IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201700248
Willie C. JETER, Lieutenant Junior Grade (O-2) U.S. Navy Appellant	)	USCA Dkt. No. 22-0065/NA

TYLER W. BLAIR
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433
Bar no. 37601

GREGORY A. RUSTICO
Lieutenant, JAGC, U.S. Navy
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686
Bar no. 37338

JOSEPH M. JENNINGS
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 37744

BRIAN K. KELLER
Deputy Director
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

Index of Brief

Table of Authorities

Page

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES

UNITED STATES CIRCUIT COURTS OF APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801–946 (2012)

Issue Presented

WHETHER THE CONVENING AUTHORITY VIOLATED LTJG JETER'S EQUAL PROTECTION RIGHTS, OVER OBJECTION, WHEN HE CONVENED AN ALL-WHITE PANEL FOR A MINORITY ACCUSED USING A RACIALLY NON-NEUTRAL PROCESS FOR SELECTION AND PROVIDED NO EXPLANATION FOR THE MONOCHROMATIC RESULT BEYOND A NAKED AFFIRMATION OF GOOD FAITH.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2016), because Appellant's approved sentence included a dismissal and confinement for more than one year. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of officers sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexual harassment, drunken operation of a vehicle, sexual assault, extortion, burglary, conduct unbecoming an officer and gentleman, communicating a threat, and unlawful entry, in violation of Articles 92, 111, 120, 127, 129, 133, and 134, UCMJ, 10 U.S.C. §§ 892, 911, 920, 927, 929, 933, 934 (2012). The Members sentenced Appellant to twenty years of confinement and a

dismissal. The Convening Authority approved the sentence and, except for the dismissal, ordered it executed.

On initial review, the lower court affirmed the findings and sentence. *United States v. Jeter* (*Jeter I*), 78 M.J. 754, 780 (N-M. Ct. Crim. App. 2019).

Appellant petitioned for review, and this Court remanded for further consideration in light of *United States v. Bess*, 80 M.J. 1 (C.A.A.F. 2020). *United States v. Jeter*, 80 M.J. 200, 200 (C.A.A.F. 2020).

On remand, the lower court ordered the production of declarations from the Convening Authority, Acting Convening Authority, and Staff Judge Advocate. (J.A. 86–88.) The United States produced the Declarations, and they were attached to the Record. (J.A. 89–103.)

The lower court affirmed the findings and sentence and held the Convening Authority did not violate Appellant's equal protection or due process rights. *United States v. Jeter* (*Jeter II*), 81 M.J. 791, 794 (N-M. Ct. Crim. App. 2021).

Appellant petitioned this Court for review, which it granted. *United States v. Jeter*, No. 22-0065/NA, 2022 CAAF LEXIS 327 (C.A.A.F. May 3, 2022). Appellant filed his merits Brief. (Appellant's Br., July 11, 2022.)

Statement of Facts

A. The United States charged Appellant with sexual offenses.

The United States charged Appellant with nineteen Specifications, including violation of a lawful general order, drunken or reckless operation of a vehicle, sexual assault, abusive sexual contact, indecent exposure, extortion, burglary, conduct unbecoming an officer and gentleman, communicating a threat, and unlawful entry. (J.A. 44–47.)

B. Appellant objected to the composition of the Members Panel. The Military Judge found no evidence of systematic exclusion or that the Convening Authority considered any criteria other than those in Article 25, UCMJ.

1. The Acting Convening Authority detailed eight Members. Six identified as Caucasian males, and two did not identify their race.

The Convening Authority referred the case to a general court-martial under General Court-Martial Convening Order (GCMCO) 1-17. (J.A. 48.) Around three months later, the Acting Convening Authority amended the Convening Order, selecting eight Members for Appellant's court-martial under GCMCO 1A-17. (J.A. 49–50, 92, 95–97.) Six Members self-identified as Caucasian males. (J.A. 105, 133, 142, 151, 160, 169.) The remaining two Members did not identify their race or gender. (J.A. 114–131.)

2. The Convening Authority detailed one additional Member after the Military Judge expressed concern about the small size of the venire.

The Convening Authority, not the Chief of Staff, detailed one additional Member under GCMCO 1B-17. (J.A. 50.) He detailed the Member after the Military Judge expressed concern on the Record about the size of the venire and potential to break quorum. (J.A. 51–53.) The additional Member self-identified as a Caucasian male. (J.A. 178.)

3. Appellant objected to the Panel's composition. The Military Judge stated, based on the Questionnaires, the Members all "appear[ed]" to be white males. Appellant neither requested nor offered evidence. The Military Judge denied the Motion.

Before the Military Judge first called the Members into court or voir dire, Appellant, an African American male, objected to the entire panel, claiming systematic exclusion of females and minority Members. (J.A. 54, 58; R. 176–77.) The Military Judge then discussed the apparent race of the Members, "Looking at the questionnaires" and "looking at what people have sort of self-identified themselves, Question 7 . . . . Without asking people directly what do you consider their [sic] race . . . and background [i]t appears that they [are] all white men." (J.A. 54–55.) The Military Judge continued, "[T]he fact that [the panel] is all white men . . . [does not show improper] selection because the underlying Article 25 [criteria] . . . aren't something that you were attacking." (J.A. 57.) After denying the Motion, and still before the Members entered court, the Military Judge

stated "[if I were] the Convening Authority of this region I wouldn't [exclude minorities and females] twice." (J.A. 59.)

The Military Judge did not elaborate how he knew the race of the two Members who did not provide racial information. (J.A. 54–58, 114, 124.)

The Military Judge asked Appellant if he had any support for systematic exclusion "other than just the bare makeup of the panel." (J.A. 55–56.) Appellant responded, "No, Sir. That's all we have." (J.A. 56.)

Following Appellant's objection to the panel, the Military Judge advised him, "[I]t's your motion. You have ways to attempt to try to do this . . . [you can] put[] on evidence or call[] witnesses." (J.A. 57–58.) Appellant stated he would "stand on our motion as it is." (J.A. 58.)

4. Appellant never requested or offered evidence about past racial compositions of court-martial panels by the Convening Authority, statistics about the pool of individuals available for selection, or other similar evidence.

Appellant never offered or requested any general or specific racial statistics for potential members at trial. (J.A. 54–63.)

Appellant never requested information about the racial compositions of courts-martial panels detailed by the Convening Authority, or any other convening authority. (J.A. 54–63.) Nor did Appellant request a fact-finding hearing to develop facts for a *Castaneda* claim. (J.A. 54–63.) Appellant never moved to

attach evidence about the selection process for his panel or the racial composition of his panel. (J.A. 54–63.)

Appellant never moved to compel data showing the racial breakdown of servicemembers available for selection by the Convening Authority in his case, or any other convening authority, over any period of time. (J.A. 54–63.) He also never requested data related to the racial breakdown of all court-martial panels throughout the Navy or military over any period of time. (J.A. 54–63.)

5. During voir dire, Appellant renewed his objection to the Panel's makeup and provided a transcript from an unidentified case. The Military Judge reaffirmed his ruling.

During individual voir dire, Appellant renewed his objection to the Panel, offering the Military Judge a six-page transcript from an unidentified court-martial. (J.A. 61, 64–69.) Appellant said the transcript was from another case referred by the same Convening Authority, where the members appeared to be white and the counsel and judge discussed that the accused was African American. (J.A. 61, 64–69.) The Military Judge recognized the name of a trial counsel, thought he knew "who the military judge [was]," and would "take it on good faith this is a Norfolk case." (J.A. 62.)

Appellant argued the document, combined with the composition of the Panel and the fact that the Members' questionnaires included questions about race, required the United States to demonstrate an absence of improper considerations.

(J.A. 61.) The Military Judge reaffirmed his Ruling, concluding: "I don't see any unlawful Article 25 issue here . . . there is no evidence [the CA is] not using the Article 25 criteria . . . . I still don't see the systematic exclusion of [eligible members based on race or gender]." (J.A. 63.)

6. Appellant never questioned the Members about their racial identity during voir dire.

The Parties conducted individual voir dire of each of the nine Members. (*See* R. 223–310.) Despite questioning all nine Members, Appellant never asked the two Members who had not self-identified about their racial identity. (J.A. 114–115, 124–125; R. 243–265.)

Appellant never questioned any Members about their racial identity or background. (R. 223–310.)

C. The Members returned mixed findings and sentenced Appellant.

The Members convicted Appellant of sexually harassing, threatening, extorting, and sexually assaulting Victim 2; sexually assaulting and unlawfully entering the residence of Victim 1; unlawful entry and burglary of Victim 3's residence; two Specifications of drunken operation of a vehicle; and two Specifications of conduct unbecoming an officer and gentleman. (J.A. 70–71.)

The Members sentenced Appellant to twenty years confinement and a dismissal. (J.A. 72.)

D. On appeal, Appellant moved to attach a Declaration to the Record, but again never moved to compel or attach statistical evidence to support his claims.

After the case was docketed at the lower court, Appellant filed a Motion to Attach a Declaration from Commander Czaplak, the Executive Officer of Defense Service Office Southeast, to the Record. (J.A. 80.)

Attached to the Declaration was a year-old letter Commander Czaplak wrote to the Convening Authority, as defense counsel for an African-American accused, asking him to "include minority members in any . . . convening order" in his client's case. (J.A. 82–85.) According to Commander Czaplak, the Convening Authority then detailed several minority members to his client's panel. (J.A. 83.)

