IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39583
Lieutenant Colonel (O-5), NORBERT A. KING II, USAF, *Appellee.*	)	USCA Dkt. No. 22-0008/AF

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

ISSUE PRESENTED:

I.

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

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2016). This Court has jurisdiction to review the above-captioned case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

Appellant was tried by a general court-martial composed of officer

members. (JA at 090.) Charge I and its specification involved the sexual assault of Appellant's biological daughter, J.K., in violation of Article 120, UCMJ. (JA at 002.) Specifically, Appellant was charged with the oral penetration of J.K.'s vulva with his mouth. (JA at 004.) Charge II and its specification involved the commission of an act of sexual penetration upon a blood relative, J.K., a non-capital offense, in violation of Title 2C, Chapter 14, Section 2, Subsection (c)(3)(a) of the New Jersey Code of Criminal Justice, as assimilated into federal law under Article 134, UCMJ. (Id.)

The court-martial convicted Appellant of both charges and specifications. (JA at 193.) The members sentenced Appellant to three years confinement and a dismissal. (JA at 194.) The convening authority approved the sentence. (JA at 201.) Appellant raised fourteen assignments of error at AFCCA. (JA at 002.) AFCCA set aside and dismissed with prejudice Charge II and its specification due to the record of trial being incomplete. (JA 085.) The record of trial did not contain the military judge's ruling which denied Appellant's motion to dismiss for unreasonable multiplication of charges. (Id.) AFCCA then reassessed the sentence to a dismissal and confinement for three years, and found the remaining findings and reassessed sentence were correct in law and fact. (Id.)

STATEMENT OF FACTS

Appellant's Convicted Offenses

In September 2016, Appellant and his biological daughter, J.K., were

watching a movie alone in their home while the rest of the family was upstairs asleep. (JA at 004.) At some point, J.K. asked Appellant if he would massage her calf because it was bothering her. (Id.) Appellant massaged J.K.'s calf and then moved his hands up to her thigh and then her pelvic bone. (Id.) Once at J.K.'s pelvic bone, Appellant rubbed J.K.'s vagina without penetrating her vulva. (Id.) Appellant then removed J.K.'s pants and underwear and penetrated her vulva with his mouth for about thirty seconds. (Id.) J.K. pushed Appellant off her and went upstairs. (Id.) While upstairs, J.K. messaged a friend and then fled her house for that same friend's home, who lived in the same on-base neighborhood as J.K. (Id.)

J.K.'s friend was asleep when she arrived to her house, and J.K.'s knocking on the door alarmed her friend's parents so much they called 9-1-1. (JA at 005.) J.K. eventually disclosed Appellant's misconduct from earlier that evening. (Id.) During the ensuing investigation, law enforcement sent J.K.'s underwear for forensic testing. (JA at 009.) The testing found male DNA on the inside front panel of J.K.'s underwear, and Appellant was not excluded as the source of the DNA. (Id.)

Court-Martial Panel

On 14 July 2017, the convening authority convened a general court-martial in Appellant's case by order of Special Order A-14. (JA 195.) The convening authority stated the court "will be constituted as follows:"

	Col A.B.
Second Alternate	Col D.L.
	Col T.O.
	Col C.Z.
First Alternate	Lt Col T.M.
	Lt Col B.H.
	Lt Col M.L
	Lt Col W.J.
	Lt Col P.B-L.
	Lt Col K.W.
	Lt Col S.W.
	Lt Col J.E.
	Lt Col N.H.
	Lt Col C.B.
	Lt Col S.J.
	Lt Col M.E.M.
	Lt Col M.A.M.

(Id.)

In Special Order A-5, dated 8 March 2018, the convening authority relieved five of the above members and detailed five additional members:

	Col A.B.	
Second Alternate	Col D.L.	
	Col T.O.	Relieved (SO A-5)
	Col C.Z.	Relieved (SO A-5)
First Alternate	Lt Col T.M.	
	Lt Col B.H.	Relieved (SO A-5)
	Lt Col M.L	
	Lt Col W.J.	Relieved (SO A-5)
	Lt Col P.B-L.	
	Lt Col K.W.	
	Lt Col S.W.	
	Lt Col J.E.	
	Lt Col N.H.	

	Lt Col C.B.	
	Lt Col S.J.	
	Lt Col M.E.M.	Relieved (SO A-5)
	Lt Col M.A.M.	
	Col A.A	Detailed (SO A-5)
	Lt Col J.L.	Detailed (SO A-5)
	Lt Col A.P.	Detailed (SO A-5)
	Lt Col G.A.	Detailed (SO A-5)
	Lt Col R.M.	Detailed (SO A-5)

(JA at 197.)

On 11 April 2018, the convening authority issued Special Order A-8, identifying the above members constituted the court, with the exception of Lt Col T.M., the first alternate. (JA at 198.)

