IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

NORBERT A. KING II,
Lieutenant Colonel (O-5), USAF
Appellant.

USCA Dkt. No. 22-0008/AF

Docket No. 39583

BRIEF ON BEHALF OF APPELLANT

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Granted Issue

WAS APPELLANT'S COURT-MARTIAL IMPROPERLY CONSTITUTED BECAUSE THE CONVENING AUTHORITY EXCUSED A MEMBER AFTER THE COURT-MARTIAL WAS ASSEMBLED WITHOUT ESTABLISHING GOOD CAUSE ON THE RECORD FOR EXCUSING HIM?

Statement of Statutory Jurisdiction

Lieutenant Colonel (Lt Col) Norbert King II (Appellant) received an approved court-martial sentence that included 3 years of confinement and a dismissal from the Air Force. Accordingly, the Air Force Court of Criminal Appeals (AFCCA) exercised jurisdiction under Article 66(b), Uniform Code of Military Justice (UCMJ).[1] This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, "upon petition of the accused and on good cause shown."

Statement of the Case

On various dates between October 2, 2017 and August 1, 2018, Appellant was tried by general court-martial before a panel of officer members at Joint Base McGuire-Dix-Lakehurst, New Jersey, and the Trenton Federal Courthouse, New Jersey. Contrary to Appellant's pleas, the panel found him guilty of sexual assault and committing an act of sexual penetration on a 17-year-old blood relative, an offense not capital, in violation of 2C N.J. Stat. Ann. § 14-2(c)(3)(a), assimilated

[1] References to the UCMJ and Rules for Courts-Martial (R.C.M.) are from the *Manual for Courts-Martial*, *United States* (2016 ed.).

into Federal Law by 18 U.S.C. § 13, in violation of Articles 120 and 134, UCMJ. Joint Appendix (JA) at 90, 193. The panel sentenced Appellant to three years of confinement and a dismissal. JA at 194. The convening authority approved the adjudged sentence and, but for the dismissal, ordered Appellant's sentence executed. JA at 200.

On August 16, 2021, the AFCCA set aside the finding as to the Specification of Charge II, but affirmed the finding as to the Specification of Charge I and the sentence. JA at 85. Appellant timely filed a petition for review to this Court on October 12, 2021. This Court subsequently granted review of his case on March 22, 2022. He hereby submits this brief.

Statement of Facts

Background

The charge against Appellant stemmed from his daughter JK's contention that he performed oral sex on her the evening of September 10, 2016. JA at 4. No witnesses observed the alleged incident, and JK's stepmother (SK) and young siblings—all of whom were in the house at the time—did not report seeing or hearing anything suspicious. JA at 29. Appellant denied the allegations, attributing the false claims to JK's frustration with his strict parenting and her desire to live with her mother. JA at 161-63. Three witnesses later testified as to Appellant's character for truthfulness (JA at 175-83, 187-89), and his mother-in-law attested to JK's

untruthful reputation within the family.[2] JA at 184. SK confirmed that it was not unusual for Appellant and JK to get into heated arguments and that, on the day of the allegations, JK was frustrated because Appellant had forbidden her from attending the senior ball and senior trip due to her lack of responsibility. JA at 185-86.

JK acknowledged having problems with Appellant and SK—problems that included her telling lies.[3] JA at 136-37. JK admitted to "[lying] constantly" to Appellant, SK, and her friends (JA at 140), and to manipulating people to get them to like her. JA at 143. She wrote in her journal that she hated her life living with Appellant and SK (JA at 139), that Appellant and SK were mad at her (JA at 140), and that she told some "big lies" to Appellant about her boyfriends. JA at 142. JK also disclosed that she had made prior allegations against her stepfather that resulted in his prosecution and conviction (JA at 145); nevertheless, she claimed that she did

[2] Two witnesses testified regarding JK's character for truthfulness. The first was the father of JK's fiancé, who admitted his opinion was based exclusively on the time he spent with her after she made her allegations. JA at 174. The second was the mother of JK's close friend, who attested that her opinion would not change even if JK had lied to her about various matters, if JK admitted to lying a lot in general, or if JK lied to manipulate people. JA at 146-47. Two of the witnesses who testified for Appellant were field grade officers who had known him for 13 years respectively (JA at 175-83), while the other had been friends with Appellant for more than twenty years. JA at 187-89.

[3] JK's friend confirmed that JK complained about being unhappy with her parental situation, getting into trouble frequently, and how her parents were too strict. JA at 148-49.

not want to get Appellant in trouble when she made her allegations against him. JA at 138, 144.

