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

REPLY BRIEF ON BEHALF OF APPELLANT

TAMI L. MITCHELL
Civilian Defense Counsel
Law Office of Tami L. Mitchell
5390 Goodview Drive
Colorado Springs, CO 80911
Tel: (719) 426-8967
tamimitchelljustice@gmail.com
U.S.C.A.A.F. Bar No. 32231

MARK C. BRUEGGER
Senior Counsel
Air Force Appellate Division
1500 W. Perimeter Rd., Ste 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
Mark.bruegger.1@us.af.mil
U.S.C.A.A.F. Bar No. 34247

Counsel for Appellant

SUBJECT INDEX

TABLE OF AUTHORITIES

RULES FOR COURTS-MARTIAL (2016 ed.)

Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Lieutenant Colonel (Lt Col) Norbert A. King II, the Appellant, hereby replies to the Government's Answer (Ans.) concerning the Granted Issue, filed on May 31, 2022.

Introduction to Appellant's Reply

This Court's predecessor, the Court of Military Appeals (CMA), held more than 56 years ago that the Government bears the *affirmative* duty to establish a convening authority's excusal of a panel member is for good cause shown on the record:

> The record of trial is required affirmatively to show the reasons for the relief of a court member by the convening authority . . . . That duty on the Government's part is not met by the inclusion on appeal of an *ex parte* statement or affidavit purporting to establish such course, *post hoc.*

United States v. Metcalf, 36 C.M.R. 309, 313 (C.M.A. 1966) (emphasis in original) (citing *United States v. Grow*, 11 C.M.R. 77 (C.M.A. 1953); *United States v. Boysen*, 29 C.M.R. 147 (C.M.A. 1960)). And five years earlier, the CMA held that prejudice is apparent in the Government's failure to establish *good cause shown on the record* for the convening authority's excusal of a panel member (where no reason was given). *United States v. Greenwell*, 31 C.M.R. 146, 148 (C.M.A. 1961). "[The accused] is entitled to be tried in accordance with the requirements of the [Uniform Code of Military Justice (UCMJ)]. He was deprived of that right. He is, therefore,

entitled to a rehearing." *Id*. (quoting *United States v. Allen*, 18 C.M.R. 250, 265 (C.M.A. 1955) (Quinn, C.J. concurring in part and in the result)).

The case law on this issue created by this Court's predecessor more than half a century ago remains good law today. That is, "[b]ecause the substitution of court members after [assembly] is such a departure from the principles applicable to jury trials, and presents such a risk of abuse," this Court should "view with circumspection any relief of a member" after assembly. *Greenwell*, 31 C.M.R. at 147-48 (quoting *Grow*, 11 C.M.R. at 83); *see also United States v. Riesbeck*, 77 M.J. 154, 163 (C.A.A.F. 2018) ("Under these circumstances, it is incumbent upon this Court to scrutinize carefully any deviations from the protections designed to provide an accused servicemember with a properly constituted panel.") (quoting *United States v. Upshaw*, 49 M.J. 111, 116 (C.A.A.F. 1998) (Effron, J. dissenting)).

Granted Issue

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.

Argument

1. Appellant did not waive the granted issue.[1]

[1] A convening authority's improper excusal of a panel member after assembly could arguably also be considered unlawful command influence, which, like jurisdiction, cannot be waived. *Riesbeck*, 77 M.J. at 160 (citations omitted).

In response to the Government's contention that Appellant waived the granted issue (Ans. at 13-14), Appellant respectfully reiterates the arguments he advanced in his initial brief. (Opening Brief (Op. Br.) at 18-19.) This includes how defense counsel relied on the assertions of the senior trial counsel, who erroneously led the court-martial to believe that certain panel members—Lt Col PBL among them—had been "excused at an earlier session." Joint Appendix (JA) at 129. As the lower court aptly observed, this "meant there was no need for Judge [S.] to conduct any further inquiry on the record." JA at 023.

