stacked the panel with victim advocates they believed would be hostile to the defense. The rosters used in member selection did not provide information on victim advocate experience or training. J.A. at 473, 486. Extensive post-trial inquiry did not reveal that VADM Brown, RADM Colvin, RADM Ryan, ADM Zukunft, the SJA, or anyone else, knew that some of the detailed members had victim advocate experience or training, much less that someone intentionally selected or nominated members with such experience were purposefully selected in order to stack the panel.[5] None of the members with this experience listed it in the court-martial member

[5] VADM Brown personally knew CWO RC, who did have experience as a victim and was successfully challenged for cause due to his experiences. J.A. at 528, 228. But VADM Brown could not have possibly known about that experience because CWO RC explained on voir dire that the experience happened two months earlier, after he had been selected by VADM Brown. The trial took place in June 2012, and CWO RC was originally selected on March 16, 2012.

questionnaires they completed after being detailed. J.A. at 411-471. Their experience only came to light after being questioned on individual voir dire. J.A. at 63, 151. Where the members were properly selected, and there is absolutely no indication of impropriety, consistent with *Bertie* and *Lewis,* this Court should find Appellant has failed his burden to raise improper selection in the form of panel-stacking.

4. Appellant is entitled to no relief because he received both a fair trial and the appearance of a fair trial.

If the exclusion of information about victim advocate training and experience from the materials considered by the Convening Authority is error, Appellant would not be entitled to relief because he received both a fair panel and the appearance of a fair panel and has not articulated any prejudice. *United States v. Ward*, 74 M.J. 225, 228 (C.A.A.F. 2015) (where there is a nonconstitutional error in the application of Article 25, UCMJ, this Court determines whether the appellant has been prejudiced by assessing whether he received both a fair panel and the appearance of a fair panel).

In *Bartlett*, , this Court determined that the appellant received a fair trial when there was a lack of improper motive, that the person that convened the court was authorized to do so, those members otherwise met Article 25, UCMJ criteria, and that the panel was otherwise "well balanced across gender, racial, staff,

command, and branch lines." 66 M.J. at 431. In *United States v. Sullivan*, 74 M.J. 448, 451-52 (C.A.A.F. 2015), this court analyzed the context of the entire trial to determine whether appellant received a fair trial despite improper exclusion of potential members on the basis of rank. In determining the exclusion harmless, this Court noted the members' actions in the case demonstrated that they were fair and unbiased—noting their active participation, unbiased questions, long deliberation, and lenient sentence. *Id.*

In *United States v. Kirkland*, 53 M.J. 22, 23 (C.A.A.F. 2000), this Court addressed whether the appellant received the appearance of a fair trial, and found an unresolved appearance of unfairness where a request for court-martial nominees appeared to exclude members outside the ranks of E-7, E-8 and E-9. While the convening authority had not actually used rank as a criterion, this Court found that there was an unresolved appearance of improper exclusion, therefore requiring relief to uphold the essential fairness and integrity of the military justice system. *Id.*

Under the tests prescribed in *Ward*, and analyzing a totality of the circumstances as in *Sullivan*, Appellant received both a fair trial and the appearance of a fair trial notwithstanding the number of victim advocates on his panel. First, Appellant received a fair trial. He was tried by qualified members, and the record does not indicate any improper action by any authority that resulted in

the particular panel composition as to persons with victim advocate training or experience. Appellant's panel was diverse, including three officers and four enlisted members ranging in age from 31 to 53 years. The five women[6] and two men had diverse professional backgrounds in healthcare, intelligence, enforcement and support staff. They also included a variety of ethnic groups (two African Americans were challenged by the defense). J.A. at 411-471. Nothing in the record indicates inattention or otherwise inappropriate or biased behavior by members. But the most striking circumstance indicating fairness is the exceptionally low sentence awarded the accused: only three months of confinement, even less than the six months requested by Appellant's own counsel. J.A. at 267-268.

Unlike in *Kirkland*, there is no unresolved appearance of unfairness here because there is no evidence in the record of intentional or otherwise improper exclusion or inclusion of victim advocates. Once it was discovered that certain members had victim advocate experience, the parties had the opportunity to question the members about their experiences. J.A.at 63, 66. The Military Judge granted two challenges and properly denied a third against persons with victim advocate experience. J.A. at 125, 228, 235. Appellant did not challenge any other

[6] Before the CGCCA, Appellant argued that the number of women on the panel constituted unlawful command influence. The CGCCA held Appellant failed to produce sufficient evidence to raise the issue of court-stacking as to that aspect of the panel composition. J.A. at 9. Appellant did not petition this Court to hear that issue, nor did the Court grant it.

members, or the panel as a whole, due to victim advocate training or experience, instead asserting that he did not wish to challenge the panel composition as a whole, and that the only member he had real concerns with was LCDR KO. J.A. at 224.

Because the Government has demonstrated that the panel composition as to members with victim advocacy training or experience was not result of a violation of Article 25, and the Defense did not challenge for cause three of the remaining four victim advocates, there is no unresolved appearance of unfairness. Rather, the record demonstrates that Appellant was tried by panel members that defense consciously chose not to challenge and did not have "serious concerns" about. J.A. at 224. These members were qualified, properly selected, and, from both an objective and a subjective viewpoint, behaved exactly as qualified, impartial members should.

Conclusion

Because the members were properly selected, and Appellant received both a fair trial and the appearance of a fair trial, this Court should affirm the findings and sentence.

/S/

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Certificate of Compliance

This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,332 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in proportional typeface with Times New Roman 14-point typeface.

Certificate of Service

I certify that a copy of the foregoing was electronically submitted to the court on July 12, 2017, and that Appellant's counsel, Mr. John M. Smith, and LT Philip A. Jones, were copied on the email at jms3consulting@comcast.net, and Philip.A.Jones@uscg.mil.