No physical evidence from the scene corroborated JK's claims (JA at 150-58), no male DNA was found on any of the swabs of JK's external genitalia, and JK's DNA was not found on the external or internal swabs of Appellant's mouth.[4] JA at 164-69. Male DNA was discovered on the inside crotch of JK's underwear that matched Appellant's profile; however, this DNA also matched the profiles of many Asian individuals in the random population including his male relatives. JA at 165-66, 192. No expert could determine how this DNA arrived on the garment, as it could have been deposited directly (*e.g.*, by the DNA contributor touching the underwear) or indirectly (*e.g.*, by JK touching an item containing the DNA and then transferring the DNA when she touched her underwear). JA at 168, 170-73, 190. It could have also have been the result of JK's underwear coming into contact with household surfaces containing the DNA, being laundered with the clothing of Appellant's male relatives, or being co-mingled in the same hamper. JA at 190-91. Appellant's son lived in the family's home along with JK during the charged timeframe, and Appellant's father had stayed there shortly before her allegations. JA at 171.

[4] After Appellant waived his Article 31, UCMJ, rights and agreed to an interview, he voluntarily permitted investigators to obtain a sample of his DNA. JA at 5, 8-9.

Court-Martial Assembly and Panel Selection

Appellant's court-martial was initially convened by Special Order A-14 on July 14, 2017. JA at 87-88, 195. Following amendments to the convening order (*see* JA at 196-97), the court-martial was subsequently convened by Special Order A-8 on April 11, 2018. JA at 089, 091, 198. This order directed "[t]he court [would] be constituted" by seventeen members. JA at 198. Among these members were Lt Col PBL and Colonel (Col) DL, the latter as an alternate. JA at 195. A separate alternate member, Lt Col TM, was excused on April 12, 2018. *Id*.

Appellant's court-martial was called to order on April 16, 2018. JA at 91. Assistant trial counsel announced the court members were present. JA at 92. Lt Col PBL was in attendance at this time, as were fourteen other unexcused members; only Col DL was missing. JA at 92-93. Following the members' swearing in, the military judge announced that the court was assembled. JA at 93.

Voir dire began the same day and continued through April 18, 2018. JA at 93, 123. During *voir dire*, Lt Col PBL disclosed that he had been falsely accused of sexually assaulting someone when he was 15 years old. JA at 94-95, 101-03. As he described it, a classmate had made the allegation because she was afraid of getting into trouble after breaking curfew. JA at 107-08. Authorities then investigated her claims for approximately two months before she recanted and moved. JA at 102.

Lt Col PBL further disclosed that he knew Appellant "reasonably well," as

they flew together in the same Squadron several years prior. JA at 100. He similarly knew some of the proposed witnesses. JA at 96-105. However, he averred that he did not have particularly close relationships with any of these individuals, including Appellant. JA at 100-01.

Neither party challenged Lt Col PBL. JA at 112-13. The military judge subsequently noted that the Defense "affirmatively desire[d] to have [Lt Col PBL] on this particular panel." JA at 113. After challenges for cause and peremptory challenges, there was a quorum of five officers—the minimum required. JA at 114. Lt Col PBL was among these five and slated to be the panel's president. JA at 115.

Before adjournment, the military judge notified the panel that he had continued the case until July 26, 2018, and estimated it would last through August 4, 2018. JA at 116. He then asked whether these dates would affect any members' ability to sit on the panel. JA at 117. Lt Col KW responded that she anticipated a permanent change of station (PCS) to attend Senior Developmental Education (SDE) on July 1, 2018. *Id*. Lt Col PBL indicated he would have a change of command on June 1, 2018, followed by a PCS to a different squadron. *Id*. However, the PCS would "keep [him] in place," but he would "just be in a different organization at that time." *Id*. The military judge stated he would address all potential availability issues with counsel, but that each member would remain on the panel and was "expected to be available" for the trial date. JA at 117-18. The military judge also instructed

the members that they could "only be released from this court-martial upon showing of good cause." JA at 118.

During a follow-up discussion, Lt Col KW clarified that she was selected for a Secretary of Defense fellowship that lasted for eleven months, and that she would be in Washington D.C. for five weeks followed by a PCS to a different duty station. JA at 119-20. In addressing Lt Col KW's possible excusal, the senior trial counsel relayed that he was unsure what the convening authority would do, but suggested that they be prepared to conduct additional *voir dire* later in the week. JA at 121. When the military judge asked what this *voir dire* would cover, the senior trial counsel answered:

> In the event a member is excused. In the event that we cannot find an alternate date and in the event a member is excused for good cause due to the conflict—specifically the conflict brought up by Lieutenant Colonel [KW], which would have us go below quorum. We have one alternate member who was already appointed. We may need additional—appointment of additional members, depending upon action the Convening Authority may take.