Such circumstances are in stark contrast to the case of *United States v. Matthews*, wherein this Court's predecessor applied waiver due to the Defense's failure to inquire further following the Government's on-the-record announcement of a member's post-assembly excusal. 38 C.M.R. 430, 433 (C.M.A. 1968). Indeed, when the military judge presented an opportunity to discuss the member's absence, the Defense responded that it had "no comments." *Id*.

An intentional waiver, like the one in *Matthews*, did not occur here, for at least four reasons. First, there is no evidence the Government alerted the Defense to Lt Col PBL's request for excusal to give the Defense the opportunity to challenge its validity before the convening authority took action on the request. *Cf. Matthews*, 38 C.M.R. at 434 (the board of review charged the Defense, having been alerted to his potential absence, with the responsibility of determining, during the continuance,

whether there was a valid basis for the prospective excusal of the panel member). Second, the senior trial counsel did not offer any reason for Lt Col PBL's excusal, and misrepresented that his excusal occurred during a previous session. JA at 129. For this reason, the rationale for Lt Col PBL's excusal was not before the military judge. Third, the military judge did not call upon the Defense to respond to trial counsel's erroneous assertion that Lt Col PBL had been excused during a prior session. Fourth, merely providing a convening order excusing Lt Col PBL is not, in and of itself, sufficient to provide notice to the Defense because it fails to state *why* he was excused.

> We note, parenthetically, that the record always contains the signed order of the convening authority appointing the court as well as any changes made in the membership thereof. We see no reason why a similar document could not be supplied in connection with matters such as this, detailing the basis for the action. Only in this manner will the appropriate officers of the court be in a position to properly discharge their responsibilities. This procedure, implicit in the above-quoted provision in *Grow* [11 C.M.R. 77], was again suggested in each of the cited cases. We are at a loss to understand the military's failure to grasp its significance. *Failure to comply in future cases invites reversal.*

Matthews, 38 C.M.R. at 434 (emphasis added).

Consequently, Appellant's case involved a mere failure to object rather any intentional waiver, and this failure was notably exacerbated by Government error. This Court should thus apply forfeiture, consistent with previous cases where it has reviewed unobjected member composition issues for plain error. *See*, *e.g.*, *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998); *United States v. Mack*, 58 M.J. 413,

417 (C.A.A.F. 2003) (citing *Cook*, 48 M.J. at 436).

Additionally, the burden is not on the Defense to ensure that the reason for a panel member's excusal is shown on the record. The duty is on the Government "to demonstrate in the record the reasons for a member's absence after [assembly] and to establish that such 'affirmatively . . . falls within the provisions of the Code.'" *Greenwell*, 31 C.M.R. at 148 (quoting *Grow*, 11 C.M.R. at 83). If the existing record is inadequate to permit judicial review due to the Government's failure to fulfill its affirmative obligations, the results cannot stand. *United States v. Garcia*, 15 M.J. 864, 865 (A.C.M.R. 1983).

2. Utilizing *Jessie* to provide the requisite on-the-record rationale for a member's post-assembly excusal misapplies the decision, and contravenes the Rules for Courts-Martial and this Court's precedent.

Over Appellant's objection, the Air Force Court of Criminal Appeals attached Colonel (Col) WA's declaration to the record of trial, citing its ability "to consider declarations from outside the record of trial when necessary to resolve issues raised by materials in the record of trial" pursuant to *United States v. Jessie*, 79 M.J. 437, 442-44 (C.A.A.F. 2020). In support of this decision, the Government repeats the Air Force Court's rationale and adds that *Jessie* permits extra-record fact determinations when necessary to resolve appellate questions. (Ans. at 14.) But both the Government and the lower court read *Jessie* too broadly, while ignoring the applicable Rules for Courts-Martial and this Court's precedent.