Commander Czaplak's Declaration alleged the Convening Authority "did not detail any African-American members" to four courts-martial: *Rollins*, *Bess*, *Jeter*, and *Johnson*. (J.A. 83.) He did not indicate how he knew the racial make-up of the panels for the three other courts-martial. (J.A. 82–83.) The Declaration did not state whether Commander Czaplak was detailed defense counsel in those other cases, whether he was present in the court room, or the basis of his claims. (J.A. 82–83.) Nor did the Declaration attach evidence directly supporting his claims about the selection and racial composition of those panels. (J.A. 82–83.)

Appellant never moved to attach or compel production of statistical evidence for available member pools in this or other cases, panels of courts-martial actually

referred by the Convening Authority, other courts-martial in the Navy, the racial makeup of the Navy, or any evidence beyond the Czaplak Declaration.

E. The lower court affirmed the findings and sentence. This Court remanded for consideration in light of *Bess*.

In Appellant's first appeal, the lower court affirmed the findings and sentence. *Jeter I*, 78 M.J. at 780. In response to Appellant's Petition, this Court remanded the case for consideration in light of *United States v. Bess*, 80 M.J. 1 (C.A.A.F. 2020). *United States v. Jeter*, 80 M.J. 200, 200 (C.A.A.F. 2020).

F. On remand, the lower court ordered Declarations from the Convening Authority, Acting Convening Authority, and Staff Judge Advocate about the selection of Members. Appellant made no motion to compel or attach statistical information about that command, the Navy, or other courts-martial.

On remand, the lower court ordered the production of declarations from the Convening Authority, Acting Convening Authority, and Staff Judge Advocate. (J.A. 86–88.) At the time, the court did not explain the legal basis for ordering further factfinding. (*See* J.A. 86.)

In accordance with the lower court's order, the Convening Authority and his staff provided their Declarations in August 2021—over four years after they issued the Convening Orders. (J.A. 86–88, 90, 94.)

Appellant never moved to attach or compel production of statistical evidence for available members or other courts-martial referred by the Convening Authority, other courts-martial in the Navy, or the racial makeup of the Navy.

1. The Declarations described the Member selection process.

The Convening Authority and his staff explained that first, the Convening Authority reviewed all questionnaires from prospective members to ensure they satisfied Article 25. (J.A. 91.) The prospective members were provided by "commands resident within Navy Region Mid-Atlantic in accordance with . . . the Convening Authority's published instruction." (J.A. 98.)

The Convening Authority used questionnaire templates provided by the Chief Trial Judge of the Navy-Marine Corps. (J.A. 98–99.) One of the standard questionnaires "did not include race as a question" while another "included race as a question;" though "potential members frequently declined to answer this question." (J.A. 99.) Next, the Staff Judge Advocate "provided a slate of potential members for consideration," including a list of names and questionnaires, to the Convening Authority for approval for General Court-Martial Convening Order (GCMCO) 1-17. (J.A. 91, 95–96, 98–99.)

Standing convening orders, including GCMCO 1-17, were "not intended for use in any particular court-martial." (J.A. 100.) The Staff Judge Advocate prepared the amended convening orders the same way as a standing convening order by making a list of names from the "available population that were all senior to the accused and available for the expected trial dates." (J.A. 100.)

The Convening Authority did not "recall being aware of, or otherwise able to infer, the race of the members selected" for any of the convening orders in this case: GCMCO 1-17, GCMCO 1A-17, or GCMCO 1B-17. (J.A. 91–92, 95.)

Because the Convening Authority reviewed all questionnaires, he "may have been aware of the race of some of the prospective members . . . if they provided that information." (J.A. 93.) But he did "not recall any specific discussion on the diversity make-up" of the panels. (J.A. 93.)

2. The Declarations explained the Acting Convening Authority amended the standing Convening Order, GCMCO 1-17, replacing it with GCMCO 1-17A, and did so by selecting from a pool of prospective members provided by the Staff Judge Advocate.

The Acting Convening Authority amended GCMCO 1-17 and replaced it with GCMCO 1A-17. (J.A. 92.) It was "not uncommon for a GCMCO to be amended due to lack of availability for the originally assigned members." (J.A. 92.) He could not recall why GCMCO 1-17 was amended or if he knew the racial makeup of GCMCO 1-17A. (J.A. 96.)

The Acting Convening Authority, "reviewed the list of eligible [Members and their questionnaires] and selected the members from this pool based on best-qualified attributes which to my recollection included experience, length of service, and judicial temperament." (J.A. 96.)

The Convening Authority's "standard practice" was to "provide a venire of eight potential members to make five for quorum." (J.A. 100.)

3. The Declarations explained the Convening Authority and his staff used statutory criteria under Article 25 to select potential Members. They did not screen Members based on race.

The Convening Authority explained in his Declaration that in selecting members he first reviewed "all members questionnaires to ensure [the command] selected qualified members based on statutory criteria." (J.A. 100.)

Neither the Convening Authority nor the Acting Convening Authority were provided, nor did they ever ask for, "information about the racial makeup of any court-martial venire." (J.A. 102–103.) Member selection was conducted in line with "statutory requirements" of Article 25. (J.A. 94; *see also* J.A. 95–96, 102.)

The Convening Authority made no "effort to screen potential members based on race." (J.A. 94.) The Acting Convening Authority "was neither aware of nor considered the Appellant's race as a criteria for detailing potential eligible members for this court-martial." (J.A. 97.)

The Staff Judge Advocate stated: "race never entered any discussion of potential members for any court-martial." (J.A. 99.) He could not recall "the convening authority in any case to ever have been aware of or discussed the race of any member of any court-martial." (J.A. 101.)

G. The lower court found no evidence of purposeful exclusion in the Declarations of the Convening Authority and his staff, declined to extend *Batson*, and affirmed the findings and sentence.

The lower court affirmed the findings and sentence. *Jeter II*, 81 M.J. at 794. The court held that "the mere absence of minority members within the venire selected by the convening authority . . . does not establish a prima facie case of purposeful discrimination" and declined to extend *Batson*. *Id.* at 796.

1. Based on information outside the Record of Trial, the lower court found two Members on the Standing Convening Order were African American.

Appellant cited two online biographies in his Brief to the lower court, arguing two Members on the standing Convening Order were African American. (Appellant's Br. at 5 n.2, Jan. 4, 2021.) The United States opposed this citation of extra-Record facts. (Appellee's Answer at 12–13, May 4, 2021.)

The Record contains no evidence of the racial makeup of the Standing Convening Order.

Appellant never moved to attach this factual evidence to the Record, but the lower court nonetheless stated in its opinion that the two Members were African American. *Jeter II*, 81 M.J. at 797.

2. The lower court's opinion cited Articles 25 and 37 and found Appellant's evidence sufficient to question the presumption of regularity, ordered declarations, but found the Declarations showed the selection process properly used Article 25.

The lower court's opinion for the first time explained its reason for ordering Declarations: it said that while convening authorities are presumed to act in accordance with Articles 25 and 37, "there appeared to be at least some evidence of actual exclusion (even if not purposeful) of members of the accused's own racial group," thus they found evidence "sufficient to question the presumption of regularity" and wanted the "rationale for selection of the members." *Jeter*, 81 M.J. at 795, 797.

The lower court reasoned that if the Convening Authority (1) knew "the race of the members on the standing convening order," (2) "specifically excluded such minority representation on the venire through the amended convening orders," and (3) "knew the race of the accused," it would "tend to show a purposeful, albeit not systematic, exclusion of [African American] members." *Id.* at 797.

But the court then found the Declarations from the Convening Authority and his staff rebutted an inference of purposeful exclusion of African Americans. *Id.* at 797–98. All three officers involved in the member selection process declared (1) "they were not aware of the race of the members detailed in either the standing convening order or the amended convening orders," and (2) they employed the Article 25 criteria and never discussed the accused's or the member's race. *Id.*

Further, the lower court reasoned the Convening Authority's replacement of the Standing Convening Order failed to show purposeful discrimination: "It is quite common that several, and sometimes *all*, of the original members are not available for what eventually becomes the trial date. In such cases, the convening authority routinely amends the convening order to remove the unavailable members and to select replacements." *Id.* at 796; *see also id.* at 798 ("While there may have been a need to switch out the members on the standing order to allow for nominating and seating new members, this is common practice especially in large jurisdictions such as Navy Region Mid-Atlantic.").

3. The lower court found the Czaplak Declaration failed to establish a prima facie case of systematic exclusion as it failed to show the Convening Authority used a non-race neutral selection process.

The lower court found the Czaplak Declaration did "not include any information as to the exclusion, improper or not, of black members" resulting in the alleged all-white panels in the four cases, including Appellant's case. *Id.* at 797. The Court found no evidence demonstrating the Convening Authority used a non-race neutral selection process or had a racial animus: he did not "kn[o]w the race of the members selected—let alone purposefully cho[o]se not to select members of the particular accused's cognizable racial group—or even kn[o]w the race of the accused." *Id.*

The lower court further noted the officer who "replaced the standing panel with new members in Appellant's case" were not "the same officer mentioned in the three other cases." *Id.* Thus, the evidence was insufficient "to establish a prima facie case of systematic exclusion of black members in Appellant's case." *Id.*

H. Appellant never offered or moved to compel statistical evidence supporting his claim of systematic exclusion.

Appellant filed (1) an Initial Brief at the lower court; (2) a Motion to Attach the Czaplak Declaration; (3) a Reply Brief at the lower court; (4) a Remand Brief at the lower court; and (5) a Reply Brief on remand. (Appellant's Br., Mar. 5, 2018; Appellant's Mot. to Attach, Mar. 5, 2018; Appellant's Reply, Aug. 10, 2018; Appellant's Br., Jan. 4, 2021; Appellant's Reply, June 14, 2021.)

