**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant CORY L. CARR**
**United States Air Force**

**ACM 35300**

**25 August 2005**

Sentence adjudged 8 March 2002 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: David F. Brash.

Approved sentence: Bad-conduct discharge and reduction to E-4.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, Major John D. Douglas, and Captain Stacey J. Vetter.

Before

MALLOY, ORR, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT



ORR, Senior Judge:

The appellant was tried by a general court-martial consisting of officer and enlisted members at Hickam Air Force Base (AFB), Hawaii. The appellant was found guilty, contrary to his pleas, of communicating a threat, simple assault, and two specifications of assault consummated by a battery in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934. The members sentenced the appellant to a bad-conduct discharge and reduction to E-4. The convening authority approved the sentence as adjudged.

The appellant initially submitted three assignments of error: (1) Whether the evidence is legally and factually insufficient to support a finding of guilty to the specification of simple assault because the evidence did not establish, beyond a reasonable doubt, that the appellant did not act in self-defense when he pointed an unloaded firearm at a person found hiding in a closet in his home, (2) Whether the military judge erred when he denied the defense motion for a mistrial where a court member introduced extrinsic information during deliberations and the prosecution did not overcome the presumption that the extrinsic information prejudiced the appellant, and (3) Whether communicating a threat and simple assault charges are an unreasonable multiplication of charges because the verbal threat was an essential part of the continuing course of conduct for which the appellant was convicted of assault with an unloaded firearm.

Later, the appellant submitted a supplemental assignment of error alleging two additional errors: (1) Whether the charges and specifications must be dismissed because the court-martial was not composed in compliance with Rules for Courts-Martial (R.C.M.) 201(b)(2) and 502(a)(1), and Article 25, UCMJ, 10 U.S.C. § 825, and therefore, lacked jurisdiction, and (2) Whether the panel detailed to the appellant's court-martial was improperly selected because the staff judge advocate (SJA) improperly excluded officers from specific career fields and officers from the appellant's unit from the pool of potential court members presented to the convening authority in violation of Articles 25 and 37, UCMJ, 10 U.S.C. §§ 825, 837. As a result of the supplemental assignment of error, this Court asked the convening authority to submit an affidavit answering questions regarding the criteria he used to select the officer court members.

*Background*

The appellant lived in government housing on Hickam AFB with three of his daughters, one of whom was 16 years old. The appellant was married but living apart from his wife. In September of 1999, the appellant's daughter, who was 14 years old at the time, began bringing boys and young men into the house and having sexual intercourse with them when her father was not home. On one occasion, the appellant found a 24-year-old active duty Marine hiding in the shower wearing only a T-shirt and underwear. On another occasion, the appellant found a 23-year-old active duty sailor hiding in his daughter's closet. At some point, the appellant's daughter told her father that she had brought four other men into the house and had sexual intercourse with them. The appellant reported the Marine and the sailor to the appropriate military authorities.

In October of 2001, the appellant came home from work early and suspected that his daughter had a male guest in the house. The appellant picked up his handgun and went to his daughter's bedroom. With the unloaded gun in his hand, he told his daughter to open her closet door. The appellant saw a young man, DLB, hiding in his daughter's closet wearing only boxer shorts. The appellant told DLB to get out of the closet. As

DLB started to get out of the closet, the appellant struck him in the face with the handgun. DLB raised his hands in an effort to shield his face from a second blow and the impact from the gun caused a scratch on his left hand. The appellant pointed the gun at DLB and asked him who he was and why he was hiding in the closet. The appellant learned that DLB was a 17-year-old high school classmate of his daughter. When the appellant was not satisfied with DLB's explanation for hiding in the closet, he continued questioning DLB. During the heated discussion, DLB told the appellant, "You don't want to shoot me, my dad is an officer." In response, the appellant told DLB, "Your Dad is about to lose a son." Then the appellant asked DLB about the torn condom wrapper he found in the room. When DLB was unresponsive, the appellant smacked him in the face. The appellant then asked DLB for his phone number. The appellant picked up the phone and called DLB's father and told him to come pick up his son. After DLB's father, a Navy Captain, found out that the appellant had struck his son with a handgun, he reported the incident to law enforcement authorities.