R.C.M. 505(c)(2)(A)(i) explicitly precludes the convening authority from excusing any panel member after assembly without establishing "good cause *shown on the record*." This differs from the statutory language at issue in *Jessie*—the words "on the basis of the *entire* record" found in Article 66(c), UCMJ. 79 M.J. at 440 (emphasis added). This difference is significant, as "the entire record" can be (and is) construed broadly to include not only what was "shown on the record" during trial, but also includes allied papers, post-trial submissions to the convening authority, exhibits not admitted into evidence, and the like. 79 M.J. at 440-441.

Conversely, the plain meaning of "shown on the record" is that a matter *must* be discussed in open court in a manner such that it can been seen in the printed transcript or heard in the audio recording of the in-court sessions. (*See* Op. Br. at 20 (citing the definitions of "shown," "on" and "record").) So as a starting point, this Court should review R.C.M. 505(c)(2)(A)(i) with a clear understanding that its language "shown on the record" says and means something different than what was analyzed in *Jessie*, and thus warrants varying treatment.

The Government—like the court below—does not acknowledge any such distinctions, and instead focuses on *Jessie*'s pronouncement that, in general, a CCA may consider outside-the-record declarations "to resolve issues raised by materials in the record of trial." (Ans. at 14 (citing *Jessie*, 79 M.J. at 442-444).) This position, however, contravenes both R.C.M. 505(c)(2)(A)(i)'s prerequisite that post-assembly

excusals be for "good cause shown *on the record*" and R.C.M. 813(c)'s accompanying requirement that military judges ensure the record reflects any changes to the panel "*and the reason for it*." When read together with R.C.M. 505(c)(2)(B)'s provision regarding the detailing of new members, the rules require post-assembly member excusals to be discussed on the record at trial before all parties and resolved before the court-martial proceeds with alternate panel members. *Cf. United States v. Hutchins*, 69 M.J. 282, 291 (C.A.A.F. 2011) ("At trial, if the parties indicate that a member of the defense team has been excused under R.C.M. 505(d)(2)(B)(iii), the military judge must ensure under R.C.M. 813(c) that: (1) the record demonstrates that a competent detailing authority has determined that good cause exists for excusing counsel; and (2) that the record sets forth the basis for the good cause determination.").

"When a member is excluded by the convening authority after assembly, the record must detail the reasons for excusal." *Garcia*, 15 M.J. at 865 (citing *Matthews*, 38 C.M.R. at 433-34; *Grow*, 11 C.M.R. at 83). Because the convening authority's discretion in excusing panel members post-assembly is subject to judicial review, the requirement for good cause to be shown on the record "affords appellate courts an adequate record to ensure that members have not been relieved or excused in an attempt to affect the court's verdict or sentence, a problem without parallel in the civilian jury system." *Id*. (citing *Grow*, 11 C.M.R. at 82-83).

The Government's argument that post-hoc submissions during an appeal are "good enough" would render R.C.M. 505(c)(2)(A)(i) and 813(c) meaningless, as the Government could circumvent its affirmative duty to place post-assembly member excusals on the record simply by adding this outside-the-record information on appeal. Moreover, it contravenes *Metcalf*'s prohibition on the use of affidavits or *ex parte* statements to substitute for what is required to be "on the record" from the outset. 36 C.M.R. at 313; *cf. United States v. Willman*, 81 M.J. 355, 359 (C.A.A.F. 2021) (to authorize CCAs to consider outside-the-record materials in determining sentencing appropriateness would create a broad, extra-statutory exception that would potentially swallow the text-based rule, and incentivize "savvy appellants" to raise meritless Eighth Amendment or Article 55, UCMJ claims in order to supplement the record of trial with outside-the-record materials). Similarly, allowing such post-hoc submissions about matters could incentivize the Government to disregard its responsibility to present a complete record of trial for appellate review. R.C.M. 1103-1104.

The Government's position is also factually problematic. As the lower court observed (and the Government does not contend otherwise), there was never any discussion *on the record* "that Lt Col PBL had been selected for Air War College." JA at 026. Instead, the only thing referenced "on the record" was a change in command that would result in him staying in place, which is not "good cause."