He never moved to produce or attach statistics supporting his claim of systematic exclusion.

Argument

APPELLANT'S CASE IS NOT MATERIALLY DIFFERENT THAN *BESS*, SO THE OUTCOME SHOULD BE THE SAME. THE COURT NEED NOT EXPAND *CASTANEDA* OR *BATSON* TO MEMBER SELECTION BECAUSE THE ANECDOTES AND LACK OF STATISTICAL EVIDENCE APPELLANT PROVIDES FALL SHORT OF A PRIMA FACIE CASE. MOREOVER, THE DECLARATIONS DISPROVE THE PURPOSEFUL EXCLUSION REQUIRED TO MAKE A PRIMA FACIE CASE. THE MILITARY JUDGE CORRECTLY FOUND "NO DISCRIMINATORY INTENT."

A. The standard of review is de novo.

Whether a convening authority's selection of a court-martial venire violated the Fifth Amendment's implicit guarantee of equal protection is reviewed de novo. *United States v. Bess*, 80 M.J. 1, 7 (C.A.A.F. 2020).

B. To establish an equal protection violation, an appellant must establish a prima facie case of purposeful racial discrimination.

"[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 239 (1976).

1. The equal protection component of the Fifth Amendment applies to a convening authority's selection of members.

The Fifth Amendment's equal protection component applies to a convening authority's selection of members under Article 25, UCMJ, 10 U.S.C. § 825 (2012).

See, e.g., *United States v. Loving*, 41 M.J. 213, 283–86 (C.A.A.F. 1994) (conducting equal protection analysis of member selection).

2. Proving a prima facie case of an equal protection violation requires proof of disparate impact on similarly situated individuals and discriminatory intent.

In multiple criminal law contexts, equal protection violations require proof of an action that (1) has a discriminatory effect; and (2) was motivated by a discriminatory intent or purpose. *See*, *e.g.*, *United States v. Armstrong*, 517 U.S. 456 (1996) (selective prosecution); *United States v. Bass*, 536 U.S. 862 (2002) (per curiam) (selective prosecution); *United States v. Washington*, 869 F.3d 193 (3rd Cir. 2017) (selective enforcement); *McCleskey v. Kemp*, 418 U.S. 279 (1987) (capital punishment); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (peremptory challenges).

An appellant alleging an equal protection violation bears the burden to make a prima facie case, including proving that "the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey*, 481 U.S. at 292; *Washington*, 426 U.S. at 241; *see also Batson*, 476 U.S. at 93.

In the selective prosecution and enforcement contexts, the standard requires "clear evidence of discriminatory effect and discriminatory intent." *See, e.g.*, *Washington*, 869 F. 3d at 214.

In other contexts, like the use of peremptory challenges, the discriminatory effect can create an inference of discriminatory intent. *See, e.g.*, *Parks v. Chapman*, 815 F. App'x 937, 951 (6th Cir. 2020) (noting prosecutor's removal of two African Americans but not two others "raise[d] an inference of discrimination").

In limited contexts, courts may accept statistics as proof of discriminatory intent. For example, in venire selection, statistics of significant underrepresentation over a significant period of time can implicitly establish purposeful discrimination. *Castaneda v. Partida*, 480 U.S. 482 (1976). The Supreme Court has also accepted statistics to prove statutory violations under Title VII of the Civil Rights Act of 1964. *Bazemore v. Friday*, 487 U.S. 385, 400–01 (1986) (Brennan, J., concurring).

3. An accused bears the burden of proving a prima facie equal protection case against a convening authority by "clear evidence"—or at minimum a preponderance of evidence.

The default burden of proof "on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence." R.C.M. 905(c).

Sometimes, a different burden applies. Precedent establishes a different burden for unlawful command influence: there, an accused bears the burden of

showing "some evidence" to raise a claim. *United States v. Bartee*, 76 M.J. 141, 143 (C.A.A.F. 2017.)

To raise a prima facie equal protection claim under the *Batson* framework, an accused's burden of proof is low. *See United States v. Collins*, 551 F.3d 914, 920 (9th Cir. 2009) ("At the prima facie stage of a *Batson* challenge, the burden of proof required of the defendant is small.").

As explained below, a presumption of regularity applies to a convening authority's selection of members, raising the default preponderance of the evidence burden of proof to the "clear evidence" standard. *See Bess*, 80 M.J. at 10; *Armstrong*, 517 U.S. at 464.

4. Once an appellant establishes a prima facie case of an equal protection violation, the burden shifts to the government to rebut the claim.

If an appellant establishes a prima facie equal protection violation, "the burden of proof shifts to the [government] to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972).

C. Appellant fails to establish a prima facie case: the Military Judge's Ruling found the Convening Authority acted with no discriminatory intent, and Appellant fails to overcome the presumption of regularity.

1. This Court is bound by the Military Judge's Finding of Fact that no systematic exclusion occurred as his Finding of Fact is not clearly erroneous.

Appellate courts are bound by the findings of trial judges unless they are clearly erroneous. *United States v. Benedict*, 55 M.J. 451, 454 (C.A.A.F. 2001).

In *United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004), the trial judge's findings of fact—because they were not clearly erroneous—bound this Court when it reviewed whether the convening authority improperly selected a court-martial panel. *Id.* at 171. The Court relied on the trial judge's findings of fact, supported by the record, concerning the convening authority's member selection to determine the convening authority properly applied Article 25. *Id.* at 174.

Here, the Military Judge found no evidence of systematic exclusion of minority Members and "no evidence" that the Convening Authority was "not using the Article 25 criteria." (J.A. 56, 58, 63.) Appellant presented no evidence at trial undermining the Military Judge's finding. Instead, Appellant offered a six-page transcript from another, unidentified court-martial, which failed to identify the convening authority or the court-martial. (J.A. 61–62, 64–69.)

Although Appellant moved to attach the Czaplak Declaration on appeal, the assertion of three other cases without African American members is insufficient to

show the Military Judge's Findings of Fact were clearly erroneous. (J.A. 82–85.) Appellant failed to attach or move to compel any evidence, beyond the ordered Declarations, of how the Convening Authority conducted member selection.

As in *Dowty*, this Court is bound by the trial court's findings of no evidence of systematic exclusion of minority members, and no evidence the Convening Authority selected based on improper criteria. *See Benedict*, 55 M.J. at 454. Appellant's Fifth Amendment claim fails.

2. This Court can dispose of Appellant's claim because he fails to show clear evidence to overcome the presumption of regularity.

a. The presumption of regularity accords judicial deference to the discretionary actions and decisions of convening authorities, taken in discharging their official duties.

"[T]he presumption of regularity supports that in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (presumption applied to Department of State official's actions). The Supreme Court extends this presumption to "prosecutorial decisionmaking" in the civilian justice system. *Hartman* v. *Moore*, 547 U.S. 250, 263 (2006); *see*, *e.g.*, *Reno* v. *American-Arab Anti- Discrimination Comm.*, 525 U.S. 471, 489–490 (1999); *Armstrong*, 517 U.S. at 464–66 (according "[j]udicial deference to the decisions of federal executive officers").

This Court affords convening authorities similar deference: "[Courts] apply the presumption of regularity and assume that the convening authority was aware of his responsibilities and performed them properly." *United States v. McClain*, 22 M.J. 124, 133 (C.M.A. 1986) (Cox, J. concurring); *United States v. Scott*, 66 M.J. 1, 4 (C.A.A.F. 2008); *cf. Hartman*, 547 U.S. at 263 (noting "judicial intrusion into executive [level agent] discretion of such high order should be minimal").

b. An appellant must show clear evidence—or at minimum a preponderance—to overcome the presumption of regularity in an equal protection claim. To the extent the lower court applied the unlawful command influence "some evidence" standard to this issue, it was incorrect.

To overcome this presumption for an equal protection claim, an appellant must show clear evidence the convening authority deviated from the prescribed criteria of Article 25. *See Armstrong*, 517 U.S. at 464. "Clear evidence . . . [is] more than just a preponderance . . . 'clear' evidence or 'clear and convincing' evidence [is] the same thing." *United States v. Smith*, 231 F.3d 800, 808 (11th Cir. 2000), *cert. denied*, 532 U.S. 1019 (2001); *see also Conley v. United States*, 5 F.4th 781, 789–90 (7th Cir. 2021) (discussing clear evidence as a "rigorous standard" greater than preponderance of the evidence).

This Court has never explicitly stated an appellant's burden of proof to overcome the presumption of regularity. *See United States v. Wise*, 6 C.M.A. 472, 478 (C.M.A. 1955) (applying presumption but not discussing evidentiary

standard); *United States v. Del Carmen Scott*, 66 M.J. 1, 4 (C.A.A.F. 2008) (same); *Bess*, 80 M.J. at 10 (same); *United States v. Gonzalez*, 79 M.J. 466, 471 (C.A.A.F. 2020) (Maggs, J., dissenting) (same).

The lower court's post-hoc explanation of its Order to produce the Declarations seems to suggest it used a "some evidence" standard to overcome the presumption of regularity, which would be incorrect under equal protection precedent. *See Jeter II*, 81 M.J. at 797. On the other hand, the lower court's citation of the "some evidence" standard may suggest that it ordered further factfinding through the lens of unlawful command influence—a much lower burden on the defense to shift the burden to the United States.