JA at 121. The alternate member was Col DL. JA at 195, 198.

The senior trial counsel added that he "anticipate[d] at least with Lieutenant Colonel [KW] there might be an excusal." JA at 121. He explained that if this were the case, the Government "would have our alternate member that is standing by." JA at 122. He then tentatively agreed with the military judge that, if the convening authority appointed more members in anticipation of challenges, he believed the

parties would receive additional challenges. *Id*. But the senior trial counsel remained unsure whether the convening authority would "appoint additional alternate members." *Id*. For its part, the Defense indicated its desire to find another date for the trial so "that the panel we all worked so hard for doesn't disappear overnight and we have to start over." JA at 122. The military judge ultimately released the panel with instruction to return on July 26, 2018. JA at 123.

The following day, on April 19, 2018, the military judge and the parties again discussed the situation regarding Lt Col KW. JA 124. The military judge summarized the R.C.M. 802 conference as:

> [Government counsel] indicated that we would not be proceeding forward either today or tomorrow with additional court members, that [Lt Col KW] had not been excused yet, that there was no motion that they intended to present to the Court to have her excused, and that those—the options essentially were being considered by the Convening Authority and his legal advisers in this particular case.

Id. The parties then litigated an Article 13, UCMJ motion, after which the Court adjourned with plans to resume on July 26, 2018. JA at 124-25.

On July 24, 2018, the court-martial was called to order and Special Order A-14, dated June 21, 2018, was inserted in the record. JA at 126, 199. This order detailed seven additional members to the court-martial, and indicated that Lt Col PBL and Lt Col KW had been relieved. JA at 199. This order says nothing about Col DL. *Id*. Trial counsel later announced the presence of the added members at the court-martial, along with the absences of three members who had been

impaneled earlier. JA at 128-29. When the military judge inquired whether the convening authority had relieved the absent members, the trial counsel answered in the affirmative. JA at 129. The senior trial counsel quickly interjected that the members who were absent attended a previous hearing and were "still on the panel" but not present. *Id*. He added "[t]he others were excused at an earlier session." *Id*. However, no such earlier session occurred. JA at 21.

The Defense remained silent following the senior trial counsel's erroneous recitation and never challenged the absence of any member. JA at 21, 129. Similarly, the military judge did not inquire further into the matter, nor did he discuss with Appellant the requirements needed to change members after assembly pursuant to Article 29(a), UCMJ, and R.C.M. 505(c)(2).

Of the additional seven panel members detailed to Appellant's court-martial, the Defense successfully challenged three for cause (JA at 130-31, 133), and both parties exercised their peremptory challenge. JA at 134-35. With two remaining members, and three impaneled earlier, the military judge announced a quorum. JA at 135.

At no time during Appellant's court-martial was the justification for Lt Col PBL's excusal referenced "on the record." Likewise, there was no discussion of whether Col DL had been excused or the reasons for his purported excusal, nor did any of the special orders relieve Col DL from his detailing as an alternate

member of Appellant's court-martial. JA at 195-200.

Appellate Proceedings

On appeal, Appellant argued his court-martial was improperly constituted. JA at 1. The Government responded with an affidavit from Col WA, the convening authority's staff judge advocate. JA at 202. Col WA attested that the convening authority had excused both Lt Col KW and Lt Col PBL at their request, and attached four documents: (1) Lt Col KW's Request for Relief from Court-Martial Duty, dated April 20, 2018, which cited her previously disclosed fellowship as justification; (2) Lt Col PBL's unsigned Request for Relief from Court-Martial Duty, dated June 14, 2018, which cited his selection to Air War College as the basis for the request; (3) Col WA's advice to the convening authority regarding the replacement member package, dated June 21, 2018; and (4) the convening authority's indorsement of the package, wherein he relieved Lt Col PBL and Lt Col KW, dated June 21, 2018. JA at 202-09. None of the documents Col WA provided were included in the record of trial, and Appellant objected to the lower court's consideration of these off-the-record matters. JA at 021. Citing its purported ability "to consider declarations from outside the record of trial when necessary to resolve issues raised by materials in the record of trial," the AFCCA granted the Government's motion to attach. *Id*. (citing *United States v. Jessie*, 79 M.J. 437, 442-44 (C.A.A.F. 2020)).

