

---

IN THE  
**Supreme Court of the United States**

---

REECE N. TSO,  
PRIVATE,  
UNITED STATES MARINE CORPS,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

---

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Armed Forces

---

**REPLY TO BRIEF IN OPPOSITION**

R. Andrew Austria  
LT, JAGC, U.S. Navy  
*Counsel of Record*

David P. Sheldon  
Law Offices of David  
P. Sheldon, PLLC  
100 M St, SE  
Ste. 600  
Washington, D.C.  
20003

Donald R. Ostrom  
CDR, JAGC, U.S. Navy  
U.S. Navy-Marine Corps  
Appellate Defense Division  
1254 Charles Morris St, SE  
Bldg. 58, Ste. 100  
Washington Navy Yard, D.C.  
20374  
202-685-7054  
rey.austria@navy.mil

*Counsel for Petitioner*

---

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

I. The government errs in defending the CAAF’s finding that no violation of Article 25 occurred ..... 2

II. The issue frequently recurs. .... 4

III. The lower court’s decisions in *Tso* and *Bartee* allow for the systematic exclusion of personnel on the basis of rank to endure. .... 5

IV. The government’s due process arguments regarding the disparate impact on women and racial minorities are a red herring. .... 6

V. The government’s “vehicle” arguments fail. ... 8

CONCLUSION..... 9

## TABLE OF AUTHORITIES

### United States Constitution

U.S. CONST. amend. V .....*passim*

### Supreme Court of the United States

*Batson v. Kentucky*, 476 U.S. 79 (1986) ..... 2  
*Burns v. Wilson*, 346 U.S. 137 (1953)..... 7  
*Dietz v. Bouldin*, 136 S. Ct. 1885 (2016) ..... 7, 8  
*In re Murchison*, 349 U.S. 133 (1955) ..... 4  
*Offutt v. United States*, 348 U.S. 11 (1954)..... 4  
*Powers v. Ohio*, 499 U.S. 400 (1991) ..... 6  
*Smith v. Massachusetts*, 543 U. S. 462 (2005)..... 8

### United States Court of Appeals for the Armed Forces

*United States v. Bartee*, 76 M.J. 141  
(C.A.A.F. 2017) .....*passim*  
*United States v. Daigle*, 1 M.J. 139  
(C.M.A. 1975)..... 1  
*United States v. Dowty*, 60 M.J. 163  
(C.A.A.F. 2004) ..... 7  
*United States v. Gooch*, 69 M.J. 353  
(C.A.A.F. 2011) ..... 6  
*United States v. Kemp*, 46 C.M.R. 152  
(C.M.A 1973)..... 7  
*United States v. McClain*, 22 M.J. 124  
(C.M.A. 1986)..... 6  
*United States v. Sullivan*, 74 M.J. 448  
(C.A.A.F. 2015) ..... 4  
*United States v. Ward*, 74 M.J. 225  
(C.A.A.F. 2015) ..... 4

**United States Navy-Marine Corps Court of  
Criminal Appeals**

*United States v. Bess*, No. 201300311 (N-M. Ct.  
Crim. App. filed Nov. 20, 2017)..... 5  
*United States v. Jeter*, No. 201700248 (N-M Ct.  
Crim. App. Aug. 22, 2017)..... 5

**Statutes**

10 U.S.C. § 825.....*passim*

**Other Authorities**

Department of Defense Joint Service Committee on  
Military Justice, *Report on the Method of Selection of  
Members of the Armed Forces to Serve on Courts-  
Martial* (1999). ..... 7

Petitioner, Private Reece N. Tso, United States Marine Corps, through counsel, hereby replies to the government's Brief in Opposition filed with this Court on December 6, 2017.