Further complicating the lower court's post-hoc explanation, regardless of whether it ordered factfinding under equal protection or unlawful command influence—and regardless of whether it knew yet what equal protection test might apply to these facts—it shifted the burden because "there appeared to be at least some evidence of actual exclusion (even if not purposeful) . . . of the accused's own racial group." *Id.* at 797. But unlawful command influence and equal protection both require intentional—that is, purposeful—exclusion contrary to either Article 25, or on the basis of race. So the lower court's explanation is at best

unhelpful and may more indicate that court ordered factfinding "just to be sure" the Article 25 process was copacetic.[1]

The Supreme Court requires "clear evidence" to overcome the presumption of regularity, which is greater than a preponderance of the evidence— both of which are greater than "some evidence." *See Chem. Found., Inc.*, 272 U.S. at 14–15; *Smith*, 231 F.3d at 808. At minimum, the lower court should have applied R.C.M. 905's default preponderance of the evidence standard if their order for factfinding was predicated on an equal protection analysis. Regardless, as explained below, Appellant's claim fails either burden.

c. Like in *Armstrong* and *Bess*, Appellant's anecdotal evidence is not "clear evidence"—or even a preponderance of the evidence—to overcome the presumption of regularity this Court already applied to this same Convening Authority during the same time timeframe.

In *Armstrong*, the Supreme Court relied on the presumption of regularity afforded to prosecutors to reject a claim of racially discriminatory selective prosecution. 517 U.S. at 458. The defendants' claim rested primarily on an affidavit and "study" claiming all twenty-four crack-cocaine cases closed by the public defender's office that year were African American. *Id.* at 459. This did not

[1] The United States rejects Appellant's implicit contention that every time the Czaplak Declaration is attached on appeal, or members of the accused's race are not on a court-martial panel, further factfinding or a *DuBay* is needed.

constitute "clear evidence to the contrary" to overcome the presumption of regularity because it failed to show any "individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted." *Id.* at 464–65, 470.

In *Bess*, this Court was faced with the same "anecdotal allegations" from Commander Czaplak regarding the race of members selected by the Convening Authority that Appellant now offers. *Compare* 80 M.J. at 5 n.2 *with* (J.A. 80–85). The court found the affidavit insufficient and reasoned, "[T]he presumption of regularity requires us to presume that [the Convening Authority] carried out the duties imposed upon him by the Code and the Manual." *Id.* at 10 (citing *Wise*, 6 C.M.A. at 478).

As in *Bess* and *Armstrong*, Appellant presented insufficient evidence to overcome the presumption of regularity afforded to convening authorities. *Compare* (J.A. 56 (finding no evidence Convening Authority purposefully excluded minority members, "other than just the bare makeup of the panel")), *with Bess*, 80 M.J. at 11 ("[A]t most Appellant presents a potential anomaly with a few cases within a short period of time, with no evidence whatsoever of intentional discrimination."), *and Armstrong*, 517 U.S. at 470 ("[The appellant's] affidavits . . . recounted hearsay and reported personal conclusions based on anecdotal evidence.").

The Military Judge correctly found no "systematic, purposeful exclusion" or evidence of discriminatory intent. (J.A. 56, 58, 63.) Appellant fails to acknowledge or address that this Court has already applied the presumption of regularity to this very same Convening Authority during the same time frame. *Compare Bess*, 80 M.J. at 10 (presuming this Convening Authority acted lawfully), *with* (Appellant's Br. at 16–40).

Appellant fails to show clear evidence or a preponderance of the evidence to overcome the presumption of regularity. However, as explained below, even if this Court were to find Appellant met his burden, his claim is rebutted by the Convening Authority's Declarations.

d. Even if this Court believes Appellant provided "clear evidence" to overcome the presumption of regularity, the Declarations rebut Appellant's claim.

Although the lower court appears to have been overgenerous in stating that the presumption of regularity was overcome based on "some evidence of actual exclusion (even if not purposeful)"—because, as explained above, only the unlawful command influence standard uses "some evidence" and any exclusion must be intentional under any test—it nonetheless correctly found no evidence of purposeful discrimination. *Jeter II*, 81 M.J. at 797.

Even if this Court finds "clear evidence" to overcome the presumption of regularity, it should find the Declarations from the Convening Authority and his

staff demonstrate he conducted member selection in accordance with Article 25 and did not consider race. (*See* J.A. 91–103); *Jeter II*, 81 M.J. at 797–98. Because the Convening Authority and his staff "were not aware of the race of the members detailed in either the standing convening order or the amended convening orders," the alleged removal of two African Americans from the Standing Convening Order was not evidence of purposeful discrimination. *See Id.* at 797–98; (Appellant's Br. at 6, 34).

Even if the presumption of regularity is overcome, no evidence supports a finding of purposeful discrimination. Appellant's claim fails.

D. This Court should again decline to extend *Castaneda* to member selection. Even applying *Castaneda*, Appellant's anecdotal evidence, of four cases in less than a year, is insufficient.

An appellant's burden of proof in a *Castaneda* claim as a default is preponderance of the evidence, but the presumption of regularity elevates the burden to the "clear evidence" standard. *See* R.C.M. 905(c); *Bess*, 80 M.J. at 10; *Armstrong*, 517 U.S. at 464; *supra* Section C.2.

1. *Castaneda* established a three-part test for establishing a prima facie case of racial discrimination in grand jury selection based on statistical evidence alone.

In *Castaneda*, the Court held the government failed to rebut a prima facie case of purposeful racial discrimination in the civilian grand jury selection process. 430 U.S. at 483, 500–01. In dicta, the Court noted a three-step framework civilian

defendants could use to establish a prima facie case of purposeful racial discrimination in the selection of grand jurors. *Id.* at 494-95. To allege purposeful racial discrimination, a defendant must (1) show he belongs to a "recognizable, distinct class, singled out for different treatment under the laws"; (2) prove the "degree of underrepresentation [on grand juries] . . . over a significant period of time"; and (3) show the selection procedure is "susceptible to abuse or is not racially neutral," which would support a "presumption of discrimination." *Id.*

"A prima facie case of systematic exclusion is not established by the absence of minorities on a single panel." *Loving*, 41 M.J. at 285 (citing *Castaneda*, 430 U.S. at 494).

2. No military court has relied on the *Castaneda* framework to grant relief for a Fifth Amendment claim in the convening authority's member selection process.

This Court has twice discussed the *Castaneda* framework in the context of a convening authority's selection of members, but it has never adopted this civilian framework from "the context of grand jury selection" to military member selection. *See Loving*, 41 M.J. at 284–86; *Bess*, 80 M.J. at 9. As the *Bess* Court noted: "We have not determined whether and how *Castaneda* applies in the military justice system where specific criteria for selecting members exist, *see* Article 25, UCMJ, none of which are race, and where deployments and other factors would likely skew a straight percentage comparison." *Bess*, 80 M.J. at 9.

3. As in *Bess*, this Court need not decide if and how *Castaneda* applies. Appellant made no attempt to present statistical evidence, merely cites the same evidence that failed in *Bess*, and fails to satisfy the second prong of *Castaneda*.

Under the second prong *Castaneda*, an appellant must demonstrate the "degree of underrepresentation [on grand juries] . . . over a significant period of time" by comparing "the proportion of the group in the total population to the proportion called to serve as grand jurors." 430 U.S. at 494.

To meet this burden, the respondent in *Castaneda* presented: (1) census statistics showing the local population to be seventy-nine percent Mexican American; and (2) eleven years of data compiled from grand jury records, which showed thirty-nine percent of persons summoned for grand jury service were Mexican American. *Id.* at 486–87. Mexican Americans comprised fifty percent of the grand jury that indicted the respondent. *Id.* at 487. The Court found the forty-percentage-point disparity between the local Mexican American population and those summoned for grand jury service over an eleven-year period was "enough to establish a prima facie case of discrimination." *Id.* at 495–96.

Here, as in *Bess*, this Court need not decide whether and how *Castaneda* applies, because Appellant "fails to meet the second prong of *Castaneda*." 80 M.J. at 9. In *Bess*, a majority of this Court declined to "determine[] whether or how *Castaneda* applies in the military justice system" because "it would not change the outcome in this case." 80 M.J. at 9. As the *Bess* court held: "[O]ne year is not a

'significant period of time' and would not establish a prima facie case under the *Castaneda* framework." *Id.*

"Were *Castaneda* to apply—however imperfectly given the unique characteristics of the military justice system—we need decide nothing more than that Appellant fails to meet the second prong of *Castaneda*." *Id.* The appellant "proffered allegations that within a one-year period, the convening authority detailed all-white panels in four cases." *Id.*

Appellant could have—given *Castaneda*, readily available federal precedent, and this Court's clear message in *Bess*—attached or moved to compel the alpha roster or pool of "everyone whom the convening authority could detail to the court-martial." *Bess*, 80 M.J. at 12. He could also have attached or moved to compel statistics, including the racial makeup of other courts-martial and those available to be detailed to other courts-martial, for example, that might have helped demonstrate systematic discrimination. But he did none of these things.

Instead, Appellant simply relies on the same anecdotal evidence that failed to show an equal protection violation in *Bess*. Appellant relies on the same Czaplak Declaration, about the same four cases, involving the same Convening Authority, and over the same one-year period. *Compare Bess*, 80 M.J. at 5, n.2, 16 n.2, *with* (J.A. 81–83; Appellant's Br. at 10).