*Legal and Factual Sufficiency*

The appellant asserts that the evidence is legally and factually insufficient to support the finding of guilty to Specification 1 of Charge II. Specifically, the appellant avers that he was acting in self-defense when he pointed the gun at DLB. The crux of the appellant's argument is that he did not know who was hiding in the closet. He testified that the person in the closet could have been one of the men who he reported to the authorities. He needed to brandish the unloaded gun because the person in the closet may have reacted violently once he was discovered. The appellant claims that the unloaded gun was intended to reduce the likelihood of harm to himself or anyone else.

Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that we approve only those findings of guilty we determine to be correct in both law and fact. In doing so, this Court is required to conduct a de novo review of the legal and factual sufficiency of the case. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency requires us to review the evidence in the light most favorable to the government. If any rational trier of fact could have found the elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *United States v. Richards*, 56 M.J. 282, 285 (C.A.A.F. 2002) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We may affirm a conviction only if we also conclude, as a matter of factual sufficiency, that the evidence proves the appellant's guilt beyond a reasonable doubt. *Washington*, 57 M.J. at 399 (citing *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987)). We must assess the evidence in the entire record "making allowances for not having personally observed the witnesses." *Turner*, 25 M.J. at 325.

Under R.C.M. 916(e)(3), the appellant was entitled to claim self-defense if he reasonably believed that bodily harm was about to be wrongfully inflicted on him and

that the force the appellant used was necessary for his protection. Given his daughter's past sexual history coupled with the condition and appearance of her room, the appellant reasonably concluded that someone was hiding in his daughter's closet. However, his actions were not consistent with someone acting in self-defense. First, the appellant retrieved his handgun from his room. He then loaded and unloaded the weapon. Next, he told his daughter to open her closet door. He then ordered DLB to come out of the closet and he hit DLB with the gun as he came out of the closet. The appellant testified that he hit DLB to "keep him off balance and to keep an upper hand on the situation so he couldn't attack me." We do not find this explanation credible.

We believe the appellant pointed the gun at DLB out of anger rather than self-defense. Contrary to DLB's testimony, the appellant denies pointing the gun at DLB. The appellant insists that while he was nervous, he kept the gun pointed at the floor. He admits that he was angry, but not very angry. Additionally, he had his daughter open the closet door, putting her most at risk for being harmed by the person in the closet. Yet he testified that he did not believe she was in any kind of danger. After weighing the evidence, and making allowances for not having personally observed the witnesses, we are not convinced that the appellant was acting in self-defense. We are convinced beyond a reasonable doubt that the appellant is guilty of a simple assault. *Turner*, 25 M.J. at 325; R.C.M. 916(e). Furthermore, in addition to factual sufficiency, we find the evidence is such that a rational factfinder could have found the appellant guilty of all elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

*Bias of Court Member*

The appellant also contends that the military judge improperly denied a request for a mistrial because a panel member improperly introduced extrinsic information during deliberations. Specifically, a panel member mentioned during deliberations that, as a five-year-old child, he was accidentally hit in the eye by his father's baseball bat requiring several eye surgeries. This left the impression with another panel member that he had been the victim of an offense similar to one to the offenses alleged, but had not revealed the information during the course of voir dire. When the appellant's trial defense counsel became aware of this issue, they filed a motion for a mistrial. In an effort to address this issue before the case was forwarded to this Court for appellate review, the military judge ordered a post-trial, Article 39(a), UCMJ, 10 U.S.C. § 839(a), session. At the session, the military judge conducted the questioning himself and he permitted very limited questioning of the panel members. The military judge offered counsel for both sides the opportunity to submit questions they wanted him to ask. After

hearing argument on the motion, the military judge denied the defense motion for a mistrial. In making his ruling, the military judge made the following findings of fact:

> One, the trial in this case ended 8 March 02. On or about 25 March 02, the Hickam Wing Staff Judge Advocate, Colonel Dent, sought out the court president, Lieutenant Colonel Binder, in order to pursue feedback on the performance of trial counsel during the course of the trial. In a 20 to 30-minute conversation, Colonel Dent asked questions geared to determine whether there were areas in which he could help his trial counsel improve their performance. He did not question Lieutenant Colonel Binder on the court's deliberations, and reminded Lieutenant Colonel Binder of his oath not to reveal the same.
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> Two, at some point in the conversation, Lieutenant Colonel Binder mentioned that one of the court members revealed a personal experience wherein it became apparent that the member had been the victim of an offense similar to one of those alleged in this case. Colonel Dent stopped the president, told him to say no more, and ended the conversation with no further direction to Colonel Binder.
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> Three, shortly thereafter, Colonel Dent requested his Deputy Staff Judge Advocate communicate to the court, as well as defense counsel, Colonel's [sic] Binder's revelation. The Deputy Staff Judge Advocate did so, and this notice resulted in the memorandum initiated by the court, which is now marked as Appellate Exhibit XXXVIII.
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> Four, after approximately a week of waiting for reaction/input from counsel on the issue, I directed, sua sponte, a post-trial Article 39(a) session in the matter in order to develop a record and entertain motions from either side.
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> Five, at the point of general voir dire at trial, all members were asked if they, or members of their family, or anyone close to them personally, had been the victim of an offense similar to any of those charged in this case. All members responded in the negative. Additionally, the members were asked if any member were aware of any matter that might raise a substantial question concerning their participation in the trial as a court member. All members responded in the negative.
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> Six, Captain Whitfill was present as a court member during general voir dire and all trial sessions thereafter.

Seven, at the age of approximately five, Captain Whitfill experienced an unfortunate accident while he and his father played baseball. As his father took swings at a self-contained hitting and pitching unit, young Whitfill stood several feet away. When his father swung the bat, the grip came loose and the bat flew from his father's hands, striking the child in the eye. The injury resulted in three eye surgeries. As far as physical consequences, the Captain has experienced some blurred vision to this day, and the injury is visible to the eye upon close examination, although he does not experience pain.

Professionally, the Captain, at one time, attributed this eye injury to his inability to become a pilot. However, he has since pursued another career path, serving in the finance arena. Rather than harboring any disappointment about this turn of events, the Captain maintains the change in career paths has been a very positive turn in his life, opening career possibilities he never would have realized as a pilot. He has not been limited in any personal pursuits in his adult life because of the eye injury. Finally, the event did not impact his relationship with his father in any negative way. On the contrary, in the Captain's opinion, the ultimate fallout from the injury likely enriched the relationship.

Also, at the age of eleven or twelve, Captain Whitfill was involved in a physical exchange with another youngster over a pool game. The two exchanged one punch each, no serious injuries were sustained, and the altercation had no lasting effects on the Captain's life.

Eight, Captain Whitfill did not reveal either of these life experiences when asked the two general voir dire questions referenced above. He did not mention the eye injury, because the scenario did not place him in victim status, nor did he view himself as a victim in the minor altercation. As to his response in the negative to the broad question of impartiality the Captain viewed neither incident as having any bearing on his ability to decide the case solely upon the evidence and the court's instructions.

Nine, Captain Whitfill mentioned that accident with his eye at some point during findings deliberations. Lieutenant Colonel Binder heard the statement. Technical Sergeant Dunn heard the statement. Major Desjardins heard the statement. Although all members were present, Master Sergeant Boatwright, Senior Master Sergeant Murray, and Master Sergeant Abshire do not remember the statement being made.

The military judge concluded that Captain Whitfill was a credible witness and that he did not harbor any personal biases or prejudices. He determined that the appellant was

not prejudiced in any respect by the matters raised in the post-trial Article 39(a), UCMJ, session and then denied the defense's motion for a mistrial.

We review a military judge's ruling on the decision whether to grant a mistrial for an abuse of discretion. *See United States v. Lavender*, 46 M.J. 485, 489 (C.A.A.F. 1997). "As a matter of military law, the decision to declare a mistrial is within the sound discretion of the military judge." *United States v. Rosser*, 6 M.J. 267, 270-71 (C.M.A. 1979). The military judge uncovered sufficient facts to determine that the extraneous information introduced by the panel member did not prevent the appellant from receiving a fair trial. After reviewing the military judge's findings of fact and conclusions of law, we hold that the military judge did not abuse his discretion by denying the appellant's motion for a mistrial.