Appellant's trial, with the members present, began on 16 April 2018. (JA at 091.) On this date, Lt Col S.G. was the presiding military judge, and Maj J.G. was the circuit trial counsel. (JA at 092.) Appellant's defense counsel were Capt D.A., Ms. B.P.O., and Mr. S.T. (Id.) All panel members, except for Col D.L., who was an alternate, were present and sworn in accordance with R.C.M. 807. (Id.) Col D.L. was not included as a detailed member during the trial, present at any of the proceedings, or sworn in as a member because he was listed on the convening order as a second alternate. (JA at 009-093, 195.) The military judge assembled the Court without the presence of Col D.L. (JA at 093.)

Following voir dire, which took two full days, all except the following five members were excused: Lt Col P.B-L., Lt Col K.W., Lt Col J.E., Lt Col R.M., and

Lt Col S.J. (JA at 115, 123.) Those five members made up the panel for Appellant's case and met quorum. (JA. at 114, 116.) Immediately after the military judge assembled the court, but prior to opening statements or the presentation of evidence, trial defense counsel raised concerns about completing the trial in the docketed five days allotted. (JA at 020.) Due to witness availability, trial defense counsel moved for a continuance, which the military judge granted until the end of July 2018. (JA at 020, 116.)

The military judge discussed the continuance with the impaneled five members and asked "[d]oes anybody know right now whether or not there is any reason why you would not be able to sit as a court member during" the new trial dates? (JA at 117.) Lt Col P.B-L. stated that he would move to a different organization but he would remain "in place." (JA at 117.) Another member, Lt Col K.W., stated she was selected for a Secretary of Defense Fellowship that started on 1 July 2018 and would last for five weeks. (JA at 119.) The military judge then explained to the members that they could only be released from serving on the court-martial for good cause. (JA at 118.)

On 14 June 2018, Lt Col P.B-L., in a written note, requested to be relieved from court-martial duty because he was selected to attend Air War College at Maxwell Air Force Base, Alabama, and his report-no-later-than date was 18 July 2018. (JA at 205.) The convening authority received written advice from his staff judge advocate on 21 June 2018 that, pursuant to Rule for Courts-Martial (R.C.M.)

505(c)(2), the convening authority could, after assembly of the court-martial, only relieve court-martial members for good cause shown on the record. (JA at 207.) The staff judge advocate explained Lt Col P.B-L. requested to be excused because "he was selected to attend Air War College with a [report-no-later-than date] to Maxwell AFB, Alabama, of 18 July 2018. Class begins on 23 July 2018." (JA at 206.) The staff judge advocate also stated, "[R.C.M.] 505(f) defines 'good cause' to include physical disability, military exigency, and other extraordinary circumstances which render the member . . . unable to proceed with the court-martial within a reasonable time. 'Good cause' does not include temporary inconveniences which are incidental to normal conditions of military life." (JA at 207.)

On appeal, the Government moved to attach the above information in response to Appellant's assignment of error filed at AFCCA, and AFCCA granted the motion. (JA at 021.) After reviewing the staff judge advocate's written advice, the convening authority relieved two members, Lt Col P.B-L. and Lt Col K.W., and detailed seven additional members to the court-martial. (JA at 199.)

Impaneled Court Member	Lt Col P.B-L.	Relieved (SO A-14, 21 June 2018)
Impaneled Court Member	Lt Col K.W.	Relieved (SO A-14, 21 June 2018)
Impaneled Court Member	Lt Col J.E.	
Impaneled Court Member	Lt Col R.M.	
Impaneled Court Member	Lt Col S.J.	
	Col E.B.	Detailed (SO A-14, 21 June 2018)
	Lt Col J.P.	Detailed (SO A-14, 21 June 2018)
	Lt Col S.M.	Detailed (SO A-14, 21 June 2018)
	Lt Col C.C.	Detailed (SO A-14, 21 June 2018)

	Lt Col S.D.	Detailed (SO A-14, 21 June 2018)
	Lt Col C.E.	Detailed (SO A-14, 21 June 2018)
	Lt Col C.S.	Detailed (SO A-14, 21 June 2018)

(Id.)

When the court-martial reconvened on 24 July 2018, a new military judge, Col S.S., and new circuit trial counsel, Maj B.J., were detailed to Appellant's court-martial. (JA at 128.) Following a second round of voir dire for the seven newly detailed members, the final panel consisted of five members: Col E.B., Lt Col J.E., Lt Col R.M., Lt Col S.J., and Lt Col C.C. (JA at 130-135.)

When the military judge asked about the previously relieved members, the new circuit trial counsel, who was not present at any of the previous hearings, mistakenly responded that they "were excused at an earlier session." (JA at 129.) As a result, there was not any discussion on the record regarding the convening authority's decision to relieve Lt Col P.B-L. from court-martial duty.

SUMMARY OF ARGUMENT

The convening authority properly relieved Lt Col P.B-L. for good cause after being advised in writing of the requirements under R.C.M. 505. (JA at 206-208.) The convening authority balanced the interests involved and determined Lt Col P.B-L.'s presence at Maxwell Air Force Base, Alabama to attend Air War College was urgently required. United States v. Matthews, 38 C.M.R. 430, 433 (C.M.A. 1968) (citing to United States v. Grow, 11 C.M.R. 77 (C.M.A. 1953)).