Perhaps if Lt Col PBL had alerted the parties to the possibility of being selected for Air War College during *voir dire*, or if the Government had alerted the Defense to Lt Col PBL's request for excusal and given the Defense an opportunity to challenge it *before the convening authority acted on it*, the Government's attempt to supplement the record pursuant to *Jessie* would have some merit. But this did not occur. Instead, the Government is effectively arguing that Lt Col PBL's excusal—without more—is sufficient to expand the record to include out-of-record matters.

In sum, the Government's motion to attach Col WA's affidavit and its accompanying documents represented an improper post-trial attempt to correct the record. The Government was limited to providing the information in Col WA's affidavit through the front door *at trial on the record*. What the Government failed to admit through the front door could not be admitted through a back door, or even a window, on appeal; the lower court erred in concluding otherwise. Eliminating Col WA's affidavit from appellate consideration results in no "good cause" for Lt Col PBL's excusal being "shown on the record."

3. <u>The replacement members were barred from participating by operation of law, due to the Government's failure to abide by R.C.M. 505(c)(2)(B). This made them unlawful interlopers, thus representing a jurisdictional defect.</u>

The Government deems its failure to show good cause on the record for Lt Col PBL's excusal a "procedural irregularity" rather than a jurisdictional error. (Ans. at 17.) It then cites several cases in an attempt to support its position. (Ans.

at 17-18 (citing *United States v. Adams*, 66 M.J. 255 (C.A.A.F. 2008); *United States v. Colon*, 6 M.J. 73 (C.M.A. 1978); *United States v. Sargent*, 47 M.J. 367 (C.A.A.F. 1997); *United States v. Gebhart*, 34 M.J. 189 (C.M.A. 1992); *Matthews*, 38 C.M.R. 430).) But these cases do not address the underlying sub-issue presented by Appellant—whether the convening authority unlawfully detailed new members to Appellant's court-martial when a quorum still remained.[2] (Op. Br. 22-25.)

On this point, Appellant respectfully reiterates that R.C.M. 505(c)(2)(B)'s language is unambiguous: "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[.]" (Emphasis added) (*See also* Op. Br. at 24 (citing *United States v. Dobson*, 63 M.J. 1, 10 (C.A.A.F. 2006); *United States v. Easton*, 71 M.J. 168, 176 n.10 (C.A.A.F. 2012)). And, once again, "[s]ince 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

[2] As Appellant noted in his opening brief, "*Sargent* and *Colon* involved properly detailed members whose absence *never* affected the statutory quorum." (Op. Br. at 24-25 (citing *Sargent*, 47 M.J. at 368-69; *Colon*, 6 M.J. at 74).) Turning to the Government's other cited cases, *Adams* dealt with seven members properly selected by the convening authority "to bring the court-martial up to quorum." 66 M.J. at 259. *Gebhart* addressed an ambiguity in the detailing of a particular member who sat in a panel that met statutory quorum requirements, and ultimately turned on the understanding of the parties at trial. 34 M.J. at 192-93. *Matthews* did not involve the appointment of any additional members; rather, the Court determined that the Defense waived any challenge regarding whether a member was excused for good cause. 38 C.M.R. at 433-34.

quorum, thus making the convening authority's appointment of new members unlawful under R.C.M. 505(c)(2)(b)." (Op. Br. at 24.) This, in turn, means that the two newly appointed members who sat on Appellant's panel were unlawful interlopers, and that the combined absences of Lt Col PBL and Col DL left the panel below the statutory minimum for a general court-martial. Accordingly, "Lt Col PBL's unlawful excusal is a matter of jurisdictional import." (Op. Br. at 25.) The Government attacks this consequence with several arguments, none of which is persuasive.