This Court should reject Appellant's claim. This evidence is insufficient to support a finding of discriminatory intent on the basis of systematic exclusion.

a. Even reviewing Commander Czaplak's allegations from *Bess* anew, this Court should reject them: he speculated about the composition of various panels and his claims are not based on personal knowledge.

The burden is on an appellant "to introduce, or to offer, distinct evidence in support of the motion" challenging the selection of the jury panel—rather than relying "exclusively [on] counsel's statements, unsworn and unsupported by any proof or offer of proof." *See Frazier v. United States*, 335 U.S. 497, 503 (1948) (citation omitted).

A witness "may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Mil. R. 602. This applies to post-trial submissions, which "have no automatic value as evidence where they are . . . not based upon personal knowledge of the declarant." *United States v. Bush*, 68 M.J. 96, 104 n.9 (C.A.A.F. 2009) (citing Mil. R. Evid. 602); *see also United States v. Dugan*, 58 M.J. 253, 259 (C.A.A.F. 2003).

In *Bush*, this Court determined an appellant's post-trial declaration alleging he lacked employment opportunities did not constitute evidence of prejudice because the appellant lacked personal knowledge as to "the reasons [a] particular employer declined to hire him." *See* 68 M.J. at 104 n.9. There, the Court noted

that post-trial submissions did not have "automatic value as evidence" if not based on personal knowledge. *Id.*

Like the post-trial submission in *Bush*, the Czaplak Declaration, offered after trial, does not indicate his assertions are based on his own observations or personal knowledge. It provides mere conclusory statements—that Appellant's panel and three others lacked "any African-American members." (*See* J.A. 82–83.) Commander Czaplak provides no further detail for these claims.

Most importantly, with respect to Appellant's and other cases, the Czaplak Declaration provides no basis for concluding he had personal knowledge of the race of each of the members on each of the panels he describes. (J.A. 82–83.) He does not claim to have reviewed members' questionnaires, discussed race with the relevant members, observed voir dire for cases to which he was not detailed, or discussed this issue with relevant counsel on any of these cases. (J.A. 82–83.) Commander Czaplak provides no factual basis to support his implicit claim to superior knowledge of the racial composition of Appellant's panel and the other panels he references.

Because the Czaplak Declaration contains no basis for finding he had personal knowledge of the racial makeup of the four panels, it is mere speculation and insufficient to provide any evidence, let alone satisfy *Castaneda*'s demand for statistics showing substantial underrepresentation.

b. Even taking Appellant's anecdotal, "four cases" claim at face value, it fails to show the Convening Authority purposefully discriminated by detailing an "all-white" panel to his, or any other, court-martial.

Rather than providing relevant statistics for the pool of everyone available to be detailed to Appellant's court-martial and for the other cases cited in the Czaplak Declaration, Appellant merely asserts his is one of "four cases" in which the Convening Authority "hand-selected all-white panels" for "African-American accused." (Appellant's Br. at 10 (citing *Rollins*, *Bess*, and *Johnson* cases).)

Once again, Appellant's claims rely on speculation. First, he relies on the Czaplak Declaration as his sole evidence for the *Rollins* case. That Declaration provides no basis for that knowledge, and notably the *Rollins* appellant never alleged improper member selection on appeal. *See United States v. Rollins*, No. 201700039, 2018 CCA LEXIS 372, at *1 (N-M. Ct. Crim. App. July 30, 2018).

Second, the Acting Convening Authority in Appellant's case did not detail members to the *Johnson* court-martial, and Appellant fails to show if this same acting Convening Authority selected members for any of the other cases. *See Jeter II*, 78 M.J. at 764–65; (J.A. 49, 82–85).

Third, the Convening Authority, when asked, detailed four minority members and a female member to the *Johnson* court-martial. (J.A. 82–85); *see also Loving*, 41 M.J. at 286 (rejecting equal protection claim against "all-white, all-male panel" where convening authority detailed minority members when asked).

c. Appellant's claim fails the second prong of *Castaneda*: he failed to move to compel or attach statistics demonstrating substantial underrepresentation.

In *Castaneda*, the respondent provided census data to demonstrate the "proportion of [Mexican-Americans] in the total population" in his county, and eleven years of grand jury data to demonstrate "the proportion [of Mexican-Americans] called to serve . . . over a significant period of time." *Castaneda*, 430 U.S. at 486–87.

In *Loving*, defense counsel presented demographic data for two military installations around the time of the appellant's court-martial. *Loving*, 41 M.J. at 285–86. But the *Loving* court agreed the raw data was "somewhat irrelevant." *Id.* at 286. The data did not (1) reflect who was ineligible for court-martial duty; (2) reflect those likely unable to meet the "best qualified" requirement of Article 25; and (3) account for rotations on and off base of African American officers who might be eligible for court-martial duty. *Id.* at 286.

This Court in *Bess* discussed the statistics that might have been relevant to make a claim for improper member selection, despite not changing the result in that case: "the pool of individuals eligible and available to serve as court members" and "everyone whom the convening authority *could* detail to the court-martial." *Bess*, 80 M.J. at 11–12 (citing *United States v. Lewis*, 46 M.J. 338, 339, 341–42

(C.A.A.F. 1997)). The *Bess* opinion provided the clearest roadmap to litigants that might attempt to prove a *Castaneda* claim in courts-martial.

But Appellant made no attempt to develop the facts that the *Bess* appellant failed to develop. Instead, despite the *Bess* opinion's lengthy discussions of the evidentiary deficiencies in that case, and unlike the respondent's efforts in *Castaneda,* Appellant never attempted to obtain or attach: (1) data showing the proportion of African Americans in the Convening Authority's "pool of members"; or (2) data showing the proportion of African Americans "called to serve [as members] . . . over a significant period of time." 430 U.S. at 494.

Appellant provides even less evidence than the *Loving* Court found insufficient. *See* 41 M.J. at 283–86. No statistics show the racial breakdown of the "total population," or the racial breakdown of any other panels—let alone panels "over a significant period of time." *Id.*

Because Appellant fails to provide necessary statistics to conduct the *Castaneda* analysis, his claim fails, and he cannot establish a prima facie case.

d. Appellant waived any right to materials pertaining to persons not selected by the convening authority.

Copies of "materials pertaining solely to persons who were not selected for detail as members need not be provided" unless: (1) a party requests them; and (2) the military judge, upon a showing of good cause, directs they be provided.

R.C.M. 912(a)(2). If not raised before a court-martial adjourns, a request for these materials is waived. *See* R.C.M. 905(e).

Here, Appellant never requested the Military Judge direct the provision of materials related to persons not selected to serve on his court-martial panel. When the Military Judge gave Appellant an opportunity by advising him "it's your motion. You have ways to attempt to [gather and offer evidence]," Appellant declined to do so and "st[oo]d on [his] motion as it [was]." (J.A. 57–58.) Appellant waived any request for evidence related to servicemembers considered, but not selected, by the Convening Authority. *See* R.C.M. 905(e); R.C.M. 912(a)(2).

4. If this Court applies *Castaneda* to member selection, it should not be watered down. Truncated timelines would be inconsistent with equal protection precedent and risk inferring purposeful discrimination simply based on the racial composition of a single or small number of panels. *Castaneda* itself suggested two and a half years of evidence may have been sufficient, rebutting Appellant's argument that Castaneda is unworkable.

The *Castaneda* line of precedent requires an appellant to provide statistics showing a group was substantially underrepresented in selections "over a significant period of time." 430 U.S. at 494. Courts typically consider a period of time to be "significant" where it shows the group's representation over years. *See Castaneda*, 430 U.S. at 494 (eleven-year period); *Ramseur v. Beyer*, 983 F.2d 1215, 1233 (3d Cir. 1992), *cert. denied*, 508 U.S. 947 (1993) (finding two years

insufficient); *Bryant v. Wainwright*, 686 F.2d 1373, 1377–78 (11th Cir. 1982), *cert. denied*, 461 U.S. 932 (1983) (five-year period sufficient). This method of proof is based on the "rule of exclusion"—the idea that that "[i]f a statistical disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident." *Castaneda*, 430 U.S. at 494 n.13. The "rule of exclusion" applies even where those who select jurors for grand jury service are appointed "at each term of court." *See Hernandez*, 347 U.S. at 476 n.1, 480; *Castaneda*, 430 U.S. at 496 n.16 (comparing judge's grand jury selections in two-and-a-half year term to substantial period of time).

Appellant argues his burden under *Castaneda* is "insurmountable" and requires a lower burden of merely showing a "pattern" in the military context, but he fails to present evidence to support his contentions that *Castaneda* precedent cannot equally apply to the military. (Appellant's Br. at 35–39.) Appellant's demand for truncated timelines in the military is unnecessary and unworkable for four reasons. First, courts have found Appellant's proposed "four cases in less than a year" time period to be insufficient under *Castaneda*. *See Rose v. Mitchell*, 443 U.S. 545, 566, 570 (1979) (testimony from witnesses covering period of "five or six years," "several years," and "two years" not significant); *see also Beyer*, 983 F.2d at 1233 (two-year period insufficient).

Second, the Supreme Court applies *Castaneda*'s "rule of exclusion" to grand jury selection processes even where the persons selecting grand jurors change between court terms. *See Hernandez*, 347 U.S. at 476 n.1, 480. Because the *Castaneda* framework is applicable to selection procedures where commissioners change with a "term of court," it can also—as it currently exists—be applied to the military's convening-authority-driven selection process where convening authorities change every few years.