When the court-martial reconvened on 24 July 2018, Appellant did not object or question the new convening order, which excused Lt Col P.B-L. and, as a result, he waived the right to challenge Lt Col P.B-L.'s excusal under R.C.M. 905(e) (2016 ed.).[1] R.C.M. 905(e) provides that "[o]ther motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, *unless otherwise provided in this Manual*, failure to do so shall constitute waiver." (emphasis added). If Appellant forfeited rather than waived this issue, then this Court reviews for plain error.

If the lack of good cause shown on the record for Lt Col P.B-L.'s release shown was plain and obvious error, the mistake was an administrative, not jurisdictional, error. This Court has routinely held that a missing or improperly detailed court member does not amount to a jurisdictional error; rather, it is merely an administrative error. *See* Matthews, 38 C.M.R 430 (Stating while a convening authority's dismissal of a member following the court's assembly was error and not for good cause, the error was not jurisdictional.) This Court should similarly find that any purported failure to show good cause on the record for Lt Col P.B-L.'s release was an administrative error.

[1] Unless otherwise noted, all references to provisions of the Manual for Courts-Martial reference the 2016 edition, since that was the version in effect at the time of Appellant's court-martial.

Additionally, Appellant's court-martial was properly constituted and did not contain any "interlopers." (App. Br. at 13.) Appellant's panel fell below quorum when the convening authority relieved Lt Col P.B-L. and Lt Col K.W for good cause. Col D.L., as an alternate member, was only intended to be detailed to Appellant's court-martial if the originally detailed members could not attend. Therefore, he, as an undetailed and unsworn individual, could not prevent the panel from following below quorum. When the panel fell below quorum, the convening authority properly detailed seven additional members in accordance with R.C.M. 505(c)(2)(B).

While an administrative error must be tested for prejudice, Appellant has failed to demonstrate prejudice. United States v. Cook, 48 M.J. 434, 436 (C.A.A.F. 2006). Appellant cannot show material prejudice resulted from the lack of good cause shown on the record when he was not entitled to have a particular court member on his panel. Additionally, there is no evidence Lt Col P.B-L.'s absence on the panel impacted the result of Appellant's court-martial. Appellant was also on notice of, and had the opportunity to challenge, Lt Col P.B-L.'s excusal. Appellant declined to do so.

The circumstances of Appellant's case demonstrate the convening authority properly excused Lt Col P.B-L. for good cause, that Appellant's court-martial was properly constituted in accordance with the convening authority's intentions, and that Appellant was not prejudiced by the administrative error of failing to articulate

the good cause for Lt Col P.B-L.'s excusal on the record. Thus, this Court should affirm the decision of the Air Force Court of Criminal Appeals.

ARGUMENT

I.

APPELLANT'S COURT-MARTIAL WAS PROPERLY CONSTITUTED.

Standard of Review

Whether a court-martial is properly constituted is an issue of law that is reviewed de novo. United States v. Colon, 6 M.J. 73, 74-75 (C.M.A. 1978). A convening authority's decision to excuse a court member for good cause, after assembly, is reviewed for an abuse of discretion. United States v. Lizana, No. ACM 39280, 2018 CCA LEXIS 348, at *11 (A.F. Ct. Crim. App. 13 Jul. 2018) (unpub. op.) (citing United States v. Strand, 59 M.J. 455, 458 (C.A.A.F. 2004)). Waiver is the intentional relinquishment or abandonment of a known right. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). Forfeiture, on the other hand, is the failure to make the timely assertion of a right. United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017). Forfeited issues are reviewed for plain error, while waiver leaves no error to correct on appeal. Gladue, 67 M.J. at 313. When "an appellant has forfeited a right by failing to raise it at trial, we review for plain error." United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (quoting Gladue, 67 M.J. at 313). 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).

Law

Under Article 29(a), UCMJ, a member of a general court-martial can only be excused or absent, after the court has been assembled, if they have been "excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause." Congress, by allowing a convening authority to release a member for good cause, "illustrates that, due to the unique nature of the military, an accused's chosen panel will not necessarily remain intact throughout a trial," and "an accused does not have the same right to have a trial completed by a particular court panel." United States v. Easton, 71 M.J. 168, 175-176 (C.A.A.F. 2012). R.C.M. 505(c)(2) requires the good cause to be "shown on the record."

"Good cause" exists when there is a "physical disability, military exigency, and other extraordinary circumstances which render the member . . . unable to proceed with the court-martial within a reasonable time. R.C.M. 505(f). The convening authority may then only detail new members, after a court has been assembled, "when, as a result of excusals [for good cause], the number of members of the court-martial is reduced below a quorum. R.C.M. 505(c)(2)(B). The

applicable number of members to meet quorum for a general court-martial at the time of Appellant's court-martial was five members. Article 29(b)(2), UCMJ.

Analysis

Appellant waived this issue under R.C.M. 905(e), but even if this Court reviews for plain error, the convening authority properly excused Lt Col P.B-L. for good cause. The failure to show good cause on the record in accordance with R.C.M. 505(c)(2)(A)(i) was plain and obvious error. But, the error was a procedural irregularity, as opposed to a jurisdictional defect, and Appellant was not prejudiced by the lack of good cause shown on the record.