## INTRODUCTION

Discrimination in the selection of court [-martial] members on the basis of improper criteria threatens the integrity of the military justice system and violates the Uniform Code.... When rank is used as a device for deliberate and systematic exclusion of qualified persons, it becomes an irrelevant and impermissible basis for selection.<sup>1</sup>

The government does not dispute servicemembers across the globe will be affected by the answer to the question presented. Nor does it dispute the systematic exclusion of servicemembers based on rank frequently recurs during the member-selection process. Nor does it dispute that fewer women and racial minorities will serve on court-martial panels if this Court allows discrimination on the basis of rank to continue. Instead, it erroneously defends the U.S. Court of Appeals for the Armed Forces' (CAAF) holding that re-impounding the same defective court-martial panel does not violate Article 25, Uniform Code of Military Justice, or the Fifth Amendment's Due Process Clause. The government also asserts that Private Tso's case is an unsuitable vehicle to address the question presented and offers

---

<sup>1</sup> *United States v. Daigle*, 1 M.J. 139, 140 (C.M.A. 1975).

misleading procedural arguments for why this Court should deny review. As discussed below, the flaws in each of the government's tenuous positions highlight exactly why this Court must intervene. Private Tso's petition should be granted.

**I. The government errs in defending the CAAF's finding that no violation of Article 25 occurred.**

The government first suggests that the lower court's decision should stand because the improperly-selected members may have satisfied Article 25's eligibility requirements and this "alone would have been sufficient to dispose of this case in the absence of supplementary judicial doctrines developed by the CAAF."<sup>2</sup> But the eligibility of those who were chosen for court-martial service in this case is not at issue: it is the manner in which they were selected.

Take for example an all-white jury that was selected using procedures that excluded racial minorities in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). There is a chance that the selected jury members could still be fair and impartial, but how they were selected still calls into question the very fundamental fairness of the proceedings and the "public[']s confidence in the fairness of our system of justice[.]"<sup>3</sup> So too here.

Next, the government offers the convening authority (CA) cured any taint from the initial

---

<sup>2</sup> Br. in Opp'n 14.

<sup>3</sup> *Batson*, 476 U.S. at 87.

selection by merely considering a broader category of potential court-members the second time around.<sup>4</sup> The military judge and the courts below each determined that the CA's initial selection violated Article 25. But each erred when it determined that the CA's cursory consideration of a roster of officers<sup>5</sup> and additional questionnaires<sup>6</sup> was sufficient to cure the taint from the first selection.<sup>7</sup> Furthermore, the courts below ignored the fact that the Private Tso's panel was selected to satisfy the requirements for a Sergeant rather than for a Private.<sup>8</sup> Thus, the circumstances surrounding Private Tso's court-martial demonstrate the CA's motive to simply rubber stamp his earlier selections and keep the improperly-selected panel.

More telling is the fact that the government's Brief in Opposition does not even address whether re-panels the same defective court-martial panel creates the appearance of unfairness in court-martial proceedings. Such selection procedures undermine the public's confidence in the military justice system and calls into question whether servicemembers are treated fairly and in accordance with contemporary American standards of justice. "A fair trial in a fair

---

<sup>4</sup> Br. in Opp'n 15.

<sup>5</sup> Rosters contain only names and no other individual data.

<sup>6</sup> A court-martial questionnaire is several pages long and asks the respondent for detailed information regarding their age, family, career history, education, experience with the criminal justice system, as well as their beliefs.

<sup>7</sup> Appellate Exhibit XLV.

<sup>8</sup> Appellate Exhibit XLVI. The criterion for selection of E-5 (Sgt) members was that the date of rank (DOR) had to be at least 1 January 2009. Appellate Exhibit XLVI at 4.

tribunal is a basic requirement of due process... But [for due process] to perform its high function in the best way ‘justice must satisfy the appearance of justice.’”<sup>9</sup> Re-impairing the same defective court-martial panel does not satisfy the appearance of justice, Article 25, or the Due Process Clause. As such, this Court cannot let *Tso* stand.