After considering these off-the-record matters, the AFCCA declined to

provide Appellant relief for an improperly constituted panel. It concluded, *inter alia*, that the court-martial retained jurisdiction to try Appellant, citing to precedent for the proposition that "missing members is not a jurisdictional issue unless the number of court members falls below a quorum." JA at 023 (citing *United States v. Sargent*, 47 M.J. 367, 368-69 (C.A.A.F. 1997); *United States v. Colon*, 6 M.J. 73, 74 (C.M.A. 1978); *United States v. Malczewskyj*, 26 M.J. 995, 997 (A.F.C.M.R. 1988)). The court also found no violation of Article 29(a), UCMJ, relying on Col WA's off-the-record documents to glean "good cause" for the excusals of Lt Col PBL and Lt Col KW. JA at 025-26. More specifically, it determined Appellant failed to show either Lt Col PBL's selection for Air War College or Lt Col KW's SDE was "plainly or obviously insufficient to be a military exigency or an extraordinary circumstance." JA at 026.

With respect to R.C.M. 505(c)(2)(A)(i)'s requirement that post-assembly excusals by the convening authority be "for good cause shown on the record," the AFCCA opined that Appellant failed to show plain or obvious error in Lt Col KW's excusal. JA at 26-27. The court based its reasoning on how Lt Col KW's written excusal request cited similar reasons to what she disclosed during *voir dire*, as well as how her potential excusal was a "distinct possibility" discussed by the trial counsel and the military judge. *Id*. The AFCCA came to a different conclusion regarding Lt Col PBL, identifying four reasons why his excusal constituted plain

error: "(1) Special Order A-14 did not explain the reasoning for the post-assembly excusal; (2) no part of the excusal package was marked as an appellate exhibit; (3) trial counsel did not announce the substantive reasons for the excusal in open court; and (4) trial counsel misstated that some members, which included Lt Col PBL, had been excused at a prior session." *Id*.

The lower court later addressed whether Lt Col PBL's excusal prejudiced Appellant, deeming "the failure to show good cause on the record . . . a nonconstitutional administrative error made by the Government." JA at 27. Applying the burden to Appellant under plain error, the AFCCA ultimately found no material prejudice in Lt Col PBL's excusal, and further opined that, had the Government borne the burden, it had done so. JA at 28-29.

Additional facts are included in the Argument section below.

Summary of Argument

Appellant's case epitomizes why the President of the United States requires a convening authority, pursuant to R.C.M. 505(c)(2)(A)(i), to establish "good cause shown on the record" when excusing panel members after assembly. "Good cause shown on the record" enables the parties to litigate post-assembly excusal of panel members, and enables appellate courts to conduct a constitutionally sufficient review if the issue is raised on appeal. However, because Lt Col PBL's excusal was not "for good cause shown on the record," Appellant was denied these due process

rights.

There is no dispute that Lt Col PBL's excusal was not "for good cause shown on the record." The dispute centers around three things: (1) the nature of the error (*i.e.* jurisdictional v. administrative); (2) the appropriate remedy; and (3) whether the Government "cured" the error with its mid-appeal submission of the documentation related to the convening authority's post-assembly excusals of Lt Col KW and Lt Col PBL. In this third dispute, at the Government's urging, the AFCCA misapplied *Jessie*.

Under the unique circumstances of this case, Appellant's court-martial was improperly constituted because the convening authority's excusal of Lt Col PBL after the court-martial was assembled was not for "good cause shown on the record." This amounts to jurisdictional error because without Lt Col PBL's excusal, a quorum would have remained (even with Lt Col KW's excusal), and because Lt Col PBL's excusal was not lawful, his replacement was not lawfully detailed. Consequently, Lt Col PBL's replacement was an "interloper" which, when subtracted from the panel, "busted" quorum.

Alternatively, if this Court concludes there was no jurisdictional error, it should hold that Appellant was prejudiced because he was deprived of the opportunity to challenge Lt Col PBL's excusal *on the record*. The failure to show good cause for Lt Col PBL's excusal *on the record* not only deprived Appellant of

an opportunity to litigate the matter at trial, but also limited his ability to litigate the issue on appeal before the AFCCA. This amounts to a violation of Appellant's due process rights. *See United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013) (attributing due process protections for servicemembers as emanating from "the plain text of the Constitution, the UCMJ, and the MCM.").

Argument

APPELLANT'S COURT-MARTIAL WAS IMPROPERLY CONSTITUTED BECAUSE THE CONVENING AUTHORITY EXCUSED A MEMBER AFTER THE COURT-MARTIAL WAS ASSEMBLED WITHOUT ESTABLISHING GOOD CAUSE ON THE RECORD FOR EXCUSING HIM.