First, the Government contends that "Col DL did not need to be excused because he was only appointed as an alternate member." (Ans. at 19.) This does not square with the convening order, which stated that Appellant's court-martial was to be constituted *with Col DL*, and notably included the excusal of another alternate member—thereby evincing an acknowledgment that even detailed alternate members must be excused in proper fashion. JA at 198. The Government's appellate posture is also inconsistent with the senior trial counsel's on-the-record assertions of the convening authority's intent, wherein he described how Col DL was "already appointed" and designated to serve if the court "fell below quorum."[3]

[3] While the Government's answer acknowledges the senior trial counsel's statements (Ans. at 19.), the import it places on these statements is contrary to the senior trial counsel's message. To the extent this Court concurs, Appellant respectfully suggests that the Government is estopped from arguing a position inconsistent with its senior prosecutor. *See*, *e.g.*, *United States v. Augspurger*, 61 M.J. 189, 194 (C.A.A.F. 2005)

JA at 121. Additionally, the Rules for Courts-Martial do not support the Government's position, as there is no explicit provision differentiating alternate and primary members with respect to excusals.[4] The overall takeaway, then, is that the parties understood *at trial* that Col DL was a detailed member of the court-martial who the convening authority intended to serve on the panel if quorum fell below the minimum, and no Rule for Courts-Martial provides a contrary interpretation.

Next, the Government relies on *Sargent* for its proposition that "[e]ven if Col D.L. was a detailed member, that would not matter." (Ans. at 19 (citing *Sargent*, 47 M.J. at 368).) But *Sargent* is inapposite in that the prohibitions of R.C.M. 505(c)(2)(B) were never in play. As the Government itself notes, this Court in *Sargent* "found no error from [one member's unexplained] absence when quorum was met, and nine detailed members heard the appellant's case." (Ans. at 20 (citing *Sargent*, 47 M.J. at 368).) Despite this clear factual disparity, the Government gleans from the holding that "Col D.L.'s absence could not have been jurisdictional when five detailed members were present and 'fully empowered to consider' Appellant's case," never acknowledging that the additional members here were not, in fact,

---

(Crawford, J., dissenting in part and concurring in the result) (noting how "[t]he statements of the prosecutor bind the Government, or at least result in judicial estoppel.") (citations omitted).

[4] References to the Rules for Courts-Martial are from the *Manual for Courts-Martial, United States* (*MCM*) (2016 ed.). The 2019 edition of the *MCM* distinguishes between members and alternate members. *See*, *e.g.*, R.C.M. 912A (*MCM* 2019 ed.); *see also* Article 29(c), UCMJ (2019 ed.).

lawfully empowered as panel members. (Ans. at 20 (citing *Sargent*, 47 M.J. at 368).)

The Government then shifts to arguing the convening authority's intent, stating that he "intended for the additional seven members to be detailed to Appellant's court-martial." (Ans. at 21.) But even if this is true, which in and of itself is complicated given the convening authority's earlier intent regarding Col DL (JA at 121, 198), such intent cannot trump R.C.M. 505(c)(2)(B). Indeed, this Court has made clear that the rule "limits the circumstances under which a convening authority may add members to the panel[.]" *Dobson*, 63 M.J. at 10. If the opposite were true, then a convening authority—perhaps unhappy with the composition of a certain panel that met quorum requirements—could continue to add members at whim. For obvious reasons, this cannot be, and is not, the rule.[5]

The Government adds to its "convening authority's intent" argument by labeling Appellant's position as logic-defying. (Ans. at 22.) Specifically, the Government posits that "[i]f Appellant's position is accepted, then after a court has been assembled, a convening authority would never be able to excuse members for good cause and simultaneously identify replacements through a new convening order." (Ans. at 23.) This miscomprehends Appellant's brief, the Rules for Courts-Martial, and court-martial practice. If a convening authority desires to excuse a

[5] This scenario would only be possible under the *MCM* (2016 ed.), as the current iteration requires a specific number of panel members depending on the type of court-martial. *See* Article 29(b)(2)-(3), UCMJ (2019 ed.).