1. Appellant waived his right to challenge Lt Col P.B-L's excusal when he did not object at trial.

When Appellant failed to object or question Lt Col P.B-L.'s excusal, prior to adjournment, he waived his right to challenge the issue. R.C.M. 905(e) provides that "[o]ther motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, *unless otherwise provided in this Manual*, failure to do so shall constitute waiver." (emphasis added). As discussed in more detail below, the lack of good cause shown on the record was a procedural irregularity and not a jurisdictional error. Since this is not a jurisdictional error, Appellant failed to raise any motions, requests, or objections before adjournment based on Lt Col P.B-L.'s

excusal. And that leaves "nothing left for [this Court] to correct on appeal." United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2000) (citations omitted).

If Appellant forfeited rather than waived this issue, then this Court reviews for plain error.

2. AFCCA's consideration of the supplemental documentation submitted by the Government was appropriate under United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020).

In response to Appellant's assignment of error filed at the Air Force Court, the Government moved to attach a declaration of Col W.A., the staff judge advocate to the general court-martial convening authority. (JA at 202.) Col W.A.'s declaration included both Lt Col P.B-L.'s and Lt Col K.W.'s requests for excusal and the replacement member package staffed to the convening authority. (JA at 202.)

Without addressing why, Appellant argues AFCCA misapplied United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020), when it granted the Government's motion to attach the above documents. (App. Br. at 13.) As AFCCA reiterated, Jessie permits Courts of Criminal Appeals (CCAs) to "consider declarations from outside the record of trial when necessary to resolve issues raised by materials in the record of trial." Jessie, 79 M.J. at 442-444. (JA at 021.) This Court explained in Jessie that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442.

(quoting United States v. Parker, 36 M.J. 269, 272 (C.A.A.F. 1993)). The constitution of Appellant's court-martial and which members were detailed and excused from his court-martial were issues directly raised by the materials already in the record. (JA at 129.) Additionally, had Appellant objected to or raised the issue of Lt Col P.B-L.'s excusal at trial, then the Government could have supplemented the record with these materials at trial.

Since the declarations and accompanying attachments were necessary to resolve the issue of whether Appellant's court-martial was properly constituted, AFCCA properly applied Jessie when it granted the Government's motion.

3. Lt Col P.B-L. was properly excused for good cause.

After Appellant's trial was continued, Lt Col P.B-L. requested to be excused as a panel member. (JA at 205.) He requested excusal because he was notified of his selection to attend Air War College. (Id.) He was to report and start school a couple of weeks before Appellant's court-martial resumed. (Id.) After reviewing the request and advice from his staff judge advocate, the convening authority excused Lt Col P.B-L so he could attend Air War College, which amounted to good cause. (JA at 208.)

While Article 29, UCMJ, allows for release for good cause, "[n]ormal conditions of military life do not provide the emergency or exigency constituting good cause for relief from court-martial duty while the trial is in progress." United States v. Boysen, 29 C.M.R. 147 (C.M.A. 1960). In other words, an "ordinary

transfer" does not equate to good cause. United States v. Metcalf, 36 C.M.R. 309, 312 (C.M.A. 1966). However, this Court reads Article 29 to allow for the release of a panel member under limited circumstances, including when "the officer appointing the court determines, after balancing the interests involved, that the member's services are elsewhere urgently required." Matthews, 38 C.M.R. at 433 (citing to Grow, 11 C.M.R. 77 (C.M.A. 1953)). The purpose of Article 29 is to "permit the convening authority to intervene in the trial and remove a member only for causes external thereto rather than as a part of the challenging process." Metcalf, 36 C.M.R. at 313.

Lt Col P.B-L.'s selection to attend Air War College was more than just an ordinary transfer. He was selected for a highly competitive Professional Military Education Course (PME). (JA 205.) Unlike an ordinary transfer, Lt Col P.B-L. did not have the flexibility to push his arrival or start date for the PME course. Nor would he have been able to miss course dates in order to participate in Appellant's court-martial and still attend the PME course in-residence at Maxwell Air Force Base, Alabama. (Id.) As AFCCA identified, Appellant failed to show or even argue Lt Col P.B-L.'s selection for Air War College was insufficient to qualify as a military exigency or an extraordinary circumstance. (JA at 026.) The convening authority was advised by his staff judge in writing that Lt Col P.B-L's excusal had to be for good cause and he explained the definition of good cause under R.C.M. 505(f). (JA 207.) And, after balancing the interests involved, the convening

authority determined Lt Col P.B-L.'s attendance was urgently required at Air War College. (JA at 208.) As a result, Lt Col P.B-L.'s excusal was for good cause under Article 29, UCMJ. Tellingly, even now Appellant does not argue that Lt Col P.B-L's selection for Air War College did not constitute good cause for his excusal.