Standard of Review

Whether a court-martial is properly constituted is a question of law reviewed *de novo*. *Sargent*, 47 M.J. 367; *Colon*, 6 M.J. at 74-75. Interpretations of R.C.M. provisions are reviewed *de novo*. *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014) (citing *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008)). "Whether an appellant has waived an issue is a legal question this Court reviews *de novo*." *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020) (citations omitted). Whether a record of trial is incomplete is a question of law reviewed *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law

"A court-martial is the creature of statute, and, as a body or tribunal, it must

be convened and constituted in *entire conformity* with the provisions of the statute, or else it is without jurisdiction." *McClaughry v. Deming*, 186 U.S. 49, 62 (1902) (emphasis added). By virtue of Article 36, UCMJ, statutory requirements "include the procedures set forth in the *Manual for Courts-Martial* [*MCM*] governing the selection and appointment of court-members." *United States v. Caldwell*, 16 M.J. 575, 576 (A.C.M.R. 1983) (citation omitted) (no emphasis in original); *see also Runkle v. United States*, 122 U.S. 543, 555-56 (1887):

> A court martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. . . . To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law.

"Jurisdictional error occurs when a court-martial is not constituted in accordance with the UCMJ." *United States v. Adams*, 66 M.J. 255, 258 (C.A.A.F. 2008) (citing *Colon*, 6 M.J. at 74). "A court-martial composed of members . . . who were never [properly] detailed by the convening authority, is improperly constituted and the findings must be set aside as invalid." *Id*. (citing *McClaughry*, 186 U.S. at 63-65; *United States v. Harnish*, 31 C.M.R. 29 (C.M.A. 1961)). Jurisdictional errors are not waived by the failure to object at trial. R.C.M. 905(e).

"Members of a court-martial must have been lawfully appointed thereto in order that they may enjoy status as members." *United States v. Padilla*, 5 C.M.R.

31, 34 (C.M.A. 1952). A member not properly detailed is an interloper, rendering the proceedings a nullity, "particularly when the court would be below the statutory quorum without the interloper." *United States v. Sonnenfeld*, 41 M.J. 765, 1994 CCA Lexis 108 at *4-5 (N-M. Ct. Crim. App. 1994) (citing *Harnish*, 31 C.M.R. 29); *accord Caldwell*, 16 M.J. at 576 ("Participation as a member by one not properly detailed to so act renders the proceedings a nullity.") (citing *United States v. Goodrich*, 5 M.J. 1002 (C.M.A. 1976); *Harnish*, 31 C.M.R. 29; *United States v. Cameron*, 13 C.M.R. 738 (A.F.B.R. 1953)).

"Ordinary rules of statutory construction apply in interpreting the R.C.M." *United States v. Tyler*, 81 M.J. 108, 113 (C.A.A.F. 2021) (citation omitted). Principal among the canons of statutory interpretation is an analysis of the plain meaning of the text. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Id*. at 254 ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (internal citation and quotations omitted). Courts "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016) (citing *Robinson v. Shell Oil Co.*,

519 U.S. 337, 341 (1997)).

Article 16(1)(a), UCMJ, requires "not less than five members" for non-capital general courts-martial. *See also United States v. Robinson*, 33 C.M.R. 206, 210 (C.M.A. 1963) ("Article 16(1), [UCMJ], makes it abundantly clear that a properly constituted general court-martial requires both a law officer and 'not less than five members.'"). Article 29(a), UCMJ, prohibits the absence or excusal of any panel member "after the court has been assembled for the trial of the accused unless excused as a result of challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause."

R.C.M. 505(c) implements Article 29, UCMJ. *MCM* (2016 ed.), Analysis of Rules for Courts-Martial at A21-28. Subsection (2)(A)(i) of this Rule prohibits a convening authority from excusing a panel member after assembly except "for good cause shown on the record." "When trial is by a court-martial with members, the court-martial is ordinarily assembled immediately after the members are sworn. The members are ordinarily sworn at the first session at which they appear, as soon as all parties and personnel have been announced." R.C.M. 911, Discussion. "New members may be detailed after assembly *only* when, *as a result of excusals under subsection (c)(2)(A) of this rule*, the number of members of the court-martial is reduced below a quorum . . . ." R.C.M. 505(c)(2)(B) (emphasis added).

Finally, "waiver is different from forfeiture. Whereas forfeiture is the failure

to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Rich*, 79 M.J. at 475 (citations and internal quotation marks omitted). "Stated another way, 'A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law.'" *Id*. (quoting *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (other citation omitted)). When "an appellant has forfeited a right by failing to raise it at trial, [this Court] review[s] for plain error." *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). To prevail under a plain error analysis, an appellant must show "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (citations omitted).