member after assembly, then the Government must show good cause for the excusal on the record. R.C.M. 505(c)(2)(A)(i). If this occurs, *and* the number of panel members is reduced below quorum, then (and *only* then) may the convening authority detail new members to the court-martial. R.C.M. 505(c)(2)(B). This is not to say that the convening authority may not effect a convening order appointing new members *before* the Government satisfies its obligations under R.C.M. 505(c)(2)(A)(i). Rather, it is that such an order may be considered a nullity if the Government fails to first properly excuse a member and then establish, *on the record*, good cause for the excusal. *See*, *e.g.*, *United States v. Lizana*, 2018 CCA LEXIS 348, at *16 (A.F. Ct. Crim. App. July 13, 2018) (unpub. op.) (upholding as proper the military judge's decision to find a convening order null and void where the convening authority appointed new members before excusing a member who fell ill, in violation of R.C.M. 505(c)(2)(B) because the panel had yet to fall below quorum). Nothing is inherently "illogical" about this scenario; to the contrary, it is the Government's apparent position—that once a convening authority details new members, those members are lawfully appointed regardless of whether good cause is shown on the record—which defies the rules and any practical application thereof.

In a separate section, but relevant to the sub-issue here, the Government contends that only violations of the UCMJ matter, and that a procedural requirement instituted by the President is "not part of the UCMJ, and therefore does not affect

the jurisdiction of the court-martial." (Ans. at 18.) Although the Government was referencing R.C.M. 505(c)(2)(A)(i) in this regard, the same rationale would presumably apply to R.C.M. 505(c)(2)(B). In any event, the Government's minimalist view of the Rules for Courts-Martial is erroneous.

Congress codified a service member's right to panel members through various statutory provisions, including Article 29, UCMJ. Pursuant to the rulemaking authority in Article 36, UCMJ, the President supplemented Article 29, UCMJ, by prescribing R.C.M. 505 to detail the lawful parameters of excusing and adding members. Consequently, this Rule is a part of the military justice process by virtue of Article 36, UCMJ. *See United States v. Caldwell*, 16 M.J. 575, 576 (A.C.M.R. 1983) ("As courts-martial are creatures of statute, their existence depends on compliance with statutory requirements. By virtue of Article [36, UCMJ], 10 U.S.C. § 836 (1976), those requirements include the procedures set forth in the Manual for Courts-Martial governing the selection and appointment of court members.") (citations omitted); *cf. Riesbeck*, 77 M.J. at 162-63 (discussing the referral process and detailing of panel members, as implemented by Articles 22-23, UCMJ and prescribed by the President in R.C.M. 501-503); *cf. United States v. Norfleet*, 53 M.J. 262 (C.A.A.F. 2000) (discussing the legal contours of military judge disqualifications, as implemented by Article 26, UCMJ, and prescribed by the President in R.C.M. 902). Indeed, even the case the Government cites to support its

contention (Ans. at 17) acknowledges the applicability of R.C.M. 505 with respect to a court-martial's jurisdiction:

> Jurisdictional error occurs when a court-martial is not constituted in accordance with the UCMJ. *See* [*Colon,* 6 M.J. at 74]. Jurisdiction depends upon a properly convened court, composed of qualified members chosen by a proper convening authority, and with charges properly referred. Article 25, UCMJ; R.C.M. 201(b); R.C.M. 503; R.C.M. 504; R.C.M. 505.

Adams, 66 M.J. at 258. But this Court did not stop there.