*Unreasonable Multiplication of Charges*

The appellant avers that Charge I and Specification 1 of Charge II are an unreasonable multiplication of charges. Specifically, he argues that the verbal threat, "Your Dad is about to lose a son," that constitutes the basis for Charge I, was an essential part of the continuing course of conduct for which the appellant was convicted of assault with an unloaded firearm in Specification 1 of Charge II. We disagree.

The appellant raises this issue for the first time on appeal. Generally, the issue of unreasonable multiplication of charges is waived by the appellant's failure to raise an objection at trial before entering his pleas. R.C.M. 905(e). In *United States v. Erby*, 46 M.J. 649, 652 (A. F. Ct. Crim. App. 1997), *aff'd in part and modified in part*, 49 M.J. 134 (C.A.A.F. 1998), this Court emphatically stated that "an accused waives any argument respecting an unreasonable multiplication of charges, as distinguished from double jeopardy/multiplicity, by failing to bring it up at trial." However, in *United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001), our superior court held that our Article 66(c), UCMJ, power "includes the power to determine that a claim of unreasonable multiplication of charges has been waived or forfeited when not raised at trial." *See also United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

Even if it is later determined that the issue was not waived, we have considered the factors set forth in *Quiroz*, and conclude that the offenses do not constitute an unreasonable multiplication of charges. In *Quiroz*, 55 M.J. at 338, our superior court adopted the following framework to use as a guide for determining whether there was an unreasonable multiplication of charges:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?; (2) Is each charge and specification aimed at distinctly separate criminal acts?; (3) Does the number of charges and specifications misrepresent or exaggerate the

> appellant's criminality?; (4) Does the number of charges and specifications *unfairly* increase the appellant's punitive exposure?; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

After considering and balancing these factors we conclude that they do not weigh in the appellant's favor. As stated earlier, the appellant did not raise the allegation of unreasonable multiplication of charges at trial. The two charges are aimed at two distinct criminal acts and do not misrepresent or exaggerate the appellant's criminal action. Additionally, while the specification for communicating a threat increased the appellant's confinement exposure by three years, we find no prejudice because the appellant received no confinement. Further, there is no evidence of prosecutorial overreaching. In fact, prior to arraignment, the military judge ordered the prosecution to sever the three specific allegations contained in the original specification of Charge I into three separate specifications. The appellant did not object to the severance. Therefore, we hold that the challenged specifications do not constitute an unreasonable multiplication of charges.

*Selection of Court Members*

In a supplemental assignment of error, the appellant claimed that the trial court did not have jurisdiction to hear the appellant's case because the general court-martial convening authority (GCMCA) improperly selected the officer panel members. The appellant gives two reasons for his claim. First, he asserts that the court was not composed in compliance with R.C.M. 201(b)(2), R.C.M. 502(a)(1), and Article 25, UCMJ. Next, he argues that the SJA improperly excluded officers from specific career fields from consideration by the convening authority. The appellant asks this Court to dismiss all the charges and specifications. The government opposes the appellant's claim that the court-martial was improperly convened.

In an effort to determine whether the convening authority properly selected the panel, this Court ordered the convening authority to submit an affidavit explaining the criteria he used to select the officer members on the panel. In response, the convening authority stated that he considered the pretrial advice provided by his SJA. In this pretrial advice, the SJA recommended that the appellant's case be referred to trial by general court-martial. In addition, the advice contained the following language:

> If you decide to refer the case to a General Court-Martial, please select a minimum of 12 officers by writing the name of any commissioned officer on active duty on the blank lines at Tab 1. UCMJ Article 25 states, "The convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament." By law, you must select at least five officers. Although you

> may select a minimum of five members to serve on this court-martial panel, I recommend that you consider selecting 2 Cols, 3 Lt Cols, 3 or 4 Majs, and 3 or 4 company grade officers. Because both the United States and defense counsel have opportunities to challenge the members for cause and can each eliminate one officer peremptorily (i.e., for no reason at all), the above configuration will yield a balanced and diverse court-martial panel that will provide us a sufficient number of officers.
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> At Tab 2 is a listing of officers assigned to Hickam AFB. You may select any of these officers as court members. *Additionally, I have eliminated all officers who are not eligible to serve as court members (i.e., JAGs, chaplains, IGs or officers in the accused's unit).*

(Emphasis added.)