Analysis of the Law

I. Appellant did not waive the Granted Issue.

As an initial matter, this Court should not find that Appellant waived a challenge to the legitimacy of Lt Col PBL's post-assembly excusal. The Defense's silence following the senior trial counsel's erroneous assertion that certain members "were excused at an earlier session" (JA at 129) did not evince an intentional relinquishment of any known right; rather, as the AFCCA held, the record indicates it was an oversight. JA at 23. This is particularly true given the various convening

orders at play (JA at 195-200), the three-month gap between sessions (JA at 125-26), and the clear confusion of Government counsel on the same topic. JA at 129. In addition, it is significant that the senior trial counsel's affirmative statement in this regard—erroneous though it was—persuaded the military judge of its accuracy. *Id*. Without ascribing any intentional misconduct to the senior trial counsel, it is difficult to fault Appellant for failing to correct this believable yet misleading statement from a fellow officer of the court, who was effectively speaking on behalf of the convening authority. Furthermore, if this Court agrees that the improper constitution of Appellant's panel represents a jurisdictional defect, waiver does not apply. R.C.M. 905(e).

II. <u>There was no "good cause" for Lt Col PBL's excusal "shown on the record."</u>

Resolution of Appellant's case requires this Court to interpret the phrase "good cause shown on the record," as it appears in R.C.M. 505(c)(2)(A)(i). Utilizing the canons of statutory construction, as well as the definitions of terms provided by Congress and the President of the United States, this Court can dissect the phrase as follows:

> (1) "Good cause" includes a "military exigency or extraordinary circumstance . . . which render[s] the member . . . unable to proceed with the court-martial within a reasonable time." R.C.M. 505(f). "Good cause does not include temporary inconveniences that are incident to normal conditions of military life." *Id*.

(2) "Shown" is defined as "permit to be seen." MERRIAM-WEBSTER DICTIONARY "Shown," www.merriam-webster.com/dictionary/shown.

(3) "On" is "used as a function word" to "indicate the location of something." MERRIAM-WEBSTER DICTIONARY "On," www.merriam-webster.com/dictionary/on.

(4) "Record" is defined as either "an official written transcript, written summary, or other writing relating to the [court-martial] proceedings," or "an official audiotape . . . or similar material from which sound . . . depicting the proceedings may be reproduced." Article 1(14), UCMJ.

As applied to Lt Col PBL's excusal, "good cause shown on the record" means "a military exigency or extraordinary circumstance that was referenced in open court, such that the discussion can be seen when reviewing the official written transcript, or can be heard by listening to the official audiotape recording of the proceedings." Conversely, "on the record" would not include "adding documentation about Lt Col PBL's excusal after the fact in the middle of an appeal," because there is *no discussion* about this documentation, nor the contents therein, in the official written transcript or audiotape. *Cf.* JA at 25 (the AFCCA opining that "on the record" would "require[] off-the-record excusal decisions of the convening authority after assembly be directly addressed in some reasonable manner in open court.").

The only potential basis "shown on the record" for Lt Col PBL's excusal was an assignment to another unit on the same installation. JA at 117. But this does not

qualify as "good cause" because it is neither a military exigency nor extraordinary circumstance; indeed, Lt Col PBL himself indicated he would be kept "in place" after this PCS. *Id*.; *accord* JA at 26 (the AFCCA opining that this particular PCS would not qualify as "good cause").

Lt Col PBL's purported selection for Air War College was never discussed at trial "on the record." Accordingly, this "good cause"—assuming *arguendo* it constituted "good cause"—was not "shown on the record." The convening authority's post-assembly excusal of Lt Col PBL was thus unlawful because it did not comply with R.C.M. 505(c)(2)(A)(i). *See* JA at 26 (the AFCCA finding "plain or obvious error to not announce the Air War College assignment as 'good cause' for Lt Col PBL's excusal[.]")

III. <u>If the excusal of a primary panel member is not lawful, then the subsequent detailing of that member's replacement is also not lawful.</u>

Pursuant to R.C.M. 505(c)(2), a convening authority must meet several prerequisites before lawfully excusing a panel member after assembly *and* replacing him with another member: (1) the convening authority must have "good cause" to excuse a panel member; (2) this "good cause" must be "shown on the record"; and (3) the excusal results in a reduction of the panel below quorum. If the first two factors are not met, then the convening authority's excusal of the panel member is not lawful because it violates R.C.M. 505(c)(2)(A)(i). If this excusal is not lawful, then the convening authority's detailing of additional panel members is also not

lawful, as his detailing of "replacement" members runs afoul of R.C.M. 505(c)(2)(B), which requires that excusals be in accordance with the requirements of R.C.M. 505(c)(2)(A). If an unlawfully-detailed replacement sits as a member, then that replacement is an "interloper" and the court-martial is a nullity, "particularly when the court would be below the statutory quorum without the interloper." *Sonnenfeld*, 41 M.J. 765, 1994 CCA Lexis 108 at *4-5 (citing *Harnish*, 31 C.M.R. 29; *Padilla*, 5 C.M.R. 31); *see also Caldwell*, 16 M.J. at 576 (citing *Goodrich*, 5 M.J. 1002; *Harnish*, 31 C.M.R. 29; *Cameron*, 13 C.M.R. 738).