In addition to indicating that the Rules for Courts-Martial are relevant for jurisdictional analyses, this Court noted how "[a] court-martial composed of members who are barred from participating by operation of law, or who were never detailed by the convening authority, is improperly constituted and the findings must be set aside as invalid." *Id*. at 258-59 (citations omitted). That is precisely what occurred here. By failing to comply with R.C.M. 505(c)(2)(A)(i) with respect to Lt Col PBL *and* Col DL, the convening authority was prohibited from detailing new members to Appellant's panel pursuant to R.C.M. 505(c)(2)(B) because the panel never fell below quorum. Accordingly, Special Order A-14, dated June 21, 2018, was null and void; the two new members ultimately selected for the panel from this order were prohibited from serving because they were never lawfully detailed, and Appellant's general court-martial proceeded with just three *properly* appointed members—two below the statutory requirement. This jurisdictional error warrants setting aside the findings and sentence.

4. Even if the error is non-jurisdictional, this Court should presume prejudice consistent with *Greenwell*. But even without this presumption, Appellant has demonstrated prejudice.

In the event this Court declines to find jurisdictional error, Appellant stands by the arguments in his opening brief regarding prejudice. (Op. Br. at 25-28.) Appellant further reminds this Court—in response the Government's contention that Appellant's desire to have Lt Col PBL as a member of his panel does not matter (Ans. at 28-30) and that Appellant "does not argue that Lt Col [PBL's] selection for Air War College did not constitute good cause for his excusal" (Ans. at 17)—how the military judge explicitly announced that the Defense "affirmatively desire[d] to have [Lt Col PBL] on this particular panel." JA at 113. This is an important fact because Lt Col PBL was selected for Air War College *after* the Government learned the Defense wanted him as a panel member. *See* JA at 205 (Lt Col PBL indicating he was selected for Air War College on June 7, 2018).

Accordingly, while Appellant does not argue that selection for professional military education may *never* qualify as "good cause" for excusing a member from court-martial service, the circumstances here raise questions regarding the propriety of Lt Col PBL's selection for Air War College. Had the Government fulfilled its affirmative obligation under R.C.M. 505(c)(2)(A)(i), then the parties could have explored the process by which Lt Col PBL was selected for the Air War College, including who was involved and whether Lt Col PBL's selection as a panel

member—and the President at that (JA at 115)—played a factor in his selection for Air War College. The Government's omission of this information from the record at the only time that matters—*at trial*—precluded the Defense from exploring the issue *at trial*.

This failure by the Government falls within Appellant's due process argument (Op. Br. at 27), which the Government criticizes as erroneous pursuant to *United States v. Vazquez*, 72 M.J. 13 (C.A.A.F. 2013). (Ans. at 25-26) For clarity purposes, Appellant is not arguing for a nebulous, generalized idea of "military due process" that conflicts with the plain language of a rule and goes "above and beyond" what is already provided, as what occurred in *Vazquez*. 72 M.J. at 19-20. Rather, Appellant is arguing that, *in accordance with the process that is due* according to the plain language of R.C.M. 505(c)(2), the Government is obligated to comply with requirements of the UCMJ and the Rules for Courts-Martial, in addition to the Constitution. *See id.* at 19 (attributing due process protections in the military as emanating from "the plain text of the Constitution, the UCMJ, *and the MCM*.").

The bottom line is that, where Congress and the President have promulgated specific rules regarding the lawful empanelment, removal, and replacement of court-martial members, *the Government must follow them*. Considering there is no parallel in the civilian sector for one person to hand-pick jurors, and that this area of the court-martial *process* is particularly vulnerable to abuse by convening authorities

who desire to influence the verdicts (especially in sexual assault cases) by their selection of members, the failure to follow these rules denies the accused (in this case, Lt Col King), the right to a "fair trial" by an impartial panel. *Greenwell*, 31 C.M.R. at 147-48 (quoting *Grow*, 11 C.M.R. at 83); *Garcia*, 15 M.J. at 865; *cf. Riesbeck*, 77 M.J. at 163 (holding that a military accused has the right to both a fair and impartial panel and the appearance of an impartial panel).

> The possible violation of Article 29(a), UCMJ, is not susceptible to a meaningful assessment of the prejudice thereby inflicted upon appellant. The Court of Military Appeals has presumed prejudice where a member has been excused by the convening authority upon grounds not demonstrated to amount to military exigency. We shall do likewise and reverse.