This court reviews jurisdictional issues de novo. *See United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). While the issue of the improper selection of officer court members was not raised at trial, jurisdictional issues are never waived. *See* R.C.M. 907(b)(1)(A). Article 25, UCMJ, gives a convening authority great discretion to select members to serve on court panels. Specifically, Article 25(d)(2), UCMJ, states in pertinent part: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *See also* R.C.M. 502(a)(1).

Even with such latitude, a convening authority's discretion is not unfettered. Failure to comply with Article 25, UCMJ, can constitute a jurisdictional defect, as when the convening authority does not personally select members. *See United States v. Ryan*, 5 M.J. 97, 101 (C.M.A. 1978); *United States v. Gaspard*, 35 M.J. 678, 681 (A.C.M.R. 1992). R.C.M. 201(b) provides: "[F]or a court martial to have jurisdiction . . . [t]he court-martial must be composed in accordance with [the Rules for Court-Martial] with respect to number and qualifications of its personnel."

The appellant contends that the information contained in the listing of the officers assigned to Hickam AFB (the alpha roster), standing alone, is insufficient to permit the convening authority to make informed decisions as to the qualifications of panel members. From this assertion, the appellant concludes that "the convening authority did not choose the members based on the criteria enumerated in R.C.M. 502(a)(1) and Article 25(d)(2)." As a result, the appellant contends that his court-martial lacked jurisdiction.

The appellant also contends that the convening authority should have been given court-member data sheets prior to his selection of panel members. Information contained in these sheets is often referred to as *Credit* data, after *United States v. Credit*, 2 M.J. 631

(A.F.C.M.R. 1976). However, *Credit* evaluated what sort of personal data on court members may be made available. *See United States v. Anderson*, 36 M.J. 963, 974 n.22 (A.F.C.M.R. 1993), *aff'd*, 39 M.J. 431 (C.M.A. 1994). Therefore, *Credit* data is a form of discovery and should not be interpreted as representing the quantum of information the SJA must provide to a convening authority prior to referral.

The appellant did not contest the selection of the officer members at trial. But he did contest the process the GCMCA used to select the enlisted members of the panel. In defending the challenge of the selection of the enlisted members, the government presented the testimony of the GCMCA who stated that he was aware of Article 25 and used that criteria when selecting all court members. He also stated that he tried to select a cross-section of the officers so that all the members are not from a particular unit or base. The military judge found that the government had shown, by competent evidence, that no impropriety occurred in the selection of the enlisted panel members.

On appeal, the appellant argues that because the SJA only provided the convening authority with a copy of the officers' alpha roster for Hickam AFB, the convening authority did not follow the Article 25, UCMJ, criteria when selecting the officer members. In determining whether members for a court-martial panel are improperly selected, our superior court has always focused its review on the process of putting together lists of nominees from the special court-martial convening authority or the GCMCA. *See United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000); *United States v. Roland*, 50 M.J. 66 (C.A.A.F. 1999); *United States v. Bertie*, 50 M.J. 489 (C.A.A.F. 1999); *United States v. White*, 48 M.J. 251 (C.A.A.F. 1998). In reviewing the process of selecting nominees in this case, we are not convinced that merely providing the convening authority the alpha roster is the best way of ensuring the convening authority complies with Article 25, UCMJ. In fact, we discourage this practice. Nevertheless, we find no evidence of impropriety in the nomination process. A paralegal from the SJA's staff testified that the reason the SJA's office used this selection process was "so there is no way anyone could possibly say that the [GCMCA] did not actually choose the members." Ironically, by attempting to prevent the perception that the SJA was pre-selecting court members, the SJA created the impression that the convening authority did not follow Article 25, UCMJ, criteria when selecting court members.

Additionally, our review of the record and appellate filings provides no grounds to draw that conclusion. We paid particular attention to voir dire and to the conduct of the members during the trial. We find nothing to suggest that any of them lacked the requisite qualifications. Indeed, convening authorities in the Air Force are often wing commanders, as is the case here. Part of their responsibilities is to be aware of the qualifications of the officers serving under them. In addition, they have ample means of ascertaining the fitness for court membership of members assigned to tenant units. "As a general principle, it is proper to assume that a convening authority is aware of his duties,

powers and responsibilities and that he performs them satisfactorily." *United States v. Townsend*, 12 M.J. 861, 862 (A.F.C.M.R. 1981).