## II. The issue frequently recurs.

The government does not contest the prevalence of Article 25 violations in the military justice system.<sup>10</sup> Instead, it contends that because the military courts can identify violations of Article 25 this Court need not intervene.<sup>11</sup> While the military courts are capable (at times) of identifying violations of Article 25, they fail to adequately address the problem. However, when a servicemember is tried by an improperly-selected panel, the lower court’s decisions in *United States v. Ward*, 74 M.J. 225 (C.A.A.F. 2015), *United States v. Sullivan*, 74 M.J. 448 (C.A.A.F. 2015), *United States v. Bartee*, 76 M.J. 141 (C.A.A.F. 2017), and *Tso* all but guarantee that accused servicemembers will not receive any relief. These decisions provide further incentive to CAs to violate Article 25.

Moreover, since the filing of Private *Tso*’s Petition, other CAs have continued to systematically exclude personnel on the basis of rank from court-

---

<sup>9</sup> *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

<sup>10</sup> Br. in Opp’n 16.

<sup>11</sup> Br. in Opp’n 16-17.



martial service.<sup>12</sup> The frequency within which such violations occur and the military courts' steadfast reluctance to provide relief demonstrate exactly why this Court must intervene.

### **III. The lower court's decisions in *Tso* and *Bartee* allow for the systematic exclusion of personnel on the basis of rank to endure.**

The panel-selection procedures utilized in *Tso* provide a proven and tested roadmap to CAs to circumvent Article 25. This Court needs to look no further than the pending Petition in *Bartee v. United States*, No. 17-175, for such an example.<sup>13</sup>

In the military justice system, the systematic exclusion of personnel based on rank from court-martial service is not used to ensure the fairness of the proceedings. Rather, CAs and their staff often believe that more senior court-martial panels are more likely to convict and/or adjudge harsher sentences.<sup>14</sup> This is the only plausible explanation

---

<sup>12</sup> See, e.g., *United States v. Jeter*, appeal docketed, No. 201700248 (N-M Ct. Crim. App. Aug. 22, 2017) (excluding officers below paygrade O-4, striking all black officers from the original convening order, and resulting in an all-white panel for an accused, black officer (paygrade O-2)).

<sup>13</sup> Another recent example is *United States v. Bess*, where the CA appears to have systematically excluded personnel on the basis of race in a case involving a black, accused servicemember. See *United States v. Bess*, No. 201300311 (N-M. Ct. Crim. App. filed Nov. 20, 2017) (selecting an all-white panel to try a black servicemember).

<sup>14</sup> See, e.g., *United States v. McClain*, 22 M.J. 124, 130-131 (C.M.A. 1986) (finding that the CA systematically excluded

for why such violations of Article 25 are so prevalent. This Court's failure to intervene and prohibit the discrimination on the basis of rank will only further encourage CAs to violate Article 25.

**IV. The government's due process arguments regarding the disparate impact on women and racial minorities are a red herring.**

“As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel. These rights are upheld through application of selection criteria contained in Article 25....”<sup>15</sup> To be clear, Private Tso is not raising a due process challenge before this Court on behalf of women and minorities who may be disparately impacted by such selection procedures, as in *Powers v. Ohio*, 499 U.S. 400, 415 (1991). Instead, he brings this matter to the Court's attention to underscore the importance of the question presented to the military justice system and to highlight how such selection procedures impacted his right to a fair trial pursuant to Article 25 and the Fifth Amendment's Due Process Clause.

Moreover, the disparate impact of such selection procedures on women and racial minorities only became apparent when the CAAF determined such selection procedures utilized in *Bartee* comport with Article 25. Given that the CAAF's decisions

---

personnel on the basis of rank in order to obtain harsher sentences).

<sup>15</sup> *United States v. Gooch*, 69 M.J. 353, 357 (C.A.A.F. 2011) (internal citations and quotations omitted).

apply to each of the armed services, the genuine and unintended consequences of such selection procedures as approved in *Tso* and *Bartee*, are no longer hypothetical, they are real.