IV. Lt Col PBL's excusal, when viewed in combination with the detailing and excusal of other members, resulted in a jurisdictional defect.

The AFCCA held that "the excusal of members for good cause, but only off-the-record, does not raise jurisdictional questions so long as the statutory quorum of members exists." JA at 24. In holding such, the AFCCA assumed that Appellant's panel consisting of "[o]ne colonel and four lieutenant colonels" represented a proper quorum. *Id*. This logic is flawed, however, because the convening authority unlawfully appointed additional members to Appellant's panel after assembly.

Pursuant to Special Order A-8, the convening authority directed that Appellant's court-martial be constituted of sixteen individuals; specifically, fifteen members and one alternate member, Col DL. JA at 198. This order included additional language mandating that the case "be brought to trial before the court hereby convened." *Id*. Moreover, it notably indicated that a second alternate

member who the convening authority previously detailed to the court (JA at 195) was excused—further acknowledging that alternate members were part of the convened court and subject to the same rules for excusal as the primary members. JA at 198.

Although the record is unclear as to why Col DL was not present for the court-martial or its assembly (*see* JA at 92-93), the senior trial counsel discussed the availability of this "member who was already appointed" if the court fell "below quorum." JA at 121. In fact, the senior trial counsel stated that he anticipated the convening authority would excuse Lt Col KW and, if that happened, the Government "would have our alternate member that is standing by." JA at 122. When compared to Special Order A-8, the senior trial counsel's assertions were justified because the clear intent from the order is that Col DL was a member who would serve if other members, like Lt Col KW, were excused.

Unlike either Lt Col KW or Lt Col PBL, it does not appear that the convening authority ever excused Col DL from his court-martial detailing. Col DL's name is not discussed in the trial transcript, nor does his name appear on any special order in the context of being relieved. He thus remained a detailed member to Appellant's court-martial who, as relevant to the granted issue, should have counted towards quorum.

If this Court adopts the AFCCA's conclusion that Lt Col KW's excusal was

proper because there was "good cause shown on the record" (JA at 25-27), then quorum for Appellant's court-martial never fell below the statutory minimum because at that point, there were still five panel members—the four members impaneled after *voir dire*—to include Lt Col PBL (JA at 114-15)—and the detailed alternate member, Col DL, who was *still* an alternate after "assembly" and not relieved. The language of R.C.M. 505(c)(2)(B) is plain: "New members may be detailed after assembly *only when*, as a result of excusals under subsection (c)(2)(A) of this rule, the number of members of the court-martial is reduced below quorum[.]" *See also United States v. Dobson*, 63 M.J. 1, 10 (C.A.A.F. 2006) (acknowledging that "R.C.M. 505(c)(2)(B) limits the circumstances under which a convening authority may add members to the panel[.]"); *cf. United States v. Easton*, 71 M.J. 168, 176 n.10 (C.A.A.F. 2012) ("[I]f excusal of a court-martial member does not reduce the panel below quorum, the accused is not entitled to an additional member, notwithstanding that the composition of the panel has now changed.") (citing Article 29(b)-(c), UCMJ). Since neither Lt Col PBL nor Col DL were properly excused under R.C.M. 505(c)(2)(A), the number of members for Appellant's court-martial never fell below quorum, thus making the convening authority's appointment of new members unlawful under R.C.M. 505(c)(2)(B).

Based on these facts, the AFCCA's reliance on *Sargent* and *Colon* to support its jurisdictional conclusion is misplaced. JA at 023. Those cases involved properly

detailed members whose absence *never* affected the statutory quorum. *Sargent*, 47 M.J. at 368-69; *Colon*, 6 M.J. at 74. In contrast, in Appellant's case, the two additional members needed to establish quorum at Appellant's court-martial were unlawfully appointed and, thus, never attained "status as members." *Padilla*, 5 C.M.R. at 34. Without their presence, and with the combined absences of Lt Col PBL and Col DL, the membership of Appellant's court-martial was reduced to less than five individuals, the statutory minimum for general courts-martial. Consequently, Lt Col PBL's unlawful excusal is a matter of jurisdictional import, and one that necessitates setting aside Appellant's conviction and sentence. *See e.g.*, *Adams*, 66 M.J. at 258; *Sonnenfeld*, 41 M.J. 765, 1994 CCA Lexis 108 at *5; *Caldwell*, 16 M.J. at 576.