4. The failure to show good cause on the record was an administrative and not a jurisdictional error.

The failure to show good cause on the record for Lt Col P.B-L.'s relief from his court-martial duties was the result of a procedural irregularity and not a jurisdictional error. This Court finds jurisdictional errors occur "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). Jurisdiction depends on a "properly convened court, composed of qualified members chosen by a convening authority, and with charges properly referred." Id. Article 29(a), UCMJ, requires that after assembly, a member must only be excused "as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause." That is what happened here. As discussed above, Lt Col P.B-L. was excused by the convening authority for good cause. (JA at 205, 208.) Since the convening authority complied with Article 29, UCMJ, the court-martial was "convened in accordance with the UCMJ," and thus, there was no jurisdictional error. Lt Col

P.B-L.'s excusal only failed to comply with R.C.M. 505(c)(2)(A)(i), a procedural rule, because the good cause for the excusal was not articulated on the record. But, this additional procedural requirement instituted by the President is not part of the UCMJ and therefore does not affect the jurisdiction of the court-martial.

In Colon, this Court found that when forty percent – four out of ten – of the detailed panel were absent, the error was not "jurisdictional in nature." 6 M.J. 73, 74 (C.M.A. 1978); *see also* United States v. Sargent, 47 M.J. 367, 368 (C.A.A.F. 1997) (reiterating that the absence of a court member does not constitute a jurisdictional error); United States v. Gebhart, 34 M.J. 189, 192 (C.M.A. 1992) (finding that when a member was appointed and relieved on the same convening order and sat on the appellant's panel, it was an administrative not jurisdictional error); Matthews, 38 C.M.R at 635 (stating that while a convening authority's dismissal of a member following the court's assembly was error and not for good cause, the error was not jurisdictional.) In the same way, Lt Col P.B-L.'s absence was not a jurisdictional error. This is especially true when the convening authority excused Lt Col P.B-L. for good cause in accordance with Article 29. Similar to Gebhart, the failure to comply with a procedural rule and show good cause on the record resulted in a "procedural irregularity," not jurisdictional error. Gebhart, 34 M.J. at 192.

5. The members detailed to Appellant's court-martial following Lt Col P.B-L.'s excusal were not "interlopers."

Appellant also argues that because Lt Col P.B-L. and Col D.L. were not properly excused, the panel never fell below quorum and the replacement members who sat on his panel were "interlopers." (App. Br. at 24.) But, interlopers are individuals who were never actually placed on a court-martial. United States v. Harnish, 31 C.M.R. 29, 30 (C.M.A. 1961). The term refers "to members who sat on a court-martial but who had not been appointed by the convening authority to do so." Cook, 48 M.J. at 437 (citations omitted).

Addressing first Appellant's contention that Col D.L. was never properly excused – Col D.L. did not need to be excused because he was only appointed as an alternate member. Col D.L. was never present at any of the hearings, never sworn in, and never a member of the assembled court. As the circuit trial counsel explained, there was "one alternate member who [has] already [been] appointed" if the court goes below quorum. (JA at 121.) Col D.L. was an option to fill in as a member, if needed, but he was not an impaneled member as is gleaned from the fact that he was not questioned by either party or the military judge during voir dire, identified on the record as detailed member or impaneled member, or present at any hearing.

Even if Col D.L. was a detailed member, that would not matter. In Sargent, a detailed member was not present when the court-martial convened and the record

did not explain the member's absence. 47 M.J. 367, 368 (C.A.A.F. 1997). This Court found no error from his absence when quorum was met, and nine detailed members heard the appellant's case. Id. Similarly, Col D.L.'s absence could not have been jurisdictional error when five detailed members were present and "fully empowered to consider" Appellant's case. Id.

At the time Appellant's court-martial was continued, the panel was assembled and consisted of five members. (JA at 115.) In June 2018, the convening authority excused two members, Lt Col K.W. and Lt Col P.B-L. for good cause. (JA at 206-207.) Simultaneously, the convening authority detailed seven additional panel members to Appellant's court-martial. (JA at 208-209.) Once the convening authority excused Lt Col K.W and Lt Col P.B-L. for good cause, Appellant's court-martial fell to three remaining members and below quorum. Once the members were released, quorum under Article 29, UCMJ, was lost. The convening authority was then required under R.C.M. 505(c)(2)(B) to detail new members. Since Col D.L. was not an impaneled member, and Lt Col P.B-L. was properly excused, the panel fell below quorum, and the newly detailed members were properly appointed.

To determine if an individual has been "properly detailed to sit as a member depends, in part, on the intent of the convening authority." United States v. Caldwell, 16 M.J. 575, 576 (A.C.M.R. 1983) (citing United States v. Padilla, 5 C.M.R. 31 (C.M.A. 1952)). Here, as opposed to the interlopers in Harnish, who

were never actually placed on the court-martial to begin with, the convening authority in Appellant's case hand-selected seven new members from a list of ten individuals because he determined they were the most qualified for court-martial duty in accordance with Article 25, UCMJ. The convening authority intended for the additional seven members to be detailed to Appellant's court-martial. (JA at 208-209.)