Based on the testimony of the GCMCA, his affidavit, and the absence of any showing of bad faith by the SJA or the GCMCA, we are convinced that the members were not improperly selected. Moreover, the record provides no basis to infer that the convening authority selected court members who did not possess the requisite qualifications. The fact that the trial defense counsel did not object to the member selection process supports this conclusion. Therefore, we hold that the convening authority's selection of court members did not deprive the court-martial of jurisdiction.

As noted above, the GCMCA signed an affidavit stating that he considered the pretrial advice provided by the SJA. While the affidavit reemphasizes the fact that he considered Article 25, UCMJ, criteria when selecting officer court members, it does give us cause for concern. Specifically, the pretrial advice states, "I have eliminated all officers who are not eligible to serve as court members (i.e., JAGs, chaplains, IGs or officers in the accused's unit)." Pursuant to R.C.M. 912(f)(1), this statement is incorrect. Although we find error, we find no prejudice to the appellant.

In the case sub judice, the appellant alleges unlawful command influence, because the SJA intended to stack the panel by the omission of the career fields listed in his pretrial advice. He asserts that by excluding JAGs, chaplains, IGs, and members from his own unit, the SJA and thus, the convening authority, raised doubts about the fairness of the panel selection process in violation of Article 37, UCMJ. We disagree. While such officers are eligible to serve, they are very likely to be challenged by counsel if selected as court members.

"While the military defendant does not enjoy a Sixth Amendment right to a trial by 'impartial jury,' he or she does have a right to 'members who are fair and impartial.'" *Kirkland*, 53 M.J. at 24 (citing *Roland*, 50 M.J. at 68). However, an accused in the armed forces does not have a right to a court panel composed of a cross-section of the military community. *Roland*, 50 M.J. at 68 (citing *United States v. Lewis*, 46 M.J. 338, 341 (C.A.A.F. 1997)). Clearly, "members may not be selected solely on the basis of their rank." *Roland*, 50 M.J. at 68 (citing *United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991)). On a motion for selection of new court-martial members based upon improper exclusion of qualified members, the defense has the burden of "establishing the improper exclusion of qualified personnel from the selection process." *Kirkland*, 53 M.J. at 24 (citing *Roland*, 50 M.J. at 69). Once such exclusion is established, "the Government must show by competent evidence that no impropriety occurred when selecting [the] appellant's court-martial members." *Id.*

Court stacking is a form of unlawful command influence which we also review de novo. *See United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998); *United States v.*

*Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). "To raise the issue, the defense must (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). "An element of unlawful court stacking is improper motive. Thus, where the convening authority's motive is benign, systematic inclusion or exclusion may not be improper." *Upshaw*, 49 M.J. at 113. In raising the issue of court stacking, "more than mere allegation or speculation is required." *United States v. Brocks*, 55 M.J. 614, 616 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 11 (C.A.A.F. 2002).

Considering the record as a whole, with particular attention to the pretrial advice, we find no basis to infer an improper motive by the SJA or the convening authority. The excluded officers are those whose presence on a panel might itself raise questions about the fairness and impartiality of the proceeding. *See United States v. Hedges*, 29 C.M.R. 458 (C.M.A. 1960) (the presence on the panel of lawyers and inspectors general creates the appearance of a hand-picked court). *See also United States v. Sears*, 20 C.M.R. 377, 381 (C.M.A. 1956) (warned that lawyers on courts-martial could be reduced to the status of a "professional juror"); *Brocks*, 55 M.J. at 616-17 (upheld the exclusion of members from the accused's own unit). We find no evidence the convening authority selected members to achieve a desired result. Furthermore, evidence at trial and in the post-trial affidavit of the convening authority establishes he was well aware of the selection criteria contained in Article 25, UCMJ, and that he applied the criteria in the selection of the court members.

We recognize that, with arguably the exception of chaplains (*see* Air Force Instruction 52-101, *Planning and Organizing*, ¶ 2.1.7 (10 May 2005)), none of these officials are per se excluded from court member service. Therefore, we do not endorse such language as the SJA utilized in his pretrial advice. To the contrary, the convening authority should give appropriate consideration to all categories of members who may legitimately be assigned court-martial duty. Nevertheless, we conclude that in the case sub judice, the SJA and convening authority acted to promote trial efficiency and "to protect the fairness of the court-martial, not to improperly influence it." *Brocks*, 55 M.J. at 617. We conclude that the first criterion set forth in *Biagase* is not satisfied.