Garcia, 15 M.J. at 866 (citing *Metcalf*, 36 C.M.R. 309; *Greenwell*, 31 C.M.R. 146). The Government must rebut a presumption of prejudice. *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). The Government has not done so, because it cannot establish that Appellant received notice of Lt Col PBL's request for excusal and had an opportunity to object to Lt Col PBL's excusal before the convening authority acted. As explained *supra*, this is exacerbated by trial counsel's affirmative misstatement on the record that Lt Col PBL was excused at a prior session, with no reason "shown on the record" for Lt Col PBL's excusal.

Under *Greenwell*, Appellant's due process violation argument has support—his panel was not constituted in accordance with the requirements of R.C.M.

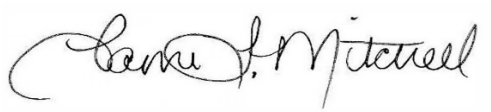
505(c)(2). This is not an amorphous, generalized military due process claim that conflicts with the plain language of a rule—this is a specific rule that requires specific action under specific circumstances, and prohibits other specific actions under these same specific circumstances. This distinguishes Appellant's case from *Vazquez*.

The Government's failure to establish "good cause shown on the record" also inhibits appellate review of the convening authority's excusal of Lt Col PBL. The entire point of R.C.M. 505(c) is to enable judicial review of a convening authority's post-assembly excusal of panel members, thereby reducing the risk that the convening authority will abuse that authority to influence the verdict. *Greenwell*, 31 C.M.R. at 147-48 (quoting *Grow*, 11 C.M.R. at 83). But adequate judicial review is impossible when the facts needed to make an informed decision are unknown, and the reason they are unknown is because the Government failed to show those facts *on the record*. Furthermore, to permit the Government to submit evidence of these facts *in the middle of an appeal* amounts to appeal by ambush. This is why the *post hoc* submission of *ex parte* affidavits on this issue is prohibited. *Metcalf*, 36 C.M.R. at 313. As Appellant opposed the Government's motion to attach Col WA's declaration and the documentation related to Lt Col KW's and Lt Col PBL's excusal requests, the lower court should have denied the Government's motion.

Conclusion

For all the aforementioned reasons, this Court should reverse the lower court's decision and set aside the finding and sentence.

Respectfully submitted,



TAMI L. MITCHELL
Civilian Defense Counsel
Law Office of Tami L. Mitchell
5390 Goodview Drive
Colorado Springs, CO 80911
Tel: (719) 426-8967
tamimitchelljustice@gmail.com
C.A.A.F. Bar No. 32231

MARK C. BRUEGGER
Senior Counsel
Air Force Defense Appellate Division
1500 West Perimeter Road, Ste. 1100
Joint Base Andrews NAF, MD 2076
Tel: (240) 612-4782
mark.bruegger.1@us.af.mil
C.A.A.F. Bar No. 34247

Certificate of Compliance

1. This Brief complies with the type-volume limitation of Rule 24 because it contains less than 7,000 words.

2. This Brief complies with the type-style requirements of Rule 37 because it has been prepared with monospaced typeface using Microsoft Word 2010 with 14 point, Times New Roman font.

TAMI L. MITCHELL
Civilian Defense Counsel
Law Office of Tami L. Mitchell
5390 Goodview Drive
Colorado Springs, CO 80911
Tel: (719) 426-8967
tamimitchelljustice@gmail.com
U.S.C.A.A.F. Bar No. 32231

Certificate of Filing and Service

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on June 10, 2022.

TAMI L. MITCHELL
Civilian Defense Counsel
Law Office of Tami L. Mitchell
5390 Goodview Drive
Colorado Springs, CO 80911
Tel: (719) 426-8967
tamimitchelljustice@gmail.com
U.S.C.A.A.F. Bar No. 32231