Notably, all of the cases where interlopers were identified, and that Appellant cites to in support of his argument, were cases in which the convening authority did not intend for the individuals to be panel members. In United States v. Caldwell, the court determined the convening authority created two separate convening orders – one if the appellant chose to be tried by officer members and another if the appellant chose to be tried by officer and enlisted members. 16 M.J. 575, 576 (A.C.M.R. 1983). The appellant chose trial by officer and enlisted members, but a member detailed to the officer-only convening order sat on the appellant's court-martial. Id. The court found because the convening authority intended for there to be alternative convening orders depending on the appellant's forum choice that member was an interloper and his participation rendered the court a nullity. Id. at 577. In United States v. Cameron, the convening authority replaced a lieutenant with another member the day before trial started. 13 C.M.R. 738, 739 (A.F.B.R. 1953). Despite being replaced, the lieutenant sat on the appellant's trial the entire time. Id. The court found he was an interloper and his

participation invalidated the entire court. Id. In United States v. Goodrich, the case is bare on facts and only states that the case was reversed because an "officer not detailed as a member of the court-martial participated as a member." 5 M.J. 1002, 1002 (C.A.A.F. 1976).

Appellant's case is fundamentally different from the above cases because the convening authority intended for the seven new members to be detailed to Appellant's court-martial. The convening authority's intent is evidenced by his handwritten initials next to each new member he detailed to Appellant's court-martial, his signature, and his direction to "[p]repare a Special Order in accordance with my above selections." (JA at 208-209.) Even if there were some ambiguity as to whether the seven new members were detailed to Appellant's court-martial because the government failed to show good cause on the record for Lt Col P.B-L.'s excusal, this Court still looks "to the intent of the convening authority with respect to service of [members] on that court-martial panel." United States v. Mack, 58 M.J. 413, 416 (C.A.A.F. 2003) (citing Padilla, 5 C.M.R. at 35). The convening authority clearly intended for the seven new members to be detailed to Appellant's court-martial.

Appellant's argument seems to suggest that for the convening authority to have detailed new members, the relief of Lt Col K.W. and Lt Col P.B-L. must first have occurred on the record with a showing of good cause. (App. Br. at 24.) This argument defies logic. If 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. A separate court hearing would have to occur for the good cause to be shown on the record before the convening authority could even appoint substitute members. This would lead to incredibly inefficient results and cannot have been the intent of R.C.M. 505(c)(2)(A)(i).

In determining if the seven new members were interlopers, Appellant's case is akin to Cook. In Cook, the appellant argued the staff judge advocate improperly excused more than one-third of the panel members detailed to his court-martial by the convening authority, in violation of RCM 505(c)(1)(B)(ii). 48 M.J. at 436. He further argued that two of the five members originally selected as alternates were erroneously detailed to the court-martial as interlopers. Id. at 437. This Court, however, found that even if there was a violation under R.C.M. 505 that alone would not make the new members interlopers. Id. In other words, a violation of a procedural rule does not, on its own, turn newly detailed members into interlopers, because an interloper is someone who was not actually appointed by the convening authority. In the same way, even though the Government failed to show the convening authority's good cause on the record in Appellant's case, that alone did not make the replacement members "interlopers," when they were otherwise properly detailed. Since Lt Col P.B-L.'s excusal was for good cause under Article 29, UCMJ, and the replacement members were properly detailed, there were no

interlopers, there was no jurisdictional defect, and Appellant's court-martial was properly constituted.

However, since the Government does admit there was an administrative error under R.C.M. 505(c)(2)(A)(i) when no good cause was shown on the record for the excusal of Lt Col P.B-L., this Court must assess for material prejudice to a substantial right. *See* Article 59(a), UCMJ.

6. Appellant has not met his burden of showing he was prejudiced by the lack of good cause shown on the record.

Any error with respect to an administrative error must be tested for prejudice. Cook, 48 M.J. at 436 (citing Gebhart, 34 M.J. 189). As discussed above, in Cook, the staff judge advocate violated R.C.M. 505(c)(1)(B)(ii) by dismissing more than one-third of the panel before the court was assembled. Cook, 48 M.J. at 436. Yet, this Court did not place the burden on the Government to disprove there was prejudice. Instead, since the appellant did not object to the panel constitution at trial, this Court analyzed the case under a plain error standard, which required the appellant to demonstrate prejudice. Id. Here, Appellant did not object to Lt Col P.B-L.'s excusal at trial or the failure to put the good cause on the record, so this Court should apply the same standard.

This Court should also dismiss Appellant's argument that this issue is parallel to an incomplete record of trial, which would require the Government to rebut a presumption of prejudice. (App. Br. at 28.) All convening orders were

inserted into the record and provided to Appellant. (JA at 088-089, 126.) The Government was only required to show good cause on the record, and that failure does not mean the record of trial is incomplete or that the Government has a presumption of prejudice to rebut. The burden of demonstrating a material prejudice stays with Appellant when he did not object to Lt Col P.B-L's excusal or the fact that good cause was not shown on the record.