Alternatively, an appellant could try to prove a *Castaneda* case of systematic discrimination by gathering data from multiple command tours for a single convening authority. Indeed, if an armed force is comprised of a knowable percentage of underrepresented groups, and one convening authority—or multiple convening authorities—never, or in a substantially underrepresented way, selects a cognizable group over a significant period of time, then those statistics may be relevant to a *Castaneda* analysis.

Third, creating a new, "military timeline," would increase the chance that courts will have to weigh and analyze, for the purpose of finding constitutional equal protection violations, statistical disparities in panel compositions, based on "chance or accident"—which longstanding and developed *Castaneda* precedent seeks to and helps avoid. *See Rose*, 443 U.S. at 568–74. Removing the "significant period of time requirement" undermines the justification for inferring

purposeful or intentional constitutional discrimination from statistics alone. This is so, because it increases the likelihood of benign statistical anomalies being labeled as purposeful discrimination.

Fourth, the *Castaneda* Court also noted that the "district judge who impaneled the respondent's grand jury was in charge for only two and one-half years of the eleven year period considered in that case." 430 U.S. at 496 n.16. And the Court noted that because the two and one-half year time period itself revealed a "significant disparity," the District Court's assumption that "shorter time period would [not support a] . . . prima facie case of discrimination" was unwarranted. *Id.* Therefore, the need to change the *Castaneda* test is far from clear.

This Court should decline Appellant's invitation to extend the *Castaneda* inference of intentional discrimination to four anecdotal cases in less than a year where Appellant failed to develop necessary facts, and where military rotation time periods suggest that—in the right case—facts might be developed that fit well within the Court's own comments about what may work within the *Castaneda* framework. 430 U.S. at 496 n.16.

Even assuming *Castaneda* applies to convening authority selection, this Court should not depart from the requirement for an appellant to provide statistics

"over a significant period of time." Whatever that means in the military justice system, Appellant fails to prove it here.

E. Unlike in *Avery* and *Alexander*, Appellant fails to show the Convening Authority's selection process was susceptible to abuse because he fails to present evidence the Convening Authority knew, or could have known, the race of all potential members.

An appellant's burden of proof in an *Avery* or *Alexander* claim as a default is preponderance of the evidence, but the presumption of regularity elevates the burden to the "clear evidence" standard. *See* R.C.M. 905(c); *Bess*, 80 M.J. at 10; *Armstrong*, 517 U.S. at 464.

1. The Supreme Court conducted case-specific factual inquiries in *Avery* and *Alexander* and found (1) systematic exclusion of African Americans in the jury selection process resulting in significant underrepresentation on the panel and (2) race-prominent selection procedures susceptible to abuse.

In *Avery v. Georgia*, 345 U.S. 559 (1953), an African American appellant made a prima facie case of racial discrimination when his venire of sixty potential jurors had zero African Americans, while public registries showed "many [African Americans were] available" to serve on the jury, and race featured prominently in the selection process. *Id.* at 562. There, after selecting potential jurors from local tax returns, jury commissioners placed "white" names on "white tickets" and African American names on "yellow tickets" where the only other information on the card was the name and address of the potential juror. *Id.* at 560. After a

number of tickets were randomly drawn, a clerk "arrange[d]" the tickets for who would "serve on the panel." *Id.* at 561.

In *Alexander v. Louisiana*, 405 U.S. 625 (1972), each step in the grand jury selection process showed statistically significant winnowing of African American candidates and left opportunity for abuse because it highlighted the race of potential jurors. *Id.* 627–28. Jury commissioners received a pool that had 13.76% African Americans. *Id.* at 627. The commissioners then highlighted the race of each potential juror by attaching a "card" stating each member's race to each questionnaire. *Id.* The commissioners removed questionnaires on the grounds they were "not qualified" or "exempted under state law." *Id.* Commissioners then "random[ly]" selected "400" of the remaining "2,000," of which 6.75% were African American. *Id.* Out of the twenty on appellant's grand jury venire, one was African American, and zero African Americans were among the twelve that indicted him. *Id.*

This "striking," "progressive decimation of potential [African American] grand jurors," coupled with the "[non]racially neutral" selection procedures at "two crucial steps in the selection process" that highlighted the race of the potential jurors and disparately narrowed the percentage of African American jurors, created a prima facie case of racial discrimination. *Id.* at 629–30. *See also Whitus v. Georgia*, 385 U.S. 545, 549 (1967) (grand and petit juries selected using records

where black persons designated with "(c)" amounted to race-prominent selection procedure susceptible to abuse); *Castaneda*, 430 U.S. at 484–86, 495 (grand jury selection procedure "not racially neutral," for Latinos because: (1) jury commissioners picked names from local population for grand jury list; and (2) "Spanish surnames are . . . easily identifiable.").

2. Appellant fails to provide any evidence beyond mere speculation that the alleged lack of African Americans on his panel resulted from systematic exclusion from a system susceptible to abuse.

Unlike in *Avery* and *Alexander*, where the Court engaged in fact-intensive analysis to find equal protection violations, Appellant fails to show African Americans were systematically excluded from his venire through a system susceptible to abuse for three reasons.

First, unlike *Avery* and *Alexander*, Appellant never attached or developed statistics or data for consideration. He neither moved to attach nor moved to produce the percentage of African Americans available as prospective members for his court-martial, the percentage of African Americans aboard Naval Station Norfolk, or even the percentage of African Americans in the Navy.

Without even that numerical or statistical baseline to compare to Appellant's Members, no court—not the trial court, the lower court, or this Court—can determine if Appellant's allegations result from systematic exclusion, or are statistically insignificant such that they provide no circumstantial evidence of the

intent required for an Equal Protection violation. Indeed, unlike the more obvious cases of systematic exclusion in areas with larger African American populations such as *Avery*—zero African Americans out of sixty members—and *Alexander*—one out of twenty—the exclusion of African Americans here could be coincidental because there were only nine Members.

Second, unlike *Avery* and *Alexander*, Appellant neither produced nor requested through discovery the racial makeup of the prospective members provided to the Convening Authority, and he fails show how many of those would have been qualified under Article 25 criteria. He fails to show any data about potential members, both available to serve on the panel and senior to Appellant, a company grade officer. *See Loving* 41 M.J. at 286 (noting failure to show "percentages of [potential members] [eligible] for court-martial duty").

Third, unlike *Avery* and *Alexander*, Appellant fails to show a system susceptible to abuse. There, grand jury selection processes that highlighted prospective members' race provided an "easy opportunity for racial discrimination." *Alexander*, 405 U.S. at 630. Here, Appellant solely relies on the question about race that appeared on the Navy-Marine Corps Trial Judiciary's model questionnaire. (Appellant's Br. at 19–21.) But: (1) members were not required to answer and "frequently declined to answer" the race question; (2) not

all questionnaires included the race identifier question; and (3) the race identifier was one of over fifty questions listed in the questionnaire. (*See* J.A. 99, 104–131.)

Moreover, under *Avery* and *Alexander*, the mere identification of race in the process is not dispositive; instead, those cases support a finding of purposeful discrimination where the race prominent procedures have "no conceivable purpose or effect other than to enable those so disposed to discriminate . . . on the basis of their race." *Turner v. Fouche*, 396 U.S. 346, 355 n.13 (1970).

But in the military, race identifiers are considered "neutral" because a convening authority may "seek[] in good faith to make the panel more representative of the accused's race or gender." *Riesbeck*, 77 M.J. at 163; *see also infra* Section E.3.

3. Unlike in *Avery* and *Alexander*, Appellant fails to show race-prominent selection procedures. Nothing requires a convening authority to be "race ignorant," and information about race has long been held to be neutral for Article 25 purposes.

"[A] convening authority is not required to be race-ignorant; he or she is only required to be race-neutral." *United States v. Green*, 37 M.J. 380, 384 (C.M.A. 1993). Military courts do "not presume improper motives from inclusion of racial and gender identifiers on lists of nominees for court-martial duty." *Loving*, 41 M.J. at 285. This is so because "[r]ace and gender identifiers are neutral; they are capable of being used for proper as well as improper reasons." *Id.*; *see, e.g.*, *Riesbeck*, 77 M.J. at 163 (permitted for inclusion).

Likewise, a convening authority cannot be presumed to discriminate on race if he does not know the racial makeup of the potential members during selection. *See Bess* 80 M.J. at 7 (rejecting argument convening authority discriminated when not all questionnaires had racial information).

Unlike in *Avery* and *Alexander*, Appellant fails to present clear evidence of race-prominent or even non-race-neutral selection procedures. (*See* Appellant's Br. at 25–27.) This Court already rejected the claim that members' questionnaires with an optional race-identifier question amount to a non-race neutral selection process. *See Loving*, 41 M.J. at 285; *Green*, 37 M.J. at 384.

Even if a single, optional race question somehow amounted to a race-prominent selection procedure, two of the nine Questionnaires had no racial identifier question. (J.A. 114–131.) If the Convening Authority sought to systematically discriminate by race, it would be a curious choice to select Members of unknown races. *See Bess* 80 M.J. at 7; (Appellant's Br. at 22–23, 27).

Indeed, the Declarations show the Convening Authority did not discriminate on the basis of race during selection and screening members by race was "never done" and race was "no[t] considered." (J.A. 91, 97, 100, 102.) Furthermore, when other accuseds requested minority representation, the Convening Authority granted the request, which undercuts any inference of purposeful discrimination. (J.A. 82–85.)