V. Even if the error here is administrative, the prejudice to Appellant warrants setting aside his conviction and sentence.

For the reason cited *supra*, the Government's failure to establish that Lt Col PBL's excusal was for "good cause shown on the record" constitutes a jurisdictional defect, necessitating that Appellant's conviction and sentence be set aside. However, if this Court holds that the composition of Appellant's panel was not a jurisdictional defect, then this Court should review for plain error. As the AFCCA held, the failure to place the reason for Lt Col PBL's excusal "on the record" was plain and obvious error. JA at 26. The only remaining issue is whether the error

materially prejudiced a substantial right. To this end, Appellant was prejudiced in at least two ways.

First, Appellant was denied the opportunity to investigate the legitimacy of Lt Col PBL's request for excusal and litigate the issue at trial. Comparing Lt Col PBL's unsigned, unendorsed, and incomplete request that was inconsistent with his "on the record" explanation (JA at 205), to Lt Col KW's signed and indorsed request that was consistent with her "on the record" explanation (JA at 203-04), Appellant's trial defense counsel undoubtedly would have sought to investigate and challenge the legitimacy of Lt Col PBL's excusal, especially considering his desirability as a panel member for Appellant's case.

Appellant's case was not a "slam dunk" for the Government. *See Background supra*. Given Lt Col PBL's personal experience with false accusations of sexual assault and his general familiarity with Appellant, Lt Col PBL was an ideal member for the Defense. He could have made the difference between conviction and acquittal.

Appellant's trial defense counsel may also have investigated the circumstances as to why the convening authority waited for two months to act on Lt Col KW's excusal request, when the parties were prepared to address Lt Col KW's excusal "on the record" in April. JA 121-24, 203, 208. However, Appellant could not litigate the matter at trial, nor could he make an informed decision to

litigate, because the documentation was not provided to him. On this point, AFCCA's holding that "Appellant . . . had ample time to [raise concern with Lt Col PBL's excusal] as the excusal occurred a month prior to court resuming" (JA at 28), is erroneous; there is no evidence that the Government provided Appellant with any notice or opportunity to respond to Lt Col PBL's request for excusal, *before* the convening authority took action on the request. Instead, Lt Col PBL's excusal was presented as a *fait accompli* that the defense was not in a position to challenge.

Appellant was further prejudiced on appeal, because without the documents contained in JA at 203-09, he had a facially legitimate and winnable appellate issue. However, the Government essentially ambushed Appellant by producing, for the very first time mid-appeal, documents that would have informed Appellant's arguments to AFCCA had they been provided at the required time—*at trial* "*on the record*."

Pursuant to *Vazquez*, because the Government failed to abide by the process outlined in the R.C.M. for lawful post-assembly excusal of panel members, the failure to abide by the requirements of R.C.M. 505 amounts to a due process violation. 72 M.J. at 19. However, this Court does not need to reach the issue of whether this is a *constitutional* violation of due process, which the Government must prove was harmless beyond a reasonable doubt. Under the circumstances of this case, this issue is more akin to an incomplete record of trial, and should be analyzed

as such. With an incomplete record of trial, there is a presumption of prejudice that the Government must rebut. *United States v. Harrow*, 62 M.J. 649, 654 (A.F. Ct. Crim. App. 2006) (citation omitted), *aff'd*, 65 M.J. 190 (C.A.A.F. 2007). Appellant respectfully submits that the Government cannot rebut a presumption of prejudice.

Conclusion

For decades, the Government has received multiple warnings from this Court of the consequences for failing to place the reason for post-assembly absences or excusals of panel members "on the record" to establish that those absences or excusals "fall within the provisions of the Code." *See United States v. Latimer*, 30 M.J. 554, 563 (A.C.M.R. 1990) (quoting *United States v. Grow*, 11 C.M.R. 77, 83 (C.M.A. 1953) and reciting cases decided by the CMA). "Failure to comply in future cases [with this facially simple requirement] invites reversal." *Id*. (quoting *United States v. Matthews*, 38 C.M.R. 430, 434 (C.M.A. 1968)). Despite those warnings, the Government continues to not comply with this facially simple requirement. It is time to impose the consequence of reversal. For all the aforementioned reasons, this Court should set aside Appellant's conviction and sentence.

Respectfully submitted,

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I certify that a copy of the foregoing was electronically mailed to the Court and to the Air Force Government Trial and Appellate Counsel Division, on April 28, 2022.

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