In a similar vein, Appellant argues "the failure to abide by the requirements of R.C.M. 505 amounts to a due process violation." (App. Br. at 27.) In Colon, this Court did find the appellant was prejudiced because the military judge's decision to begin trial when four members were missing violated military due process. 6 M.J. at 74. However, without overruling Colon, this Court in United States v. Vazquez, dismissed the idea of military due process. 72 M.J. 13 (C.A.A.F. 2013). Specifically, this Court stated the concept of military due process is "an amorphous concept . . . that appears to suggest that service members enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM. They do not." Id. at 19. While Appellant does not argue a violation of military due process, he does, without explanation, cite to Vazquez and argue the failure to show good cause on the record was a due process violation. (App. Br. at 27.) But Vazquez, which dealt with new members being detailed mid-trial, does not state failure to show good cause on the record under R.C.M. 505 results in a due process

violation. Instead, this Court in Vazquez held "a case *could* exist where Article 29(b), UCMJ, would be unconstitutional *as applied*" but the appellant "has not met the burden of showing that it is his case." Vazquez, M.J. 72 at 21 (emphasis added). This is also not such a case. Appellant has not met the burden of demonstrating that Article 29, UCMJ, was unconstitutionally applied to his case or that there was a due process violation, because the failure to show good cause on the record was nothing more than a procedural error.

Next, Appellant argues he was prejudiced in two ways. First, that he "was denied the opportunity to investigate the legitimacy of Lt Col P.B-L.'s request for excusal and litigate the issue at trial." (App. Br. at 26.) And second, that he was prejudiced because Lt Col P.B-L.'s "personal experience with false accusations of sexual assault and his general familiarity with Appellant" made him "an ideal member for the [d]efense." (Id.) Neither argument has any merit.

Addressing Appellant's contention that he was denied the opportunity to investigate Lt Col P.B-L.'s excusal first: when Appellant's trial resumed in July 2018, Appellant was aware Lt Col P.B-L. was previously excused by the convening authority. Appellant received Special Order A-14, dated 21 June 2018, which memorialized Lt Col P.B-L.'s excusal. (JA at 128, 199.) Appellant was also present when trial counsel announced the persons detailed to his court-martial on 24 July 2018, which did not include Lt Col P.B-L. (JA at 128-129.) Appellant also participated in the voir dire of the newly detailed seven members and executed

challenges for cause and a peremptory challenge on those members. (JA at 133-134.) At any time, Appellant could have objected or inquired about Lt Col P.B-L.'s excusal. He did not.

And even if Appellant did not affirmatively waive this issue, Appellant's failure not to object or inquire about Lt Col P.B-L.'s excusal is important for this Court's prejudice analysis. In Gebhart, this Court found no prejudice, in part, because the appellant at trial "did not object to any irregularity in the detailing process either generally or particularly with respect" to a member who was detailed and relieved in the same convening order. 34 M.J. at 193. Similarly, Appellant had the opportunity to object to and question Lt Col P.B-L.'s excusal, but did not do so. Material prejudice did not result from the Government's failure to show good cause on the record regarding Lt Col P.B-L.'s excusal, especially when the failure was due, in part, to a misstatement by counsel new to the case. The circuit trial counsel, who was new to the case, mistakenly said Lt Col P.B-L. was "excused at an earlier session." (JA at 129.) However, Appellant retained the same three trial defense counsel throughout his court-martial, and they were aware Lt Col P.B-L. was not excused in an earlier session. (JA at 129.) After the circuit trial counsel misspoke, Appellant had the opportunity to correct the circuit trial counsel, question or object to Lt Col P.B-L.'s excusal, or ask for good cause to be shown on the record, but did not do so.

Appellant then contends he was prejudiced because Lt Col P.B-L.'s "personal experience with false accusations of sexual assault and his general familiarity with Appellant" made him "an ideal member for the [d]efense." (App. Br. at 26.) Appellant, however, is not entitled to have "a trial completed by a particular court panel as a defendant in a civilian jury trial does." Easton, 71 M.J. at 176. "Article 29, UCMJ, illustrates that, due to the unique nature of the military, an accused's chosen panel will not necessarily remain intact throughout a trial." Id. Appellant was not entitled to keep Lt Col P.B-L. on his panel throughout the entirety of his court-martial, especially when, as discussed above, there was good cause for his release.

Further, Appellant's argument insinuates he was prejudiced because he lost a panel member who was biased in his favor. But, the only requirement for panel members is that "in the opinion of the convening authority [they] are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament." R.C.M. 502(a)(1). An Appellant is entitled "to an impartial and unbiased panel," not a panel member who might be biased in his favor. United States v. Nash, 71 M.J. 83, 88 (C.A.A.F. 2012) (citing United States v. Mack, 41 M.J. 51, 54 (C.M.A. 1994)). As AFCCA described, Appellant wants to "assess prejudice through his lens of a favorable panel, rather than the convening authority's lens of selecting a panel of his or her choosing under Article 25, UCMJ, criteria." (JA at 028.) There is no evidence the convening authority

chose Lt Col P.B-L. to sit on Appellant's panel based on his familiarity with Appellant or the previous false allegation – indeed, those would have been improper selection criteria for the convening authority to use. Since Appellant was not entitled to Lt Col P.B-L.'s presence on his panel, he was not prejudiced by the failure to place his removal for good cause on the record.