Appellant fails to show by "clear evidence" or by a preponderance of the evidence that his case had systematic exclusion or race-prominent selection procedures susceptible to abuse found in *Avery* or *Alexander*. His claim fails.

F. The narrow *Batson* framework, which has not been extended to other contexts, does not apply to a convening authority's selection of the venire under Article 25.

1. This Court has not extended *Batson* to member selection.

A convening authority's member selection process is "substantially different from civilian jury selection practice." *United States v. Bertie*, 50 M.J. 489, 491 (C.A.A.F. 1999). "[T]he Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial." *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (citation omitted).

"A service member has no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen." *Id.* (citations omitted); *see also United States v. Santiago-Davila*, 26 M.J. 380, 389 (C.M.A. 1988) (noting this process "contemplates that a court-martial panel will not be a representative cross-section of the military population").

There is no constitutional or statutory right for an accused to have members of his own race, or any other, included on either a court-martial panel or a civilian jury. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 404 (1991); *Bess* 80 M.J. at 7. The

Fifth Amendment nonetheless prohibits excluding members of any "cognizable racial group" from court-martial service. *See Santiago-Davila*, 26 M.J. at 389–90.

In *Bess*, two members of the Court rejected extending *Batson* to the convening authority's selection of members, and a majority declined to decide if or how *Batson* applied because "the record [did] not establish the factual predicate for Appellant's proposed constitutional test." 80 M.J. at 14 (Maggs, J., concurring).

2. *Batson* applies to peremptory challenges, not member selection.

In *Batson*, the Court held an accused could establish a prima facie case of purposeful discrimination in the selection of a petit jury based solely on a prosecutor's exercise of peremptory challenges at trial. 476 U.S. at 96. The *Batson* framework has never been extended beyond peremptory challenges. *See Bess*, 80 M.J. at 9 n.9; *cf. also Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (discussing expansions of *Batson* to peremptory challenges in other contexts).

An accused must show: (1) he is a member of a "cognizable racial group," and the prosecutor removed a member of the defendant's race with a peremptory challenge; and (2) the facts and circumstances "raise an inference" the prosecutor used the peremptory challenge "on account of [the juror's] race." *Batson*, 476 U.S. at 96. An accused is "entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting *Avery*, 345 U.S. at 562).

Appellant fails to "cite any precedent that would require extending *Batson*'s holding outside the context of peremptory challenges." *Bess*, 80 M.J. at 8–9 (plurality); (Appellant's Br. at 31–33). "Indeed, the only extensions of *Batson* have been within the peremptory strike context itself." *Id.* at 9 (citing *Flowers*, 139 S. Ct. at 2243).

3. Failing to detail members is not equivalent to using a peremptory challenge: *Batson*'s rationale applies to purposeful exclusion, not to lack of inclusion.

a. The Article 25 framework distinguishes member selection from a prosecutor's unregulated peremptory challenges. Striking members from a limited pool is fundamentally unlike including members from hundreds or thousands of available servicemembers.

Convening authorities must select members based on identified statutory criteria. *See* Art. 25(d)(2), UCMJ, 10 U.S.C. § 825 (2012). A decision to not select a member, using statutory criteria, is legally and substantively distinct from using a peremptory challenge—"the component of the jury selection process at issue [in *Batson*]." *Batson*, 476 U.S. at 89; *see also United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997).

Peremptory challenges involve striking or removing potential members. *See* Art. 41(b), UCMJ, 10 U.S.C. § 841(b) (2012). Conversely, member selection under Article 25 involves selecting qualified members based on statutory criteria. While a convening authority may not be "precluded by Article 25 from

appointing . . . a representative cross-section of the military community," he or she is not required to do so. *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988).

In reviewing grand jury selection—a process more akin to convening authority member selection than peremptory challenges—the Supreme Court does not view jury commissioners using statutory criteria to select members as exercising "the functional equivalent of an unlimited number of peremptory challenges." (Appellant's Br. at 31 (quoting *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring)); *see, e.g.*, *Alexander*, 405 U.S. at 628–30; *Castaneda*, 430 U.S. at 484–88. This Court should decline to do so as well.

Appellant's removal framework is not appropriately tailored to the selection of members to courts-martial for four reasons. (Appellant's Br. at 31–35.) First, unlike peremptory challenges, which remove members from panels, the failure to select a member does not "remove" members of a particular group.

Second, there is no presumption that the lack of members of a particular group resulted from improper consideration. *Bertie*, 50 M.J. at 492.[2]

Third, this requirement would be unworkable—since a convening authority routinely considers a "full roster" of potential members. *See, e.g.*, *Bartee*, 76 M.J. at 143 (noting convening authority considered "roughly 8,000" potential members). A prosecutor's requirement to provide a race-neutral explanation for a

[2] *See supra* Section C.2.b.

peremptory challenge is limited to that member—*Batson* would require a convening authority to explain his or her rationale for not selecting dozens, hundreds, or thousands of potential members.

Fourth, *Batson* protects an accused from racially motivated peremptory challenges—procedures with little to no statutory or regulatory protections. *See* R.C.M. 912(g); *Batson*, 476 U.S. at 89. But the convening authority selection process already includes these protections through operation of Article 25, which generally prohibits convening authorities from selecting members on the basis of race. *See Riesbeck*, 77 M.J. at 162.

b. A convening authority's member selection is distinguishable from a prosecutor's peremptory challenges. *Batson* does not apply.

Appellant's claim that convening authorities exercise "an unlimited number of peremptory challenges" during member selection is an easy shorthand, but fails closer scrutiny of the differences between the two processes. (Appellant's Br. at 31.) A convening authority, as an Executive Branch decisionmaker, applies the statutory, objective criteria of Article 25, outside the courtroom and prior to trial, based on paper questionnaires and information provided by staff, sometimes after reviewing large alpha rosters of available personnel. *See* Art. 25, UCMJ, 10 U.S.C. § 825 (2012); *see, e.g.*, (J.A. 91–93, 95–96, 98–100); *see also Batson*, 476

U.S. at 86–87 ("Those on the venire must be 'indifferently chosen.'" (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879))).

By contrast, a trial counsel's challenges come in the heat of trial proceedings, after significant voir dire questioning, observation of individual members, and can be made "for any reason at all, as long as that reason is related to [counsel's] view concerning the outcome." *Batson*, 476 U.S. at 89. The *Batson* test was created to account for exactly these circumstances.

The convening authority's selection of members is a detached process of inclusion based on discrete statutory criteria, while peremptory challenges are a deliberate, subjective process of exclusion. *See Jeter II*, 81 M.J. at 796 ("Unlike the mechanism utilized in peremptory challenges in which a prosecutor specifically excludes a member of the same cognizable racial group, member selection is generally a process of *inclusion*, based on the statutory requirements found in Article 25, UCMJ.").

Additionally, the sui generis nature of the *Batson* framework makes it less adaptable to process-focused equal protection claims involving convening authorities' member selection. Unlike *Castaneda* and *Alexander*, whose frameworks address selection procedures like Article 25 selection, the *Batson* framework applies—not to an official Executive Branch process aided by staff—but to the subjective, fully discretionary courtroom action of a single prosecutor

that, except for *Batson*, requires no explanation. *See Castaneda*, 430 U.S. at 494; *Alexander*, 405 U.S. at 627–28; *Batson*, 476 U.S. at 96. Convening authorities' member selection, through applying Article 25, is too different from a prosecutor's exercise of peremptory challenges for *Batson* to be useful.

Further, the subjective response called for under *Batson* is the subject of much criticism. Some, for example, argue the "race neutral response" requirement encourages a minimalist response and mendacity. *See, e.g.*, Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wash. U. L. Q. 713, 786-796 (Fall 1999). Too, *Batson* focuses on any subjective plausible response from the prosecutor—or here, would focus on the convening authority. In contrast, *Castaneda* and general Equal Protection law would encourage full litigation—both by placing a burden on the movant to present and explain a clear or preponderance of the evidence case, but also by requiring a substantive response concerning the selection process. In any case, shallow litigation of the issues would be discouraged. The *Batson* framework, with this baggage, should not be further extended to convening authority member selection.

Finally, the *Batson* test permits shifting of the burden even with narrow proof that there may be a "'pattern' of strikes against black jurors included in the particular venire" of a single case, rather than requiring proof across multiple criminal trials as in *Castaneda*. 476 U.S. at 97. The *Castaneda* and broader equal

protection "systematic exclusion" framework, as demonstrated above and below, are far better suited to providing protection for equal protection violations. And, the statutory unlawful command influence "court stacking" framework, with its low burden on the movant and constitutional-type prejudice analysis, has its own benefits in protecting accuseds where raised and litigated.

As the plurality in *Bess* explained, "[T]he narrow terms of *Batson*'s holding neither compel nor impel [this Court] to extend it to a convening authority's selection of members, the manner of which Article 25, UCMJ, limits and directs, even if his supposition about the race of his panel's members was an established fact." *Bess*, 80 M.J. at 8.

Batson need not and should not be extended to a process already protected by Articles 25 and 37, UCMJ, and already protected by standard Equal Protection law. *Batson*'s framework—never held to apply to Article 25, UCMJ—need not be applied to the convening authority's member-selection process.

4. The member selection process is not "immune from constitutional scrutiny" in the absence of *Batson*.

Appellant's claim that "convening authorities' discretion to select members will remain immune from constitutional scrutiny" if this Court does not apply *Batson* is incorrect. (Appellant's Br. at 35.)