Even if one assumes arguendo that unlawful command influence occurred, the record and appellate filings provide no basis to conclude that the proceedings were unfair. We paid particular attention to the members' answers during voir dire, to the questions they asked of witnesses, and to their findings, which included findings by exceptions and substitutions. We find nothing from which to infer that they approached their duties without an open mind, or that they otherwise conducted themselves in such a way as to impugn their impartiality. Furthermore, trial defense counsel did not object to the court member selection process, vitiating any suggestion on appeal that the proceedings were burdened by the appearance of unfairness. Therefore, we conclude that the second and

third *Biagase* criteria are also not fulfilled. We are satisfied beyond a reasonable doubt that there was no unlawful command influence in this case and hold that the convening authority committed no error in this regard.

*Conclusion*

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the findings and sentence are

AFFIRMED.

JOHNSON, Judge (dissenting):

I must dissent from my learned brethren in the majority. The record lacks sufficient evidence to adequately resolve the jurisdictional challenge. R.C.M. 201(b) states a court-martial has jurisdiction if (1) it is convened by an official empowered to convene it, (2) *it is composed in accordance with the rules with respect to the number and qualifications of it personnel*, (3) each charge is referred to it by competent authority, (4) the accused is subject to court-martial jurisdiction, and (5) the offense is subject to court-martial jurisdiction. R.C.M. 502(a)(1) defines the eligibility requirements for court-martial service. Article 25, UCMJ, specifically provides that when "convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

In a motion at trial, the defense challenged the enlisted court member selection process. Specifically, the defense charged there was a systematic exclusion of minorities.[1] At the time of trial, the GCMCA had been in place for eight months. He testified that he selected the officer members of the court-martial panel by reviewing an *alpha roster* and selected the enlisted members by reviewing *court member data sheets*. The court member data sheets provided extensive information about the member including: name, date of birth, marital status, grade, MAJCOM [major command], date of rank, organization, date arrived station, race, duty position, total active federal service date, duty history, educational background, professional military education, previous court-martial experience, pending absences (leave, retirement, etc.), and specific tasks that would interfere with serving on a court-martial.

It appears the alpha roster contained considerably less personal data on prospective officer court members. The GCMCA testified he reviewed the alpha roster.

[1] The trial judge denied the defense motion.

He looked at the names, grades, duty titles, and organizations of the members. He stated he understood and had been told that he could select anybody on base within his command. Furthermore, he had been briefed by the SJA of the requirement to apply Article 25, UCMJ, criteria. He testified on the motion at trial that he had applied the criteria when selecting the court members.

In the pretrial advice, the SJA further advised the convening authority that he could select any of the officers assigned to Hickam AFB, however the SJA eliminated "all officers who [were] not eligible to serve as court-members (i.e., JAGs, chaplains, IGs or officers in the accused's unit)."

Post-trial, this Court requested additional information to clarify what criteria the GCMCA used to select the officer members. Specifically this Court asked what criteria the convening authority used other than name, rank, organization, and duty title. In response, appellate government counsel submitted an affidavit from the convening authority simply stating he considered the pretrial advice provided by his SJA.

We know the pretrial advice was flawed in that the SJA sua sponte eliminated otherwise eligible classes of officers from consideration to serve as court-martial members. What we don't know, however, is other than the name, grade, duty title, and organization, what else did the convening authority consider when he made his officer selections. Did he know the officers whom he selected, either personally or by reputation? Many of them were assigned outside the wing, such as: PACAF/XP, PACOM/J3, PACAF/SG, JICPAC, 65 AS, PACAF/PA, PACAF/SV. Could he have gleaned their age, education, training, experience, length of service, and judicial temperament based on the scant information presumably contained in the alpha roster? Without answers to these critical questions, I cannot say the convening authority was provided with adequate information about the qualifications of the prospective officer court members to sufficiently comply with the Article 25, UCMJ, mandate. Accordingly, this court-martial lacked jurisdiction.

OFFICIAL

ANGELA M. BRICE
Clerk of Court