Even if Appellant had a material right to a favorable panel member, there is no evidence to suggest Lt Col P.B-L. would have been a vote in Appellant's favor despite Appellant's contention that Lt Col P.B-L. "could have made the difference between conviction and acquittal." (App. Br. at 26.) This is speculative. For instance, during voir dire, Lt Col P.B-L. stated he only knew Appellant from a previous squadron and did not interact with him outside of work. (JA at 100.) When he was asked by trial counsel, "[i]s there anything about your interaction with [Appellant] that makes you think you . . . know a little bit too much about him as a person . . . to really sit on [his] case," Lt Col P.B-L. responded in the negative. (JA at 101.) And, in response to trial defense counsel's questioning, he said he would judge Appellant fairly despite his familiarity with him. (JA at 108.) Based on his previous interactions with Appellant and his responses to the voir dire questions, there is nothing to indicate Lt Col P.B-L. would have voted one way or the other simply because he was previously familiar with Appellant. Instead, Lt Col P.B-L.'s answers indicated there was nothing about his past familiarity with

Appellant that would make him a poor choice to fairly and impartially listen to the evidence in Appellant's case.

Appellant also posits that Lt Col P.B-L.'s past sexual assault allegation made him "an ideal member for the defense." (App. Br. at 26.) Again, there is nothing to suggest Lt Col P.B-L. would have voted for an acquittal based on that experience. Appellant can only hazard a guess at how Lt Col P.B-L. might have decided his case. Lt Col P.B-L.'s responses are what is expected of a non-biased member and indicate that a case's determination depends on the evidence as the "evidence will speak for itself." (JA at 102.) It is also just as likely Lt Col P.B-L. could have found Appellant guilty based on his past experiences. In the false allegation against Lt Col P.B-L., he indicated the forensic testing came back negative. (JA at 107.) But in Appellant's case, the forensic testing pointed to Appellant and corroborated J.K.'s allegation. Specifically, male DNA was located on the inside front panel of J.K.'s underwear and Appellant, and his paternal male relatives, could not be excluded from the forensic testing. (JA at 009.) Lt Col P.B-L. could have determined that, unlike in his case, the forensic testing pointed toward Appellant's guilt. But, again, it is impossible to determine how Lt Col P.B-L. would have voted one way or the other, and this Court should decline Appellant's invitation to engage in such speculation.

Additionally, Lt Col P.B-L. was not the only member who identified that false accusations of sexual assault occur. (JA at 029.) Two other members on

Appellant's assembled court-martial agreed false accusations can happen and Appellant was still convicted of the charged offenses. Appellant argues that he lost a "favorable" panel member, but Appellant cannot demonstrate that the other panel members were not fair and impartial. This Court in United States v. Dockery, stated "there is a difference between the failure to remove a biased member who sat on a panel that tried an accused, and the erroneous removal of an unbiased member from a panel, where there is no challenge to the ultimate makeup of the panel." 76 M.J. 91, 99 (C.A.A.F. 2017). While here the removal of Lt Col P.B-L. was not erroneous, the sentiment is the same. Appellant is not contending he was prejudiced by the composition of the final panel, but instead only that he was prejudiced when a "favorable" panel member was excused. Appellant's assembled panel was fair and unbiased.

Finally, the failure to show good cause on the record for the excusal of Lt Col P.B-L. did nothing to alter the composition of Appellant's court-martial to Appellant's detriment. In Sargent, a previously detailed court-member failed to attend the appellant's trial and this Court looked to the composition of the appellant's court-martial in its prejudice analysis. 47 M.J. at 369. This Court found the "absence of a detailed member actually reduced the number of votes (from 7 to 6) needed" for a favorable result for the appellant. Id. In Appellant's case, while the excusal of Lt Col P.B-L. did not reduce the number of votes he needed for an acquittal (nor could it because five members were still needed for

quorum), he was left with the same composition of panel members that he had prior to the excusal – five members, after additional members were detailed. As in Sargent, this is further evidence Appellant was not materially prejudiced by the failure of the Government to show good cause on the record for Lt Col P.B-L.'s excusal.

Since Appellant cannot meet his burden of showing prejudice under a plain error standard, this Court should find that Appellant is not entitled to relief for the procedural error in this trial.

CONCLUSION

WHEREFORE the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of Air Force Court of Criminal Appeals.

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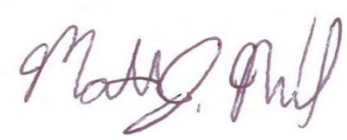

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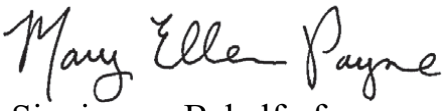

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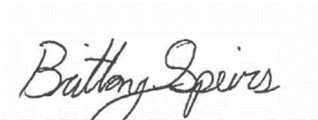

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/s/

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APPENDIX

Cited Unpublished Opinions