First, the Constitution's equal protection guarantee already applies to convening authority member selection, regardless of whether *Batson* applies, and it

is buttressed by Article 25. *See Bess*, 80 M.J. at 7; Art. 25, UCMJ. Appellant was free to gather or request evidence and make a prima facie equal protection claim under any of the equal protection frameworks for addressing racial discrimination in jury selection he discusses in his brief. (Appellant's Br. at 23–25, 35–36); *see, e.g.*, *Castaneda*, 430 U.S. at 494; *Alexander*, 405 U.S. at 627–28. But importantly, Appellant has chosen time and again not to make a case, at trial or on appeal, to gather or request evidence. He never requested statistical evidence for any courts-martial, available member pools, or even the racial makeup of the Navy.

Second, Appellant ignores this Court's well-established court-stacking framework for addressing improper member selection, which provides ample protection. *See Riesbeck*, 77 M.J. at 165; (Appellant's Br. at 35). That framework requires that appellant meet the low evidentiary threshold of "some evidence" to shift the burden to the government to prove no improper selection beyond a reasonable doubt. *See Bartee*, 76 M.J. at 143; *Riesbeck*, 77 M.J. at 165.

Third, Appellant requests this Court apply a framework used for peremptory challenges to member selection, which no court has ever done. *See Bess*, 80 M.J. at 9 n.9; *Flowers*, 139 S. Ct. at 2243 (discussing extension *Batson* framework to peremptory challenges in other contexts).

The Constitution and Article 25 already provide frameworks to scrutinize convening authorities' member selection procedures. Appellant's argument fails and *Batson* need not apply.

5. Even applying *Batson* to the member selection context, Appellant fails to: (1) overcome the "clear evidence" burden; (2) present evidence the convening authority "removed" any African American members; or (3) present facts and circumstances sufficient to "raise an inference" of a "practice to exclude [members] . . . on account of their race."

An appellant's burden of proof in a *Batson* claim is low. *See Collins*, 551 F.3d at 920. In any application of *Batson*'s principles to a convening authority's member selection as a default is preponderance of the evidence, but the presumption of regularity elevates the burden to the "clear evidence" standard. *See* R.C.M. 905(c); *Bess*, 80 M.J. at 10; *Armstrong*, 517 U.S. at 464.

In *United States v. Gooch*, 69 M.J. 353 (C.A.A.F. 2011), the Court held an appellant failed to demonstrate that a court-martial member selection method improperly excluded African American members. *Id.* at 358–59. There, evidence showed the selection process used "exclude[d] three of the four eligible African American members from [the convening authority's] consideration." *Id.* Citing *Batson* and *Santiago-Davila*, this Court found those cases to be "distinguishable" because the appellant presented no evidence showing an "improper motive" to "exclude members based on race." *Id.*

Here, as in *Gooch*, any purported *Batson* issue is "distinguishable," and Appellant fails to merit relief under *Batson* for three reasons. First, Appellant fails to prove African Americans were absent from his panel: although the Military Judge observed it "appeared" to be an all-white panel, he made this comment based on the questionnaires, prior to the Members entering court, and Appellant never asked two of the Members, who did not self-identify, about their race. *See Bess*, 80 M.J. at 4 (noting lack of clarity about members' races); *see also id.* at 14–15 (Maggs, J., concurring) (same).

Second, Appellant presents no evidence, let alone clear evidence, establishing the Convening Authority had improper motives in the member-selection process.

Third, even shifting the burden to the Convening Authority, the Declarations provided race-neutral explanations for the Convening Authority's actions. The Convening Authority and his staff described the selection process in detail and how they applied statutory criteria, not race, to select members. (J.A. 94–97, 100–02.)

Thus, even applying *Batson* to convening authority member selection, Appellant's claim fails.

G. If this Court finds Appellant has made a prima facie case of an equal protection violation, the Declarations from the Convening Authority and his staff rebut Appellant's claim of racial discrimination.

All equal protection frameworks, after an appellant first establishes a prima facie case, shift the burden and provide the government an opportunity for rebuttal.

1. The United States can rebut a prima facie case through showing potential jurors were selected using a race-neutral selection process.

"With a prima facie case made out, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" *Castaneda*, 430 U.S. at 494 (citation omitted); *see also Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991) (same). "If the defendant carries this burden of production [in rebuttal], the presumption raised by the prima facie case is rebutted and drops from the case." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507–08 (1993).

2. The Declarations show the Convening Authority conducted a race-neutral member selection.

In *Gooch*, an affidavit from a legal clerk detailed the member selection process and showed there was no improper motive "to exclude members based on race" because the command never advised the clerk to select members based on race and "the methodology used was not intended to exclude African Americans." 69 M.J. at 359.

In *Castaneda*, the state failed to rebut the petitioner's prima facie case when they did not call the commissioners who selected the grand jury venire to explain how they determined which members to include. 430 U.S. at 497. "[T]he lack of rebuttal evidence in the record" was "particularly revealing" as the "grand jury commissioners [did not testify] about the method by which they determined [juror qualifications]" and the state did not challenge the accused's provided statistics. *Id.* at 498–99; *see also Alexander*, 405 U.S. at 632 (finding affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion).

In *Woodfox v. Cain*, 772 F.3d 358 (5th Cir. 2014), the testimony of one of two judges in rebuttal evidence constituted "more than affirmations of good faith that discrimination did not occur" because it described the selection criteria and process they used to select grand jury forepersons. *Id.* at 381–83. The judge testified to seeking "facts about the person . . . including character, communication skills, patience, independence, reputation and education" and "actively tried to be inclusive, and appointed women and African-American forepersons." *Id.* at 381. The court found the one judge employed race-neutral selection criteria, but the state failed to provide adequate rebuttal evidence as to the other judge, who was deceased, and could not account for his selections. *Id.* at 383.

Here, as in *Gooch*, this Court can look to the Declarations from the Convening Authority and his staff to rebut Appellant's claim. *See* 69 M.J. 388–89. Unlike the lack of evidence in *Castaneda* and more akin to the judge's race-neutral criteria in *Woodfox*, the Convening Authority and his staff provided more than mere affirmations of good faith. (Appellant's Br. at 29–30, 35.) In detailing their selection procedures, the Acting Convening Authority explained selections were made based on "best-qualified attributes [including] experience, length of service, and judicial temperament." (J.A. 95.)

The Convening Authority explained he would first review the questionnaires to ensure they aligned with Article 25, (J.A. 91, 100), and then the Staff Judge Advocate would create a list of potential members in line with Article 25 criteria for his review and signature. (J.A. 91, 95–96, 98–99.)

In describing the process, the Convening Authority and his staff declared: (1) they did not make "any effort to screen potential members based on race"; (2) "race never entered any discussion of potential members for any court-martial"; and (3) they never "considered [the Appellant's] race as a criteria for detailing potential eligible members for this court-martial." (J.A. 94, 97, 99.)

Thus, because the Declarations provided details about what criteria the Convening Authority used and how he conducted the selection process without any discriminatory intent, the Declarations sufficiently rebut Appellant's claim.

H. If this Court finds the Declarations insufficient to rebut the prima facie case, the United States should be given the opportunity to rebut Appellant's prima facie case.

The government is generally provided an opportunity to present rebuttal evidence after an appellant has made a prima facie case. *See Castaneda*, 430 U.S. at 497; *see also United States v. Esquivel*, 88 F.3d 722, 727 (9th Cir. 1996) (rebutting prima facie case under *Castaneda*).

This Court can reject Appellant's requested remedy of "dismiss[ing] the findings and specifications," because the United States has not been provided an opportunity to present rebuttal evidence. (Appellant's Br. at 17, 29, 41.)

Although the lower court, without explanation, ordered Declarations to answer specific questions, the United States never had the opportunity—or motivation, not knowing any equal protection burden had shifted—to present evidence or request a *DuBay* in rebuttal, as seemingly neither the trial court nor the lower court found a prima facie equal protection case to shift the burden. *See* (J.A. 63); *Jeter I*, 81 M.J. at 797–98 (post-hoc explanation for ordering Declarations citing Articles 25, 37, and "some evidence" of non-purposeful exclusion); *Jeter II*, 78 M.J. at 767.

Moreover, *Avery* and *Alexander* do not support Appellant's claim his prima facie case went "unrebutted." (Appellant's Br. at 17, 29.) Both *Avery* and *Alexander* involved cases where the state had the opportunity to rebut and used it

to present evidence before reaching the Supreme Court. *See Avery*, 345 U.S. at 561–62; *Alexander*, 405 U.S. at 632. The Court decided those cases on the evidence the state had already presented. But that is not this case.

If this Court finds Appellant has shown a prima facie case, the United States should be given an opportunity to present rebuttal evidence.

Conclusion

The United States respectfully requests this Court affirm the lower court's decision.

TYLER W. BLAIR
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433
Bar no. 37601

GREGORY A. RUSTICO
Lieutenant, JAGC, U.S. Navy
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686
Bar no. 37338

JOSEPH M. JENNINGS
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE

BRIAN K. KELLER
Deputy Director
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE

Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 37744

Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

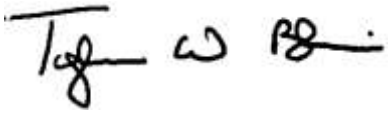
Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 13597 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief was prepared in a proportional typeface using Microsoft Word Version 2016 with 14-point, Times New Roman font.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on August 31, 2022.



TYLER W. BLAIR
Captain, U.S. Marine Corps
Appellate Government Counsel