“The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights.”<sup>16</sup> The need for a fair selection process is even more important given that the CA is responsible for selecting members for court-martial service.<sup>17</sup> A fair and impartial court-martial must begin with the fair and impartial selection of members.<sup>18</sup>

Whether re-panels a defective panel comports with due process is a question this Court should address. As this Court recognized in *Dietz v. Bouldin*, 136 S. Ct. 1885, 1895 (2016), there are “additional concerns in criminal cases” when a jury is re-panels after discharge.<sup>19</sup> Private Tso’s case

---

<sup>16</sup> *Burns v. Wilson*, 346 U.S. 137, 142 (1953).

<sup>17</sup> See *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (“Actual appointment of fair and impartial members is the duty and responsibility of the CA.”); *United States v. Kemp*, 46 C.M.R. 152, 156 (C.M.A. 1973) (“It was to the convening authority that Congress entrusted the decision as to its implementation.”).

<sup>18</sup> See Department of Defense Joint Service Committee on Military Justice, *Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial* 8 (1999) (“The fundamental goal of a military court-martial member selection system, as in civilian society, is to identify and select a panel of court-martial members that is competent, fair, and impartial.”).

<sup>19</sup> “Given additional concerns in criminal cases, such as attachment of the double jeopardy bar, we do not address here

poses such concerns, making his case worthy of review.

## V. The government’s “vehicle” arguments fail.

The government advances two “vehicle” arguments against granting certiorari, neither of which should preclude review.

First, the government asserts that Private Tso’s case is a poor vehicle to address the question presented because the lower court summarily affirmed based on its decision in *Bartee*.<sup>20</sup> However, this Court has granted certiorari in cases raising the same question presented, despite the lower court summarily affirming some cases in light of one of its recent decisions. Such was the case in this Court’s recent grants of certiorari in *Dalamazzi v. United States*, No. 16-961, *Cox, et al., v. United States*, No. 16-1017, and *Ortiz v. United States*, No. 16-1423. Moreover, the government’s vehicle arguments in its Brief in Opposition in *Bartee* do not apply here. Private Tso was tried and convicted by an improperly-selected panel.

Second, the government argues that because the lower court did not conduct a harmless error analysis, Private Tso’s case is an unsuitable vehicle to address a harmless-error issue.<sup>21</sup> However, this

---

whether it would be appropriate to recall a jury after discharge in a criminal case.” *Bouldin*, 136 S. Ct. at 1895 (citing *Smith v. Massachusetts*, 543 U. S. 462, 473-74 (2005)).

<sup>20</sup> Br. in Opp’n 18.

<sup>21</sup> Br. in Opp’n 18.

Court is more than capable of performing a harmless-error review should it grant certiorari and correctly decide that re-impounding the same defective court-martial panel violates Article 25 and the Fifth Amendment's Due Process Clause.

## CONCLUSION

Servicemembers sacrifice many of their constitutional rights in order to defend our Nation. The Uniform Code of Military Justice stands as a testament to Congress' desire to protect servicemembers' statutory and constitutional rights to a fair a trial. But the lower court's decision effectively strips servicemembers of due process, as well as the important protections Congress conferred on military personnel when it enacted Article 25. Therefore, Private Tso respectfully requests that this Court grant certiorari, reverse the decision of the lower court, and hold that re-impounding the same court-martial panel that was originally dismissed due to the systematic exclusion of rank violates Article 25, Uniform Code of Military Justice, and the Fifth Amendment's Due Process Clause.

Respectfully submitted,

R. Andrew Austria  
LT, JAGC, U.S. Navy  
*Counsel of Record*

Donald R. Ostrom  
CDR, JAGC, U.S. Navy  
U.S. Navy-Marine Corps  
Appellate Defense Division

1254 Charles Morris St, SE  
Bldg. 58, Ste. 100  
Washington Navy Yard, D.C.  
20374  
202-685-7054  
rey.austria@navy.mil

David P. Sheldon  
Law Offices of David  
P. Sheldon, PLLC  
100 M St, SE,  
Ste. 600  
Washington, D.C. 20003

*Counsel for Petitioner*